REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 310/2014

In the matter between:

NAMIBIA TANTALUM MINING (PTY) LTD	**APPLICANT**

And

THE MINISTER OF MINES AND ENERGY	**FIRST RESPONDENT**
COMMISSIONER OF THE REPUBLIC OF NAMIBIA	**SECOND RESPONDENT**
DAUREMAS MINERAL DEVELOPMENT (PTY) LTD	**THIRD RESPONDENT**
FROYA PRODUCT LABELS CC	**FOURTH RESPONDENT**
JACOBUS DE KLERK	**FIFTH RESPONDENT**
MICKAL NGAJOZIKWE TJITUKA	**SIXTH RESPONDENT**

Neutral citation: *Namibia Tantalum Mining (Pty) Ltd v The Minister of Mines and Energy* (A 310/2014) [2016] NAHCMD 17 (11 February 2016)

Coram: PARKER AJ
Heard: **26 – 27 October 2015**
Delivered: **11 February 2016**

Flynote: Delay in bringing review proceeding – Court to determine whether delay was unreasonable – If delay unreasonable court to consider whether unreasonable delay has been explained to satisfaction of court – Where there is no explanation for the unreasonable delay there is nothing for court to consider whether

to condone the delay – Where review application has been dismissed on the basis of unexplained unreasonable delay in instituting the application court should refuse to grant order of mandamus as alternative relief to the relief of review – To order mandamus in such circumstances would have the effect of setting at naught the order dismissing the review application – That would result in absurd consequences and would not condone to due administration of justice.

Summary: Delay in bringing review proceeding – Court to determine whether delay was unreasonable – If delay unreasonable court to consider whether unreasonable delay has been explained to satisfaction of court – Where there is no explanation for the unreasonable delay there is nothing for court to consider whether to condone the delay – Court found that there has been unreasonable delay in instituting the review application and no explanation has been given for the unreasonable delay – Consequently, court dismissed the review application – Applicant prayed for an order of mandamus as alternative to the order to review some of the same decisions which formed the subject of the review application – Court concluded that to grant the mandamus sought would have the effect of setting at naught the order dismissing the review application – That would result in absurd consequences and would not condone to due administration of justice – Consequently, court dismissed the review application and refused to grant an order of mandamus.

ORDER

The application is dismissed with costs, including costs of one instructing counsel and two instructed counsel.

JUDGMENT

PARKER AJ:

[1] On 10 November 2014 the applicant brought an application on notice of motion and prayed the court to grant the relief set out in the notice of motion. The chapeau of the order the applicant seek reads as follows:

1. Calling upon respondents to show cause why:

    1.1 The decision taken by the first respondent to grant Exclusive Prospecting Licenses ("EPLs") Numbers 5547, 5548, 5549 and 5550 to the third respondent should not be reviewed, corrected and set aside.

    1.2 The decision taken by the first respondent not to consider the application to renew the following Exclusive Prospecting Licenses which were duly allocated to the applicant, namely 4044, 4042, 4043 and 4614, should not be reviewed, corrected and set aside.

    1.3 The decision taken by the second respondent to recognise and register the claims of fourth and sixth respondents in respect of areas already covered by the exclusive prospecting licenses of applicant (should) not be reviewed, corrected and set aside.

    1.4 The decision taken by second respondent to consent to, recognise and register amendments to fifth respondent's claims and by so doing allowing the fifth respondent's claims to encroach on areas covered by applicant's exclusive prospecting licenses (should) not be reviewed, corrected and set aside.

    <u>Alternatively to paragraphs 1.3 and 1.4</u>

1.5 Ordering the first respondent to determine the appeals lodged by applicant against the registration of the claims of fourth, fifth and sixth respondents in the areas of the exclusive prospecting licenses of applicant as well as the appeal against the alteration of the parameters of the claims of fifth respondent to encroach onto the area of the exclusive prospecting licenses of applicant and to announce his findings within one month of this order.

2. Directing that any respondent who may elect to oppose this application pays the costs of this application, including the costs of one instructing and two instructed counsel. In the event of more than one respondent electing to oppose this application, costs on the aforesaid scale and basis are sought against all such respondents jointly and severally, the one paying, the other to be absolved.

3. Granting to the applicants such further and/or alternative relief as this Honourable Court may deem fit.

[2] The third, fourth and sixth respondents have moved to reject the application, and they are represented by Mr Corbett SC (with him Mr Obbes). The second and fifth respondents have not. Mr Frank SC (with him Mr Akweenda) represents the applicant.

[3] Mr Corbett argued that the applicant delayed the launching of the review application, and according to counsel, on this basis alone, the review application stands to be dismissed with appropriate costs order. Mr Corbett's view can find support in the authority of *Keya v Chief of the Defence Force* 2013 (3) NR 770 (SC).

[4] *Keya*, para 21, per O'Regan AJA, reminds us that -

> '[21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court

concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay.

[22] The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizen and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established.'

[5] I did not hear Mr Frank to forsake the *Keya* principles on delay in instituting review proceedings. Mr Frank's only qualification is that whether there has been an unreasonable delay in a particular case ought to be determined with reference to the particular case. In that regard, counsel set out in his submission a chronology of events which in his view, indicates that there has not been an undue delay in instituting the review application.

[6] I agree with Mr Frank that in considering whether there has been unreasonable delay each case must be judged on its own facts and circumstances. *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) says so at para 132. Counsel set out in his submission a chronology of events which, in his view, indicate that there has not been unreasonable delay in bringing the present review application.

[7] Mr Corbett argues the other way, and makes the following submission. The fourth respondent holds eight mining claims (ie 69087 to 69094). The applicant apparently now seeks review of the decision taken by the second respondent to recognize and register the claims of the fourth and sixth respondents in respect of

areas that are already covered by the exclusive prospecting licences of the applicant (prayer 1.3 of the notice of motion).

[8] On the papers, I find that the applicant knew – at the latest – on 11 February 2014 about the registration of the eight mining rights in favour of the fourth respondent. In this regard, what Khalin (deponent of the replying affidavit) says about some information given to him by Froya Roed (for fourth respondent) does not detract from the factual finding I have made that the applicant knew about the registration, at the latest on 11 February 2014, but waited for some nine months before launching the review application. I find that there has been an unreasonable delay, as submitted by Mr Corbett. Having so found, I ought, upon the authority of *Keya*, to consider whether, in the exercise of my discretion, I should grant condonation for the unreasonable delay.

[9] There is no sufficient explanation put forth by the applicant for the unreasonable delay. It would, therefore, be unjudicial to condone the delay. There is simply no consideration placed before the court that could possibly outweigh 'the public interest in the finality' of the decision of the administrative officials'. (See *Keya*, para 22.)

[10] In this regard, as *Keya*, op. cit., proposes, it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. In the instant case, the respondents have *ex abundanti cautela* established prejudice to the effect that the fourth respondent and the third respondent have already commenced exploration work, and have invested N$15 000 000 since January 2014-March 2015 to pursue their rights respecting the mining claims. The joint venture between Froya and Dauremas employs 15 Namibian employees and has entered into contracts with three independent contractors for road construction, drilling, reporting and geophysics. Thus, as I see it, if the relief is granted, retrenchment of the employees are likely to follow and the investment made would go to waste. I, therefore, conclude that the prejudice established is material in buttressing the finding of

unreasonable delay in instituting the application. It follows that for the laches in instituting the review application, the review application stands to be rejected.

[11] In any case, the order sought in paras 1, 1.1, 1.2, 1.3 and 1.4 in the review application is, with respect, bad in law. The applicants seek an order, calling on the administrative officials to 'show cause why' their decisions 'should not be reviewed, corrected and set aside'. But in our law there is no onus on an administrative body or an administrative official to justify his, her or its act. See *Davies v Chairman Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W); cited with approval in *Immanuel v Minister of Home Affairs and Others* 2006 (2) NR 687, para 54, and applied in *Gideon Jacobus Du Preez v Minister of Finance* Case No. A 74/2009 (Unreported).

[12] Based on these reasons, the review application falls to be dismissed. But the matter does not end there. The applicant probably having seen the writing on the wall, brings on the back of the review application an application for mandamus (para 1.5), as an alternative relief to the relief sought in paras 1.3 and 1.4 of the notice of motion. The prayer for an order of mandamus is formulated in the following terms:

'Alternatively to paragraphs 1.3 and 1.4

1.5 Ordering the first respondent to determine the appeals lodged by applicant against the registration of the claims of fourth, fifth and sixth respondents in the areas of the exclusive prospecting licenses of applicant as well as the appeal against the alteration of the parameters of the claims of fifth respondent to encroach onto the area of the exclusive prospecting licenses of applicant and to announce his findings within one month of this order.'

[13] I have rejected the review application on the basis that there has been an unexplained unreasonable delay in bringing that application. The orders that I have refused to grant are in respect of paras 1.1, 1.2, 1.3 and 1.4 of the notice of motion. If I were to grant the order of mandamus in that behalf, I would in the same breath in this judgment effectively be setting at naught an order dismissing the review

application. Such an absurd consequence would not conduce to due to administration of justice. For this reason, I think, I should refuse to grant an order of mandamus prayed for in the alternative in this proceeding. It follows inevitably that the alternative relief in para 1.5 of the notice of motion should be refused.

[14] Based on these reasons, the application is dismissed with costs, including costs of one instructing counsel and two instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT :	T J Frank SC (assisted by S Akweenda) Instructed by Conradie & Damaseb, Windhoek
FIRST AND SECOND RESPONDENTS:	No appearance Government Attorney, Windhoek
THIRD, FOURTH AND SIXTH RESPONDENTS:	A W Corbett SC (assisted by D Obbes) Instructed by Koep & Partners, Windhoek