

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTIVE 61

Case Title: NAMIBPLAAS GUESTFARM AND TOURS CLOSE CORPORATION v THE MINISTER OF MINES AND ENERGY 1 ST RESPONDENT THE MINING COMMISSIONER 2 ND RESPONDENT THE MINISTER OF ENVIRONMENT, FORESTRY AND TOURISM 3 RD RESPONDENT THE ENVIRONMENTAL COMMISSIONER 4 TH RESPONDENT	Case No: HC-MD-CIV-MOT-GEN-2024/00122 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 9 April 2024 Delivered on: 30 April 2024
Neutral citation: <i>Namibplaas Guestfarm and Tours Close Corporation v The Minister of Mines and Energy</i> (HC-MD-CIV-MOT-GEN-2024/00122) [2024] NAHCMD 201 (30 April 2024)	
Results on merits: Merits not considered.	
The order:	

1. The applicant's non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency in terms of the provisions of rule 73(3) of the Rules of Court.

2. Pending the final determination of the review application brought in terms of Part A of this application –

2.1. the first and second respondents are interdicted and restrained from, in any manner whatsoever, giving effect to and/or implementing the Minister's decision referred to in Part A hereof and;

2.2 the fifth respondent is interdicted and restrained from, in any manner whatsoever, conducting any prospecting activities or further activities of any kind (apart from the rehabilitation of the areas where past exploration has taken place) within the area covered by EPL 3638.

3. Cost of the application shall be costs in the cause.

Reasons for orders:

Prinsloo J:

Introduction

[1] This matter came before me on an urgent basis, during which the applicant sought interim and urgent relief. The application consists of parts A and B. The latter is review relief sought by the applicant.

The parties

[2] The applicant is Namibplaas Guestfarm and Tours CC, which is the registered owner of Portion 1 of Farm Namibplaas No. 93.

[3] The respondents are as follows:

a) The Minister of Mines and Energy (the Minister of Mines) duly appointed in terms of Article 32(3)(i)(bb) of the Namibian Constitution and the responsible Minister to the application at hand and was cited by virtue of his decision-making powers relevant to this application;

- b) The Mining Commissioner (the Mining Commissioner) is appointed under s 4(1) of the Minerals (Prospecting and Mining) Act 33 of 1992;
- c) The Minister of Environment, Forestry and Tourism duly appointed in terms of Article 32(3)(i)(bb) of the Namibian Constitution cited by virtue of his interest in this application;
- d) The Environmental Commissioner (the Environmental Commissioner), appointed under s 16 of the Environmental Management Act 7 of 2007.
- e) Valencia Uranium (Pty) Ltd (Valencia), a private company with limited liability incorporated in terms of the Company Laws of Namibia.

[4] Valencia is the only respondent who opposed the application. The GRN respondents, at the time of the application, still had some time to file the review record and declare their position regarding the review application. Unfortunately, this court does not have the benefit of what their position might be.

The relief sought and the purpose of the application

[5] The relief in the notice of motion is as follows:

'PART A

KINDLY TAKE NOTICE THAT application will be made in terms of Rule 76 on behalf of the abovenamed

Applicant, on a date to be arranged with the managing judge, for an order in the following terms:

1. Calling upon the Respondents to show cause why:

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 6 March 2024 (which the Applicant only became aware of on 8 March 2024), to the effect that the Fifth Respondent's application for the renewal of Exclusive Prospecting Licence 3638 ("EPL 3638") be renewed ("the Minister's Decision"), should not be reviewed and set aside in terms of Rule 76(1);

1.2 The Minister's Decision referred to in paragraph 1.1 above, should not be declared to be in conflict with Article 18 of the Namibian Constitution.

2. Ordering the Respondents to pay the Applicant's costs jointly and severally, the one paying the others to be absolved.

3. Granting further and/or alternative relief to the Applicant.

B. KINDLY TAKE NOTICE FURTHER THAT application will be made on Tuesday, 9 April 2024 at 9H00, or as soon thereafter as the matter may be heard, for an order in the following terms:

1. Dispensing with full and proper compliance with the Rules relating to service and time limits as set out in Rule 73(3) of the Rules of this Honourable Court, by reason of the urgency of the matter.

2. Ordering the relief sought in paragraph 1 of Part A above to operate as an interim order, pending the final determination of the review application.

3. Pending the final determination of the review application brought in terms of Part A hereof –

3.1. interdicting and restraining the First and Second Respondents from in any manner whatsoever giving effect to and/or implementing the Minister's Decision referred to in Part A hereof; and

3.2. interdicting and restraining the Fifth Respondent from in any manner whatsoever conducting any prospecting activities or further activities of any kind (apart from the rehabilitation of the areas where past exploration has taken place), within the area covered by EPL 3638.

4. In the event of opposition to this Part B, ordering the First and the Second Respondents, and any

other Respondent who may oppose this application, to pay the Applicant's costs jointly and severally, the one paying the others to be absolved.

5. Granting further and/or alternative relief to the Applicant.'

[6] The main application is a review application under Part A of the Notice of Motion brought in terms of rule 76(1) wherein the applicant essentially seeks to review and set aside the decision of the Minister of Mines and Energy taken on 6 March 2024 to the effect that Valencia's EPL 3638 was renewed.

[7] The applicant is averring that the Minister made a decision that is in conflict with Article 18 of the Constitution. However, the relief sought on an urgent basis under Part B of the Notice of Motion is to interdict and restrain the Minister of Mines, the Mining Commissioner and Valencia from implementing the Minister's decision or exercising any rights in relation thereto.

[8] The applicant in Part B of the application seeks an order that the relief sought in paragraph 1 of Part A above operate as an interim order, pending the final determination of the review application. However, the applicant conceded that this relief would be incompetent and did not persist therewith.

Background

[9] The background of this matter appears to be common cause between the parties, but for the sake of completeness, I will briefly sketch the history of the relationship between Namibplaas and Valencia.

[10] The applicant was previously registered as Namibplaas Farming CC, and as far back as 2006, an Exclusive Prospecting Licence (EPL), more specifically EPL 3638, was granted to Dunefield Mining Company (Pty) Ltd to prospect on Namibplaas. The EPL is situated in the mountains, which form part of Namibplaas.

[11] A company by the name of Forsys Metals Incorporated (Forsys) held 70% shareholding in Dunefield and acquired the remaining shareholding in 2013.

[12] In 2005, Forsys also acquired 90% shareholding in Valencia and obtained the remaining shareholding in 2007. With the approval of the Minister of Mines, EPL 3638 was transferred to

Valencia with effect from 22 November 2021.

[13] Valencia lodged an application for the renewal of the EPL on 20 June 2022, which was granted on 6 March 2024. The applicant was informed by way of a letter on 8 March 2024 of the renewal. This renewal constituted the seventh renewal since 2006, and the current renewal is valid until 1 February 2026.

[14] It is common cause that during 2022 to 2023 the applicant and Valencia engaged in discussions and negotiations in respect of Valencia having the option to purchase the farm. During the talks, Valencia had interim access to the farm to conduct fieldwork activities. This was an oral agreement between the parties, not a written one, as required by s 52(1) of the Minerals Act.¹

[15] Unfortunately, for reasons that are not relevant for purposes of this ruling, the negotiations did not result in a sale of the farm, and in May 2023, the applicant was informed accordingly.

[16] It would appear that hereafter, there was a substantial breakdown in communication between the applicant and Valencia, resulting in the withdrawal of the interim permission to access the farm. Valencia left the farm in May/June 2023 and has not yet returned to the farm. Ever since, Valencia has engaged the applicant to enter into an s 52 agreement, which has not been concluded to date. Valencia has thus not prospected since it left the applicant's farm.

The applicant's case

[17] Mr Pieter Cornelius Christiaan Burger, the sole member of the applicant, deposed to the founding affidavit.

[18] Many issues were raised on behalf of the applicant regarding Valencia's conduct on the farm, its failure to rehabilitate the prospecting area and alleged violations of the Minerals Act.

¹ 52. (1) The holder of a mineral licence shall not exercise any rights conferred upon such holder by this Act or under any terms and conditions of such mineral licence –

(a) in, on or under any private land until such time as such holder –

(i) has entered into an agreement in writing with the owner of such land containing terms and conditions relating to the payment of compensation, or the owner of such land has in writing waked any right to such compensation and has submitted a copy of such agreement or waiver to the Commissioner; or (ii) has been granted an ancillary right as provided in section 110(4) to exercise such rights on such land.

However, these averments would only be relevant for future proceedings.

[19] The applicant approached this court without having the benefit of the review record available to determine the reasoning of the Minister of Mines.

[20] Regardless, for purposes of the current proceedings, the applicant raised four grounds of review, which, according to the applicant, are presented to this court to establish its prima facie right to the interim relief sought, which would ultimately be raised during the review proceedings. The applicant relies on four grounds of review, ie:

a) The Minister renewed a lapsed EPL: according to the applicant, EPL 3638 lapsed on 21 September 2022, given that the endorsements on the licence cover the period 21 September 2020 to 20 September 2022. Thus, the applicant believes it was legally incompetent and ultra vires the Minister's powers in terms of the Minerals Act to renew a lapsed EPL.

b) No valid Environmental Clearance certificate for prospecting activities: in this regard, the applicant submitted that the activities under EPL 3638 include sampling as part of the exploration process, which would require an Environmental Clearance Certificate in terms s 27(1) of the Environmental Management Act 7 of 2007, which Valencia does not have. The Environmental Clearance Certificate the Environmental Commissioner granted relates to mining activities on EPL 3638 and not prospecting activities. The applicant maintains that the certificate issued to Valencia does not relate to its property as it was issued to Farm Namibplaas 3, Erongo Region. In contrast, its farm is identified as Portion 1 Namibplaas No. 93. According to the applicant, the Environmental Commissioner re-issued and irregularly corrected the certificate. Irregularly, because the Environmental Management Act does not provide for the correction of errors, and if an amendment is effected to the conditions, then a formal application process is required in terms of regulation 19 of the Environmental Impact Assessment Regulations.²

c) The Minister failed to afford the applicant audi: According to the applicant, it had a right to be heard before the Minister decided on the renewal of the EPL. The applicant avers that the Minister ignored the multiple requests to be heard, which constitutes a violation of the duty of the Minister to afford the applicant, as a directly affected party, the opportunity to be heard.

d) The Minister's decision was not rationally justified: In this regard, the applicant relies on s

² Environmental Impact Assessment Regulations Government Notice 30 of 2012 (GG 4878) came into force on date of publication: 6 February 2012.

71(2) of the Minerals Act, which states that an EPL 'shall not be renewed on more than two occasions, unless the Minister deems it desirable in the interests of the development of the mineral resources of Namibia that an exclusive prospecting licence be renewed in any particular case on a third or subsequent occasion.' In the current instance, the EPL has been renewed seven times. Therefore, the threshold is much higher than in initial renewals. It is thus averred that the Minister failed to properly apply his mind to the matter, causing a violation of the applicant's right to fair and reasonable administrative action under Article 18 of the Namibian Constitution.

[21] The applicant contended that it is entitled to the interim relief as it has demonstrated that it has a clear right, alternatively, a prima facie right, to protect its interest and, in so doing, requires that the Minister acts within his powers and according to the criteria for the evaluation of mineral licence renewal applications. It further contended that it would suffer irreparable harm if the current status quo is not maintained and protected pending the determination of the review.

[22] According to the applicant, the balance of convenience is in its favour, and if Valencia were to exercise its rights in terms of the EPL, the applicant stands to suffer significant financial consequences, which would be difficult to quantify even if the applicant can sue for damages suffered.

[23] On the issue of urgency, the applicant submitted that it only became aware of the Minister's decision on 8 March 2024. Valencia's legal practitioners further informed the applicant that they wanted to engage the applicant on access to EPL 3638. If there is no positive response from the applicant by 13 March 2024, they will lodge an application in terms of s 109 of the Minerals Act before the Minerals Ancillary Rights Commission (MARC).

[24] The applicant states that on various occasions, the office of the Minister was approached regarding the renewal of the EPL before it even became aware of the Minister's decision. However, by 19 March 2024, the applicant did not receive a satisfactory reply as to when the Minister would revert on the issue, which resulted in the launching of the urgent application.

Valencia's case

[25] An extensive answering affidavit was deposed to by Mr Oliver Armin Krappman, a geologist Valencia appointed on a consultancy basis. Mr Krappman gave the court a detailed

background of the development of the exploration activities on Namibplaas, which I will not replicate for purposes of this ruling.

[26] More to the point at hand, Mr Krappman contended that the application is not urgent as the applicant knew at least since August 2023 that Valencia applied for a renewal of the EPL and knew since June 2023 that Valencia applied for a mining licence in respect of EPL 3638. According to Mr Krappman, the applicant knew that the status of the renewal application was 'renewal intention to refuse, pending representation'.

[27] Mr Krappman further submitted that although the applicant threatened in its correspondence that it would take steps to make representations against the renewal of the ELP and would take steps to protect its interests, it did nothing. For this reason, the applicant was in as good a position in August 2023 to make representations to the Minister of Mines as it is purporting to do now.

[28] He is of the view that the applicant's decision to bring the current application on an urgent basis was not prompted by the Minister's decision to renew the EPL but was prompted by Valencia's application to the MARC. He further believes that the applicant's urgency is self-created.

[29] Mr Krappman avers that the applicant does not say in its application for interim relief that it would not obtain substantial redress in due course except that Valencia intends to exercise its rights under EPL 3638. However, Valencia would only be entitled to exercise its rights if the applicant grants access in terms of s 52(1) of the Act or if the MARC grants Valencia ancillary rights. Therefore, the MARC would be best placed to balance the competing rights of the parties and can afford the applicant the redress it may prove to be entitled to, and if aggrieved by the decision made by the MARC, the applicant may appeal to the High Court in terms of s 113 of the Act.

[30] It is further his submission that the applicant's concern for the environmental damage to the land can be remedied with s 130 of the Act, which would adequately address its concerns. The Minister can give Valencia notice to remedy any spillage, pollution, loss or damage to the applicant's land.

[31] On the interim relief sought, Mr Krappman submitted as follows:

a) Prima facie right: Valencia cannot fully address the alleged grounds of review until the review record is filed. He, however, contends that the review grounds as set out by the applicant have no merits and that the applicant did not demonstrate a clear right.

b) Apprehension of irreparable harm: the applicant's apprehension of any harm is unreasonable. As per the applicant's papers, Valencia has not been conducting exploration activities or any other activities on the farm since the end of June 2023. He further submitted that Valencia has the right to approach the MARC as the applicant refuses to negotiate an agreement in terms of s 52(1), and there can be no harm suffered if Valencia's application to the MARC is heard and decided. The contrary may be true, as the MARC may impose the terms and conditions necessary to ensure that its rights are exercised in a manner least onerous and harmful to the applicant.

c) Balance of convenience: Valencia's prejudice is ignored by the applicant as it only focuses on the review relief sought concerning the Minister's decision. However, as the holder of an EPL, Valencia enjoys property rights that have equal protection under Article 16 of the Constitution. If there is a conflict between the respective rights, then remedies are in place to balance the conflict.

d) Several satisfactory remedies: The crux of the applicant's complaint relates to alleged environmental breaches, and the MARC can address this complaint by imposition of conditions. The applicant further has a remedy under s 130 of the Act. According to Mr Krappman, the applicant also has remedies in terms of the Environmental Management Act.

Discussion

[32] This court heard extensive and competent arguments advanced by both counsel in this matter which I considered, but for brevity, I do not intend to repeat these arguments.

Urgency

[33] The applicant is seeking an interim interdict pending the finalisation of the review application. In the interim, it seeks to restore the status quo ante before the Minister made the impugned decision.

[34] With regard to the point of urgency, rule 73(4) provides for two requirements, namely, the circumstances which render the matter urgent must be clearly set out and, secondly, the reasons why the applicant in a matter claims that he or she would not be afforded substantial redress at a hearing in due course.

[35] In *Bergmann v Commercial Bank of Namibia Ltd*,³ the court held that its power to dispense with the forms and service provided for in the Rules of Court in urgent applications is a discretionary one and that one of the circumstances under which a court, in the exercise of its judicial discretion, may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the application, is when the applicant, who is seeking the indulgence, has created the urgency either mala fide or through his or her culpable remissness or inaction.

[36] Valencia contends that this application is not urgent. Alternatively, if it is urgent, the urgency was entirely self-created as the applicant was aware of both the application for the renewal of the EPL and the application for the mining licence on EPL 3638 months in advance.

[37] It is clear from the argument advanced by the applicant that this application could not have been filed earlier than the date on which the Minister made his decision because it would have resulted in the respondents arguing that the application is premature and that the applicant is pre-empting an outcome that is not known yet.

[38] I cannot fault the applicant in this reasoning. The relevant date in respect of determining urgency must be 8 March 2024, when the decision of the Minister came to the attention of the applicant when Valencia made it clear via its legal practitioners that it intends to implement the Minister's decision by making an application for a right to access the farm.

[39] Valencia takes issue with the fact that the applicant addresses the urgency issue in one or two paragraphs. I am of the view that nothing more needs to be said in this regard, and I agree with Mr Corbett that the combination of the decision of the Minister and Valencia wanting to implement the decision is cause for urgency.

The interim relief

³ *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 at 49H.

[40] Even though the applicant is seeking interim relief, it is imperative to establish the requisites for an interim interdict pending the outcome of the review application.

[41] The requirements for an interim interdict have been consistently applied in our courts as follows:⁴

- a) A prima facie right;
- b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- c) That the balance of convenience favours the granting of an interim interdict and
- d) That the applicant has no other satisfactory remedy.

Prima facie right

[42] The court has to consider whether the applicant has furnished proof in its founding papers that, if uncontradicted and believed during the main application, would establish its right. More is required than merely looking at the allegations of the applicant, although something short of weighing the probabilities of conflicting versions is required.⁵ The court must thus be satisfied that the applicant can succeed in reviewing and setting aside the decision of the Minister.

[43] The applicant raised at least four definitive grounds of review, which must be considered during the main application. In my view, having had a peek at the grounds of review raised by the applicant, not all of these grounds would carry the same weight during the review application. However, if, for instance, the court upholds the issue of failure to afford the applicant audi and finds that there was an absence of reasonable and fair administrative justice on the part of the Minister in reaching his decision, the applicant would have a reasonable prospect of succeeding in having the Minister's decision set aside. Therefore, if there are reasonable prospects of success on the review application, it links with the requirements for an interdict, specifically the prima facie right.

[44] The issues of audi and the fact that the Minister's decision was not rationally justified are

⁴ *Alpine Caterers Namibia (Pty) Ltd v Owen and Others* 1991 NR 310 (HC) at 313F-I, *Rossing Uranium Ltd v Cloete and Another* 1999 NR 98 (LC), *Shoprite Namibia v Paulo* 2010 (2) NR 475 (LC) at 482 para 27.

⁵ *AFS Group Namibia (Pty) Ltd v Chairperson of the Tender Board of Namibia and Others* NAHC 184 (1 July 2011) at para 73.

not issues that the respondent can address in opposition to the applicant's application, as the review record is unavailable. I am of the view that based on these grounds of review, without going into the other grounds of review, the respondent is not in the position to throw serious doubt on the applicant's case, even though Mr Töttemeyer argued that audi is flexible and there need not be an oral hearing.

[45] Given the conspectus facts of the matter, I am of the view that the applicant, at the very least, made out a prima facie right.

Apprehension of irreparable harm

[46] As mentioned earlier, the applicant made various allegations regarding significant damage to the farm and the failure to redress rehabilitation.

[47] Valencia maintains that it cannot exercise its rights under the EPL until the s 59(1) agreement is in place or if the MARC grants the access sought, and then there can be conditions set by the MARC.

[48] Valencia further maintains that the applicant does not say what harm it would suffer and why it would be irreparable. That is not entirely correct. The applicant explains that it is a game farm aimed at eco-tourism. The applicant further explained that there is potential to impact the ecosystem and a threat of further devaluing the farm.

[49] Considering that Valencia's primary business is prospecting and mining, it is safe to say that there is an expected impact, which cannot necessarily be quantified at the drop of a hat. If Valencia succeeds in exercising its rights in terms of the EPL and getting access to the farm to start prospecting/mining, it may, in my view, injure the applicant's property rights.

Balance of convenience

[50] Valencia complains that the applicant does not consider its rights when the applicant contends that there would be no prejudice to the Minister should the relief sought be granted. It is indeed so that there can be no prejudice for the Minister. It is, however, not clear what exactly the prejudice to Valencia would be, given the fact that it has not accessed the applicant's property for months and as it has now approached the MARC and actually submitted that the

review application might be finalised before the review process would be finalised by the MARC.

Other satisfactory remedies

[51] Valencia raised several possible alternative remedies; however, all these are premised on the understanding that the minister's decision is lawful.

[52] This would mean that the applicant must be subjected to all these processes, which stand to be set aside should the applicant succeed in the review application.

[53] The applicant is well within its rights to pursue the review application and have it heard by a court before being subjected to all the various alternatives proposed by the respondent.

Conclusion

[54] I am of the view that the applicant made out a case for the interim relief sought, and I will grant it accordingly. The cost is to be determined in the main review application.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	5th Respondent
A W CORBETT SC (assisted by P HAMMAN) Instructed by Pieter Hamman Legal Practitioners Windhoek	R TÖTEMEYER (assisted by N BASSINGTHWAIGHTE and G LOSPER) Instructed by LorentzAngula Inc. Windhoek

