REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: HC-MD-CIV-MOT-REV-2021/00285

HAIB MINERALS (PTY) LTD **APPLICANT**

and

MINISTER OF MINES AND ENERGY **FIRST RESPONDENT**
MINING COMMISSIONER **SECOND RESPONDENT**
ORANGE RIVER EXPLORATION AND MINING CC **THIRD RESPONDENT**

Neutral citation: *Haib Minerals (Pty) Ltd v Minister of Mines and Energy* (HC-MD-CIV-MOT-REV-2021/00285) [2023] NAHCMD 103 (10 March 2023)

Coram: MILLER AJ
Heard: **3 October 2022**
Delivered: **10 March 2023**

Flynote: Judicial Review – Section 72 of the Minerals (Prospecting and Mining) Act No 23 of 1992 – Rejection of application for renewal of Exclusive Prospecting License – Article 18 of the Namibian Constitution – When setting aside a decision of an administrative authority, a review court will not, as a general rule, substitute its own decision for that of the functionary, unless exceptional circumstances exist.

Summary: On 21 April 2004, EPL 3140 was awarded to an entity, then known as Deep South Mining Company (Pty) Ltd. Due to changes in name and shareholding, the entity then known as Deep South Mining Company (Pty) Ltd is presently known as Haib Minerals (Pty) Ltd, the applicant in this matter. The activities permitted in terms of EPL 3140, concerned the exploration for the possible mining of a copper ore deposit in the area covered by EPL 3140. It is common cause that as the years progressed since EPL 3140 was first awarded, the exploration license was renewed on several occasions.

It is apparent from the papers that the applicant and its predecessor were not able thus far to progress to the stage where it could present a pre-feasibility study to the first and second respondent and to apply for a mining license.

The applicant advances several reasons why it became necessary to have the exploration license extended from time to time and why a further extension was sought in the year 2021. A fundamental problem is the fact that the copper deposit is what is described as a low ore deposit. What it means is that a large tonnage of material must be processed with a commensurate lower yield of copper. This led over the years to the fact that the applicant in its present and past forms, considered what best mining option there is to adopt and overcome the problem to the extent that it could. To that end, there was a substantial financial investment in the project, research was commissioned and performed which all resulted ultimately in the applicant having to make other drastic changes in the methodology of its mining and exploration activities. This much was reflected in the reports the applicant provided to the first and second respondent as and when changes became necessary.

A further factor was the effect that the Covid-19 pandemic had on the programs contemplated by the applicant.

In April 2021, when the last extension of EPL 3140 was to expire, the work being undertaken was not completed and a further extension of EPL 3140 was applied for. This application was refused and the decision not to renew EPL 3140 is the subject of this matter. The applicant thus instituted an application to have the decision by the Minister to refuse the renewal, reviewed and set aside and for the said decision to be declared in conflict with Article 18 of the Namibian constitution

Held that, from a reading of the relevant Act, it is apparent that the first respondent is called upon to exercise a discretion whether or not to renew the license. In exercising that discretion the first respondent must take into account the provisions of section 72(4) of the Act.

Held that, it is apparent from the papers that first and foremost in the mind of the first respondent was the fact that there was no pre-feasibility report which in turn created the impression that the applicant did not fulfil its previous undertaking.

Held that, the fact that there was no pre-feasibility report is not disputed. However, the applicant fully explained why that was the case. Absent from the reasoning of the first respondent is any assessment or evaluation of the facts presented by the applicant. The facts could not simply be ignored in the evaluation process. They remained relevant and had to be considered together with all the other relevant facts. That to my mind renders the whole process unreasonable and consequently the decision of the first respondent must be reviewed and set aside

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ORDER

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1. The decision purportedly taken by the first respondent in terms of section 72 of the Minerals (Prospecting and Mining) Act No. 33 of 1992 ("the Minerals Act") on 9 June 2021, and formally communicated to the applicant on 14 June 2021, to the effect that the applicant's application for the renewal of Exclusive Prospecting License 3140 ("EPL 3140") not be granted or renewed ("the Minister's decision") is hereby reviewed and set aside in terms of Rule 76(1);

2. The decision referred to in paragraph 1 above, is hereby declared to be in conflict with Article 18 of the Namibian Constitution.

3. The respondents are to pay the applicant's costs jointly and severally, the one paying the others to be absolved, including the costs of one instructing and one instructed counsel.

4. The matter is finalized and removed from the roll.

JUDGMENT

MILLER AJ:

Relief sought

[1] This judgment concerns Part A of the Notice of Motion which reads as follows:

> ‘1.1 Calling upon the respondents to show cause why:
>
> 1.1.1 the decision purportedly taken by the first respondent in terms of section 72 of the Minerals (Prospecting and Mining) Act No. 33 of 1992 (“the Minerals Act”) on 9 June 2021, and formally communicated to the applicant on 14 June 2021, to the effect that the applicant’s application for the renewal of Exclusive Prospecting License 3140 (“EPL 3140”) not be granted or renewed (“the Minister’s decision”) should not be reviewed and set aside in terms of Rule 76(1);
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> 1.1.2 the decision referred to in paragraph 1.1.1 above, should not be declared to be in conflict with Article 18 of the Namibian Constitution.
>
> 1.2 Ordering the respondents to pay the applicant’s costs jointly and severally, the one paying the others to be absolved.
>
> 1.3 Granting further and/or alternative relief’

[2] Part B of the Notice of Motion was disposed of by me in a separate judgment at an earlier stage.

[3] The relief being sought in paragraph A is opposed by the respondents.

The factual Background

[4] On 21 April 2004, EPL 3140 was awarded to an entity, then known as Deep South Mining Company (Pty) Ltd. Due to changes in name and shareholding, the entity then known as Deep South Mining Company (Pty) Ltd is presently known as Haib Minerals (Pty) Ltd, which is the applicant. The activities permitted in terms of EPL 3140, concerned the exploration for the possible mining of a copper ore deposit in the area covered by EPL 3140.

[5] It is common cause that as the years progressed since EPL 3140 was first awarded, the exploration license was renewed on several occasions. As indicated earlier during that time, the holder of EPL 3140 morphed into different shareholding and changes in name. These events are conveniently summarized in paragraph 11 of the applicant`s heads of argument as follows:

'11. The controlling interest in EPL 3140 evolved over time. Initially Deep South Mining Company (Pty) Ltd ("Deep South Mining") was granted EPL 3140 on 21 April 2004. Metallurgical studies on the copper ore body found on EPL 3140 were conducted by experts, METS Engineering of Australia, during the period 2005 to 2007. In 2008 Deep South Mining signed an option and joint venture agreement with Teck Resources Limited ("Teck"), the largest diversified Canadian mining company. In so doing Teck exercised its option to acquire a 70% interest in EPL 3140, and in order to facilitate this, EPL 3140 was transferred with Ministerial consent into a newly formed Namibian joint venture company, the applicant. Teck held a 70% controlling shareholding, with Deep South Mining being a minority shareholder.[1] During September 2016 Deep South Resources became a 100% shareholder in the applicant,[2] and during May 2017, through an acquisition of shareholding, the applicant became a wholly-owned subsidiary of Deep South Resources.[3]'

[6] It is apparent from the papers that the applicant and its predecessor were not able thus far to progress to the stage where it could present a pre-feasibility study to the first and second respondent and to apply for a mining license.

[7] The applicant advances several reasons why it became necessary to have the exploration license extended from time to time and why a further extension was

[1] Record, 25, para 12.
[2] Record, 26, para 13.
[3] Record, 26, para 14.

sought in the year 2021. A fundamental problem is the fact that the copper deposit is what is described as a low ore deposit. What it means is that a large tonnage of material must be processed with a commensurate lower yield of copper. This led over the years to the fact that the applicant in its present and past forms, considered what best mining option there is to adopt and overcome the problem to the extent that it could. To that end there was a substantial financial investment in the project, research was commissioned and performed which all resulted ultimately in the applicant having to make other drastic changes in the methodology of its mining and exploration activities.

[8] This much was reflected in the reports the applicant provided to the first and second respondent as and when changes became necessary.

[9] A further factor was the effect that the Covid-19 pandemic had on the programs contemplated by the applicant.

[10] The upshot of all this was that in April 2021, when the last extension of EPL 3140 was to expire, the work being undertaken was not completed and a further extension of EPL 3140 was applied for. This application was refused and the decision not to renew EPL 3140 is the subject of this matter.

The Reasons for the refusal

[11] By way of a letter dated 16 April 2021 the first respondent gave notice to the applicant of his intention not to renew EPL 3140. The relevant part thereof reads as follows:

> 'Your renewal application and the accompanying exploration report clearly indicates that you did not carry out any substantial exploration activities in this Exclusive Prospecting License as promised for past tenure(s).'

[12] The applicant responded to the notice by way of a letter of 5 May 2021. In its representation it raised a number of points. The applicant referred to a perceived lack of clarity in the notice, the impact of the covid-19 pandemic, the re-orientation of the work programme and, the repercussions that a refusal will have on the existing

work force and the international investors.

[13] The applicant also noted that another entity, the third respondent, has filed an application for an Exclusive Prospective License (EPL 8457) over the same area on 12 November 2020.

[14] The applicant was then requested to provide further documentation, which it did. No further response was received by the applicant until 14 June 2021, when it received a copy of letter by the first respondent dated 9 June 2021. This letter contained the ultimate refusal of the application.

[15] In that letter, the first respondent stated that he had considered the representations made by the applicant prior to coming to the decision he made. The relevant part thereof reads as follows:

> 'I regret to inform you that I am not convinced by your representation. In the best interest of the development of the mineral resources of Namibia, this license cannot be renewed further in the view of the following: This license has been valid since 2004 and renewed on seven (7) occasions, four (4) of those renewals were under Haib Minerals. At this stage, the project has failed to advance to the pre-feasibility stage, and your proposed drilling program in the previous tenure was not conducted as planned. Section 71(2) of the Minerals (Prospecting and Mining) Act 33 of 1992 does not allow the Minister to renew an exclusive prospecting license on more than two occasions unless the Minister deems it desirable in the interests of the development of the mineral resources of Namibia. I, therefore, deem this license not desirable. As a result, this refusal is final.'

The Relevant Legislation

[16] Section 72 of the Act deals with the issue relating to the renewal of Exclusive Prospecting Licenses. It reads as follows:

> '72 (1) Subject to the provisions of subsection (2) of this section, the provisions of section 68 shall apply mutatis mutandis in relation to an application for the renewal of an exclusive prospecting license.
>
> (2) An application for the renewal of an exclusive prospecting license shall –

(a) be made not later than 90 days before the date on which such license will expire if it is not renewed or such later date, but not later than such expiry date, as the Minister may on good cause shown allow;

(b) not be made-

(i) in the case of a first application for the renewal of such license, in respect of any land greater in extent than 75 per cent of the prospecting area in respect of which such license has been issued; or

(ii) in the case of any other application for the renewal of such license, in respect of any land greater in extent than 50 per cent of the prospecting area existing at the date of such application, without the approval of the Minister, granted in the interest of the development of the mineral resources of Namibia and on good cause shown by the holder of the exclusive prospecting license in question; and

(c) be accompanied by a report in duplicate containing the particulars contemplated in section 76(1)*(e)* prepared in respect of the immediately preceding period of the currency of such exclusive prospecting license. Republic of Namibia 71 Annotated Statutes Minerals (Prospecting and Mining) Act 33 of 1992.

(3) Subject to the provisions of subsection (1), the Minister shall not grant an application for the renewal of an exclusive prospecting license, unless the Minister is on reasonable grounds satisfied with the manner in which the programme of prospecting operations have been carried on or the expenditure expended in respect of such operations.

(4) The Minister shall not refuse to grant an application for the renewal of an exclusive prospecting license-

(a) if the holder of such license –

(i) has complied with all the terms and conditions of such license;

(ii) has complied with the proposed programme of prospecting operations; and

(iii) has expended the expenditure in respect of such operations as in accordance with the terms of such mineral agreement;

(b) if the Minister is on reasonable grounds satisfied-

(i) with the proposed programme of prospecting operations or the proposed expenditure to be expended in respect of such operations;

(ii) that the person concerned has the technical and financial resources to carry on such prospecting operations;

(c) on the grounds thereof that such holder has contravened or failed to comply with any provision of this Act or any terms and condition of such license, unless the Minister has by notice in writing informed such holder of his or her intention to so refuse such application –

(i) setting out particulars of the contravention or failure in question; and

(j) requiring such holder to make representations to the Minister in relation to such contravention or failure or to remedy such contravention or failure on or before a date specified in such notice, such holder has failed to so remedy such contravention or failure to make representation…' (emphasis added)

[17] From a reading of the relevant Act, it is apparent that the first respondent is called upon to exercise a discretion whether or not to renew the license. In exercising that discretion the first respondent must take into account the provisions of section 72(4) of the Act.

[18] In essence, the first respondent`s refusal to grant the requested extension is based upon the fact firstly, that the license had been extended on a number of occasions. Secondly the first respondent was of the view that the applicant had not undertaken to complete the work he had promised to do prior to the expiry of the existing license. The absence of a pre-feasibility report led the first respondent to conclude that the applicant had not fulfilled the promise it had made.

[19] The absence of a pre-feasibility report left the first respondent with the impression that the applicant had failed to meet the undertaking it had given.

A Basis to Review

[20] In seeking an answer to the question whether the decision of the first respondent is to be reviewed, it needs to enquire whether the decision can be rationally justified. In the matter of *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*[4] it was held that:

'What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A Court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interest involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness is at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct that they would have chosen. It is for judges whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.'(emphasis added)

[21] Moreover, the process of decision making requires a transparent process which will enable the court to be properly informed as to what facts led to the decision.[5]

[22] It is apparent from the papers that first and foremost in the mind of the first respondent was the fact that there was no pre-feasibility report which in turn created the impression that the applicant did not fulfil its previous undertaking.

[23] The fact that there was no pre-feasibility report is not disputed. However, the applicant fully explained why that was the case. Absent from the reasoning of the first respondent is any assessment or evaluation of the facts presented by the applicant. The facts could not simply be ignored in the evaluation process. They

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[4] *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

[5] *Kersten t/a Witvlei Transport v National Transport Commission and Another* 1991 NR 234 (HC) at 23F.

remained relevant and had to be considered together with all the other relevant facts. That to my mind renders the whole process unreasonable and consequently the decision of the first respondent must be reviewed and set aside.

The Remedy

[24] The applicant in its submissions during the course of the hearing before me, advanced the argument that I should go further than merely reviewing and setting aside the impugned decision. It was submitted that I should make the decision that the first respondent should have made. Some reliance was placed upon certain remarks made by the second respondent, during the course of a meeting, that a decision to refuse the application had already been taken some time prior to the notice forwarded to the applicant notifying it to advance reasons why the license should not be renewed.

[25] These remarks were made by the second respondent and may well represent his own view of the matter. It cannot follow without more, that they represented the views of the first respondent and it is not apparent what role, if any, it played in the decision making process.

[26] The following passage from the judgment in *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism*[6] is relevant:

'When setting aside a decision of an administrative authority, a review court will not, as a general rule, substitute its own decision for that of the functionary, unless exceptional circumstances exist. (*SA Jewish Board of Deputies v Sutherland NO and Others* 2004 (4) SA 368 at 390B).

Thus, in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) BCLR 1239 (C), the Cape Provincial Division of the High Court of South Africa stated at 1259D-E:

"The purpose of judicial review is to scrutinize the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant administrative function themselves. As a

[6] *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC) at 31F.

general principle, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative authority of the state administration is vested in the Legislature, the executive authority in the Executive and the judicial authority in the courts." (emphasis added)

[27] This is not a matter which requires of me to substitute my own decision.

[28] I will make the following order:

1. The decision purportedly taken by the first respondent in terms of section 72 of the Minerals (Prospecting and Mining) Act No. 33 of 1992 ("the Minerals Act") on 9 June 2021, and formally communicated to the applicant on 14 June 2021, to the effect that the applicant's application for the renewal of Exclusive Prospecting License 3140 ("EPL 3140") not be granted or renewed ("the Minister's decision") is hereby reviewed and set aside in terms of Rule 76(1);

2. The decision referred to in paragraph 1 above, is hereby declared to be in conflict with Article 18 of the Namibian Constitution.

3. The respondents are to pay the applicant's costs jointly and severally, the one paying the others to be absolved, including the costs of one instructing and one instructed counsel.

4. The matter is finalized and removed from the roll.

K MILLER

Acting Judge

APPEARANCES

APPLICANT:	AW CORBETT SC Instructed by HD Bossau & Co., Windhoek
1ST and 2ND RESPONDENTS:	F KADHILA OF Office of the Government Attorney, Windhoek