



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2017/00307

In the matter between:

GECKO SALT (PTY) LTD

APPLICANT

and

THE MINISTER OF MINES AND ENERGY

1ST RESPONDENT

THE MINING COMMISSIONER

2ND RESPONDENT

WALTRUD GOSSOW

3RD RESPONDENT

ROLF GOSSOW HOLDING (PTY) LTD

4TH RESPONDENT

SALZ-GOSSOW (PTY) LTD

5TH RESPONDENT

THE MINISTER OF ENVIRONMENT AND TOURISM

6TH RESPONDENT

THE ENVIRONMENTAL COMMISSIONER

7TH RESPONDENT

THE DIRECTOR OF THE ANTI-CORRUPTION COMMISSION

8TH RESPONDENT

TY INVESTMENTS (PTY) LTD

9TH RESPONDENT

Neutral citation: *Gecko Salt (Pty) Ltd v The Minister of Mines and Energy* (HC-MD-CIV-MOT-REV-2017/00307) [2019] NAHCMD 187 (12 June 2019)

Coram: ANGULA DJP

Heard: 3 May 2019

Delivered: 12 June 2019

Flynote: Practice – Notice of Motion – Amendment – Inserting a new declaratory relief to the existing review relief – Delay in bringing the application to amend not satisfactorily explained – Amendment found to be substantial and therefore required a detailed explanation for the delay – Statutory provisions and facts forming the basis for the amendment not pleaded – If amendment granted would contradict the provisions of the Minerals (Mining and Prospecting) Act, 33 of 1992 – Application dismissed.

Summary: In an interlocutory application to amend a notice of motion, in the main application being the review application – The amendment sought to introduce a new declaratory relief to declared certain mining licenses as have been abandoned – Application brought after the pleadings have closed – Amendment found to be substantial – Explanation for the delay in bringing the application found to be inadequate and not candid therefore rejected by the court – Court found that no statutory provisions and facts upon forming the basis for amendment have been pleaded – Court of the view that the relief would be competent in terms of the Minerals (Mining and Prospecting) Act, 33 of 1992 in that the Act does not provide for a scenario whereby a mineral license can abandoned by its holder – Consequently, the application was dismissed with costs.

ORDER

1. The application is dismissed.
2. The applicant is to pay the respondents' costs, not limited to the amount stated in rule 32(11), such costs to include the costs of one instructing and one instructed counsel.
3. The matter is postponed to 26 June 2019 at 08h30 for status hearing.

JUDGMENT

ANGULA DJP:

[1] I have before me an application for leave to amend a notice of motion. The applicant brought review proceedings in which he sought, as the main relief, an order to review and set aside the decision by the first respondent, the Minister of Mines and Energy, relating to the transfer of some three mining licences from one Rolf Wolfgang Gossow to the fourth respondent. The licences are described as mining licenses 82D, 82E and 82F. The applicant now wishes to amend its notice of motion by inserting a new prayer 3 to read: 'That it be declared that the mining licenses 82D, 82E and 82F have been abandoned and therefore lapsed'.

[2] The application is opposed by the 3rd, 4th and 5th respondents.

[3] The deponent to the applicant's affidavit alleges that during the course of consultation to draft the replying affidavit, counsel for the applicant realised that it was necessary that an amendment of the notice of motion be sought so as to include a prayer that the mining licences have been abandoned. Furthermore, it was advised that the relief was appropriate as it will dispose of all the issues between the parties once and for all. This was because, if in law, the licences have indeed been abandoned, and a declarator to that effect is made then the dispute concerning the transfer of the licences would be finally determined. The deponent contends further that the necessary allegations to support the declarator sought by the proposed amendment were made in the founding affidavit. In this regard the deponent argues that the allegation of abandonment is based on the fact that the licences were not used over many years and furthermore that the licences were not reflected as assets in the Liquidation and Distribution account of the estate of either the late JP Gossow or RR Gossow.

[4] The applicant concedes that there has been a delay in seeking the amendment, but submits the reason for the delay has been fully explained. The applicant submits further that the amendment sought is not *mala fide* and will not cause injustice or prejudice to the respondents.

Opposition by the respondents

[5] The respondents filed a detailed grounds of objection to the proposed amendment which were in turn elaborated upon in the answering affidavit. The respondents point out that the applicant should have amended its notice of motion after the record of the proceedings at which the decision sought to be reviewed was made, had been filed in terms of the rules. The respondents point out further that after the record was filed the applicant was asked in writing whether it was going to amend its notice of motion; that in response, the applicant pertinently informed the respondents that it was persisting with the relief sought in the notice of motion. The respondents further complain that the applicant waited for the pleadings to close before it sought a far-reaching and independent declaratory relief.

[6] The respondents' further ground of objection is that even though the alleged abandonment of the licences was mentioned in the founding affidavit, no declaratory relief was sought, this resulted in the respondents dealing with the allegation of abandonment in the answering affidavit secondarily. The respondents argue that, in any event no statutory basis has been pleaded underpinning the allegation of abandonment

[7] A further point raised by the respondent is that of non-joinder of the executor of the estate of the late Rolf Richard Gossow from whom the licenses were transferred into the name of the fourth respondent. In this connection the respondents' contend that applicant ought to have joined the executor of the estate of the late Rolf Richard Gossow for the reason that the executor is a necessary and interested party if the amendment were to be granted.

[8] The respondents further allege that in addition to the unexplained delay, if the amendment were to be allowed, they would be severely prejudiced in that: the amendment will occasion an exception in motion proceedings. In other words, it will introduce a new cause of action which they were not called upon to meet; and further that it will result in the infringement of their common law rights and constitutional rights to fair trial enshrined in Article 12 of the Namibian Constitution.

Submissions on behalf of the applicant

[9] Mr Rorke, who appeared on behalf of the applicant, in his written submissions referred to applicable case law regarding the approach to be followed by the Court with regard to amendments. As regards the respondents' contention that they have been prejudiced in that they dealt with the allegation of abandonment secondarily, counsel submits that the respondents own failure to deal with the factual allegations in the founding affidavit concerning the alleged abandonment was the direct cause of their alleged prejudice, if any. Secondly, the allegation of abandonment is already direct and material to the dispute between the parties on the basis of the relief prayed for in the unamended notice of motion. Thirdly, that to the extent the Court may hold that the respondents have been prejudiced, such prejudice can be cured, in that the Court has the power to allow the respondents to file further affidavits in terms of rule 52(7) or in the exercise of the Court's inherent jurisdiction.

[10] As regards the respondents' complaint that the explanation proffered by the applicant for the delay in seeking the amendment at this stage of the proceeding is inadequate, counsel submits that the amendment sought is minor and is based on the evidence already contained in the applicant's founding affidavit and that the amendment does not involve a withdrawal of an admission or a change of front which considerations would ordinarily require a detailed explanation.

[11] As for the respondents' complaint that the introduction of the amendment would render the motion or pleadings 'excipiable', counsel points out that exceptions are taken to pleadings in action proceedings and not in motion proceedings. In any event, so the submission goes, the amended declaratory relief as formulated, is clear and is therefore not capable of being labelled as vague and embarrassing.

[12] As regards the respondents', contention that the executor of the estate of the transferor of the licences would need to be joined if the amendment is allowed, counsel argued that the executor is *functus officio*; and that the respondents have not placed evidence before Court in their opposing affidavit why the executor would have direct and substantial interest in an order declaring the licences declared abandoned.

[13] Finally, counsel submits that the respondents' allegation relating to infringement of the respondents common law and constitutional rights, such allegation is not supported by evidence and should be disregarded.

Submissions on behalf of the respondents

[14] Mr Corbett who appeared for the respondents, assisted by Mr Obbes, submits in his heads of argument that there had been a substantial delay in bringing the application for the amendment. In essence, counsel submits that the respondents would be prejudiced if the amendment were to be allowed. In this regard counsel stresses that the applicant elected not to amend its notice of motion in terms of rule 76(9) and confirmed further in the supplementary affidavit that it would persist in seeking the relief as set out in the notice of motion; and that the applicant waited to apply for an amendment after the pleadings had been closed. Furthermore, no sufficient explanation has been proffered why the declaratory relief sought was not sought from the beginning or in terms of an amended notice of motion as provided for by rule 76(9).

[15] Counsel submits further that there is no statutory or other legal basis pleaded in the founding affidavit to sustain the alleged abandonment of the licences. In this connection counsel refer to the *Yannakou* matter¹ where the Court laid the rule that a litigant who relies on a particular section in a statute must say so, and in addition to referring to the said section, must plead the facts which entitle him or her to invoke the said section. Counsel points out that the applicant did not make any reference to any statutory provision of the Minerals Act in support of the alleged abandonment or lapsing of the mining licences. Furthermore, so the criticism continues, even if it was possible in law that a licence can be abandoned, the applicant did not make an allegation that the holder of the licences abandoned such licences with full knowledge of rights in question.

[16] As regards the applicant's allegation that the licences were not reflected as assets in the liquidation and distribution accounts of late Rolf Richard Gossow, that such failure to reflect it in the liquidation and distribution accounts means that the licences have been abandoned, Counsel submits that such allegation calls into

¹ *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623 – 624.

question the administration of the estate of the late Richard Gossow and therefor the executor of the said estate is a necessary and interested party to the proceedings. Non-joinder of such necessary party may result in the proceedings being subsequently challenged and set aside. In support of his argument in this regard, counsel referred to the matter of *Webb*² where the applicant applied for a declaratory order as to whether or not the respondents were entitled to any mineral rights under a Deed of Sale or a Deed of Transfer. The Court found that where there may be involved not only the definition of the rights of the applicant but also the definition of those rights in competition with the other holders of mineral rights, joinder of affected parties was required. Counsel therefore submits that this principle finds application in the present matter.

Applicable legal principles

[17] The applicable legal principles concerning amendments are now well settled. They have been neatly summarised in the *I A Bell* matter and recently in the *TrustCo Group International* matters³. Counsel are in agreement as to the applicable principles. It is the application of the principles to the facts on which counsel are in disagreement. I will apply the principles to the facts of the present matter without reviewing or reconsidering such principles in detail, in order to resolve the issues in dispute which have been raised by the parties.

Issues for decision

[18] I think that two main issues stand out for decision in order to resolve the dispute between the parties. The first issue is, whether the self-admitted delay by the applicant in bringing the application to amend has been satisfactorily explained. Secondly, whether in the event that the amendment is granted, the relief sought by the amendment would be competent given the statutory provisions of the Mineral (Prospecting and Mining) Act, 1992 with regard to abandonment of licences.

² *Webb v Beaver Investments (Pty) Ltd and the Registrar of Deeds*, 1950 (SA) 491 (TPD).

³ *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & 4084-2010) [2014] NAHCMD (17 October 2014); *TrustCo Group International (Pty) Ltd v Atlanta Cinema Capital CC and Others* (I370/2012) [2016] NAHCMD 297 (30 September 2016).

[19] I proceed to consider the applicant's explanation for the delay in bringing the application. The applicant concedes that there has been undue delay. It has been held that the explanation required depends on the nature of the amendment sought; that the more substantial, the amendment; the more compelling case for an explanation⁴.

[20] Mr Rorke SC for the applicant submits that the amendment in question falls far short of being substantial so as to require a comprehensive and detailed explanation. Counsel argues that the delay has been sufficiently explained namely that the need for amendment was only discovered by counsel when he was consulting in preparation for the drawing of the replying affidavit and that the relief initially thought to be adequate was, on reflection, considered to require amplification and amendment.

[21] I should immediately say that I do not agree with the contention that the amendment sought is not substantial and therefore does not require a detailed explanation. In my view, the amendment sought is substantial. A declarator is a distinct and independent relief from a review. Different requirements and considerations apply to each relief, that is, a declarator and a review. With regard to a declarator, the Court approaches the question of a declarator in two stages: firstly, the Court enquires: is the applicant a person interested in any existing, future or contingent right or obligation? Secondly, and only if satisfied at the first stage, the Court decides whether the case is a proper one which to exercise its discretion⁵. With a review relief the Court exercises its inherent power, eg. if a public body exceeds its powers, the Court steps in to set aside the impugned act or decision⁶.

[22] In my view, it is not correct, as Mr Rorke tried to put it, that the amendment sought is to amplify or amend the initial relief. The proposed amendment does not seek to amend the initial or existing relief. The amendment sought, if granted, will constitute a free-standing, distinct and independent relief not framed as an alternative relief to the existing relief. It seek declaratory relief as opposed to the existing review relief initially sought. On the applicant's own version, if the relief sought by the amendment is granted, it will finally determine the real issues of

⁴ *I A Bell Equipment Company* (supra).

⁵ *Daniel v Attorney-General & Others; Peter v Attorney-General & Others* 2011 (1) 212-330 (HC).

⁶ *African Realty Trust Ltd v Johannesburg Municipality* 1906 TH 179 at 182.

dispute between the parties. Under the circumstances the applicant was therefore required to give a detailed explanation. On the other hand if only the review relief is granted the licences will still continue to exist and act as a burden over the land to which the licences relate.

[23] There is no sufficient, plausible or detailed explanation placed before Court why the relief now sought was not included in the original notice of motion, given the fact that on the applicant's own case the allegation of abandonment was made in the founding affidavit. Furthermore, there is also no explanation why the amendment was not sought at the time when the applicant supplemented its founding affidavit after receipt of the record as provided by rule 76(9). It is rather unfortunate that the applicant took upon itself to decide that the amendment does not require a detailed explanation. That is an issue for the Court to decide. The applicant appears not to appreciate that it is seeking an indulgence from the Court. The applicant was under an obligation to give a full and detailed explanation and not hold back any or further reasons or facts that explain the delay, as it appears to have decided in its wisdom. In my view, the explanation suffers from candour and forthrightness to justify an indulgence from the Court.

[24] In my judgement, when the explanation is considered in conjunction with other facts and circumstances, eg. how the case developed as the pleadings were exchanged, it calls into question the *bona fides* of the applicant's explanation. I say this for the reasons that the applicant says that the issue of abandonment was already raised in the founding affidavit, but there is no plausible and cogent explanation why the relief was not there and then included in the notice of motion.

[25] In response to the respondents' complaint that they dealt with the issue of abandonment secondarily and as a result they have been prejudiced, counsel for the applicant argued with reference to what the court said in *Ongwediva Town Council v Kavili*⁷ at para 18 that there was a duty on the respondents and their legal representatives to engage meaningfully in drafting the answering affidavit by dealing with facts in the founding affidavit which are in dispute; that those facts ought to have been dealt 'with seriously and unambiguously' in the answering affidavit. Counsel then proceeds to submit that the respondents' own failure to deal with the allegation

⁷ HC-NLD-CIV-ACT-DEL-2017/00228) [2018] NAHCMD 35 (16 April 2018).

of abandonment squarely and unambiguously is the cause of their own prejudice. In other words the prejudice complained by the respondents is self-inflicted.

[26] In my view, the same fate befalls the applicant. Not only does it appear that it failed to pay serious attention to its original relief in its notice of motion so as to synchronise it with the allegations of abandonment made in the founding affidavit, but the explanation proffered for not doing so is wholly inadequate. It would have been a different consideration altogether had the applicant been forthright and stated that the amendment constitutes a change of front or is afterthought and then offered a detailed explanation for the delay. Under those circumstances, depending on the detailed explanation, I might had no problem to grant the amendment, subject to the prejudice suffered by the respondents being addressed. However, in the present matter the applicant is approbating and reprobating at the same time. The explanation is pregnant with equivocation and is not frank, candid, and nor is it forthright.

[27] I find it rather puzzling that the applicant is prepared to say that ‘counsel on reflection considered [the notice of motion] to require amplification and amendment’, but is not prepared to admit that the amendment sought is ‘an afterthought’. I do not consider it necessary to get entangled into the resolution of the semantics as to whether there is a major difference in meaning between ‘on reflection’ (‘meaning an action taken after another action but related to the first’) and an ‘afterthought’ (meaning something not thought of originally: something secondary). In my view, the ordinary meaning conveyed by the two words is the same. This type of nitpicking is another reason why I found that applicant has not been frank and candid to the court in its explanation for the delay.

[28] It is fair to say that the relief sought in the notice of motion ordinarily determines and dictates the content of the founding affidavit. On a proper reading of the founding affidavit it becomes clear that the allegation of abandonment contained in the founding affidavit was not made to obtain a declaratory relief. This much is not in dispute. It is clear from the papers that the declaratory relief was not contemplated when the original relief was drafted. It is, in my view, rather unfortunate for the applicant to deny that the amendment sought is not an afterthought. It is clear that at some stage the applicant realised that it could, so to speak, kill two birds with one

stone by praying for the declaratory relief in order to finally get rid of the burden of the licenses over its property once and for all, given the fact that an allegation of abandonment had been made in relation to the review relief.

[29] For the foregoing reasons, the application stands to be dismissed. I turn to consider whether the relief sought by the amendment, if granted, would be competent having regard to the provisions of the Minerals Act.

Would the relief sought by the amendment be competent, if granted?

[30] It needs to be stated upfront that the Minerals Act, which governs and regulates the mineral licenses regime does not provide for a situation where a mineral license is abandoned by its holder. Instead, section 54 of the Act provides for an incident where a license holder abandons a reconnaissance area, prospecting area, retention area or a mining area. It is the area to which the licence relates which is abandoned. In terms of the Act, a licence is not abandoned but is cancelled. The Act sets out a procedure how a licence is to be cancelled: It provides that the holder of the licence may abandon an area to which the licence relates by notice in writing addressed and delivered to the Mining Commissioner. Upon receipt of the notice, the Mining Commissioner shall cancel the licence and make an entry in the register of mineral licence and notify the holder of the licence that his or her license has been cancelled and further notify the owner of the land over which the licence relates, that his or her land area has been abandoned. In other words the land is no longer burdened with the licence. It is only once this process has been completed that it shall be known to the public and in terms of the Act that the area to which the licence related, has been abandoned.

[31] Mr Rorke SC for the applicant, both during oral submissions and in his written submissions mentioned that that in terms of the South Africa law, a mining right may be abandoned where there is evidence, objectively viewed, evincing an intention by the licence holder to abandon the license. Counsel concedes, however that in Namibia there is no authoritatively laid down principle in case law as to what is required for there to be an abandonment of a mining right. During oral submissions, the court enquired from Mr Rorke whether he was advocating for a parallel system:

the one prescribed by the Minerals Act and one outside the process prescribed by the Act. Counsel answered in the affirmative.

[32] I do not agree with Counsel's submission in that regard, for the reason that if the Namibian Legislature intended for the Minerals Act to cater for the situation whereby, an abandonment of a mining licence can be determined objectively, it would have provided for such a scenario in the Minerals Act like the South African Legislature appears to have done.

[33] As mentioned earlier in this judgment Mr Corbett for the respondents submits in his written submissions that the amendment, if allowed, will cause the pleadings to become excipiable. However, during his oral submissions counsel submitted that that the relief sought would not be competent. I prefer the latter argument because it sounds more palatable for the reason that it speaks directly to the provisions of the Minerals Act. It has been held that a litigant who relies on a particular section in a statute must say so, and in addition to referring to the section must plead the facts which entitle him or her to invoke the section in question⁸. The pleadings have closed. On the pleadings as they stand, the applicant has not complied with this requirement. There is no allegation in the pleadings on which statutory provisions or other legal principle upon which the allegation of abandonment is premised.

[34] I have earlier summarised the provisions of the Mineral Act which deal with the incident of abandonment of a licensed area. The Act does not envisage a situation whereby a licence can be abandoned. A mineral licence must be cancelled after it had been delivered by the holder thereof to the Mining Commissioner. It is an active process which does not leave room for objective assessment whether or not a licence still exists or has been abandoned. The Act provides for a situation whereby the holder of a mineral licence abandons an area to which the mineral licence relates. In my view, a declarator that the mining licences have been abandoned would be incompetent as it would be contrary to the clear provisions of the Minerals Act. This is a further reason why the amendment sought cannot be allowed.

⁸ *Yannakou v Appollo Club* 1974 (1) SA 614 (A) 623; *Courtney-Clarke v Bassingthwaight* 1990 NR 89 (HC) (1991 (1) SA 684 Nm) at 95B.

[35] The applicant does not allege that the holder of the licences notified the Mining Commissioner in writing that licenses in question have been cancelled. This quite apart from the fact that on the pleadings, the Mining Commissioner, who is the custodian of the register of mineral licences which have been issued, states that according to his records, the licences are alive and the holder has been paying its yearly licence fees. Furthermore as, Mr Corbett correctly points out, there is no allegation that the holder of the licences in question intended to abandon the said licences with full knowledge of the rights in question. In other words, in terms of the Act, the licence is cancelled and not abandoned. What can be abandoned is the land to which the licence relates on the licence.

[36] In my judgment, the fact that the licences were not reflected in the Liquidation and Distribution accounts of the estate of the holder cannot be a basis for the contention that the licences have been abandoned. It happens so many times in practice that an executor might not have been aware of the existence of assets which belong to the estate and is discharged from office. Such assets are never considered abandoned. Once the existence of estate's assets has been discovered after the executor has been discharged from office, section 18(5) of Administration of Estates Act, 1965 makes provision for the executor to be re-appointed to deal with the newly discovered estate's assets and to amend the Liquidation and Distribution account to include the newly discovered assets. If the original executor, has in the meantime died or is unwilling to resume office, the Master can appoint somebody else, deemed to be fit and proper, to act as an executor to liquidate and distribute such assets⁹. The argument on behalf of the applicant, that the executor becomes *functus officio* appears to have overlooked the provision of section 18(5) and must be rejected.

[37] In sum: firstly, the applicant has failed to furnish a satisfactory explanation for the delay in applying for an amendment earlier; secondly, the applicant failed to plead the provision of the Minerals Act and the facts upon which the allegations of abandonment of the licences is premised; in any event the relief would contradict the provisions of the Act; thirdly, the assumption that the licences have been abandoned due to the fact that they have not been reflected in the licence holder liquidation and

⁹ D Meyerowitz: *The Law of Practice of Administration of Estates* page 83, 5th edition.

distribution account overlooks the clear provisions of section 18(5) of the Administration of Estates Act, 1965.

[38] For the foregoing reasons, I have arrived at the conclusion that the proposed amendment cannot be granted and is refused.

[39] In the result, I make the following order:

1. The application is dismissed.
2. The applicant is to pay the respondents' costs, not limited to the amount stated in rule 32(11), such costs to include the costs of one instructing and one instructed counsel.
3. The matter is postponed to 26 June 2019 at 08h30 for status hearing.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT:

S C RORKE SC

Instructed by Ellis & Partners Legal Practitioners,
Windhoek

1ST, 2ND, 6TH, 7TH, 8TH

RESPONDENTS:

No appearance

Of Office of the Government Attorney, Windhoek

3RD, 4TH, 5TH, 7TH, 8TH

RESPONDENTS:

A W CORBETT SC (with him D OBBES)

Instructed by Engling, Stritter & Partners,

Windhoek

9TH RESPONDENT:

No appearance

Of Fisher, Quarmby & Pfeifer, Windhoek