



**NOT REPORTABLE**

CASE NO: SA 50/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MINISTER OF MINES AND ENERGY**

**Appellant**

and

**DAVID JOHN BRUNI N.O.**

**First Respondent**

**IAN ROBERT McLAREN N.O.**

**Second Respondent**

**VERALEX INDUSTRIES (PTY) LTD (IN LIQUIDATION)**

**Third Respondent**

**TAMARIX MINING AND EXPLORATION CC**

**Fourth Respondent**

**Coram:** SHIVUTE CJ, HOFF JA and FRANK AJA

**Heard:** 13 April 2021 and 15 July 2021

**Delivered:** 5 August 2021

**Summary:** The first and second respondents (as duly appointed liquidators of the third respondent/Veralex (liquidated on 21 November 2008)) instituted an action relating to a mining licence issued to the third respondent prior to its liquidation and which mining licence the liquidators intended to assign to fourth respondent (Tamarix). This action was as a result of an application for the transfer of the mining licence to Tamarix made to the Minister/appellant to approve the assignment and upon application for renewal of mining licence on 2 August 2013. The liquidators were

informed by letter on 18 October 2013 that 'when a company is liquidated, the mining rights ceased to belong to that company because the company has become unfit to hold a licence'. This final response (ie the letter of 18 October 2013) came after a protracted period of time (referred to as 'evasive non-action' by the court *a quo*) that the appellant did not respond to the respondents' case. The letter in question is from the Office of the Mining Commissioner and signed by the Commissioner not the Minister.

The respondents' action sought a declarator to the effect that s 51(1)(b) of the Minerals (Prospecting and Mining) Act 33 of 1992 does not apply to entities in liquidation; for the court *a quo* to condone the late filing of the renewal application; to approve the renewal application as well as the transfer application and in the alternative, for an order ordering the appellant to consider the applications and to communicate his reasons to the respondents within 30 days.

In the court *a quo*, by the time the matter went to trial, Tamarix had withdrawn from the agreement to purchase the licence - so the respondents no longer sought the relief relating to the transfer application. The court *a quo* found for the respondents and condoned the late lodging of the renewal application with the Minister and directed the latter to renew the mining licence for a further period of ten years (ie from 5 August 2013 to 4 August 2023). A costs order, inclusive of the costs of one instructing and one instructed legal practitioner, was also made against the Minister.

This appeal lies against the whole judgment and order of the court *a quo*.

On appeal, respondents raised an issue as to the completeness of the record at the initial hearing on 13 April 2021 in that certain, potentially material evidence (referred to in appellant's heads of argument) of the Mining Commissioner (the Commissioner) who was the only witness for the Minister was not included in the record. Their argument at the initial hearing and at the second hearing was that the appeal should be struck from the roll as the record was not complete and no condonation application

had been brought for this defect. Appellant's legal practitioner in an explanatory affidavit averred that the evidence was left out with the agreement of the legal practitioner for the respondents at the time the record was filed. Appellant's legal practitioner referred to correspondence and the report filed per rule 11(10) of the Rules of the Supreme Court. Respondents' legal practitioner denied that an agreement in terms suggested by appellant's representative was entered into.

*Held that*, whereas it is correct from the affidavits that there was no consensus as to the omission of the evidence in question and hence no agreement as averred on behalf of the appellant, there is no basis to find that the legal practitioner for the Minister did not honestly believe that there was such an agreement. She acted accordingly and was in fact, surprised by the allegations with regard to the record being incomplete which was raised in the respondents' heads of argument.

*Held that*, any prejudice that the respondents might have suffered by the late filing of the additional evidence (which was already in their possession) was addressed by the order as to wasted costs given at the initial hearing.

*Held that*, insofar as the omission of the evidence of the Commissioner amounts to non-filing of the record (which this court doubts), the court is prepared to, in the special circumstances of this case, condone the late filing of the complete record and accordingly reinstate the appeal insofar as it was deemed to have been withdrawn.

On the merits, with regards to the letter of 18 October 2013, the legal practitioner for the appellant submitted that it was the final decision taken by the Minister which by implication meant the condonation application for the late filing of the renewal application as well as the renewal application itself were finally disposed of and in essence declined. Respondents contend that the letter does not in express terms thereof state that the condonation application was considered and declined nor that the renewal application was likewise declined. The court *a quo's* finding (which is in line with the respondents' submissions) as to the nature of the decision contained in

the letter is incorrect insofar as the letter 'constitutes a refusal to renew, such decision is set aside due to non-compliance by the Minister with the provisions of ss 92(4) and 96(4)(c) of the Act'. The court *a quo* in its reasoning, completely ignored the point made in the letter (ie the reason why the merits were not considered by the appellant because of the view taken, wrongly at that, that Veralex lost its licence upon its liquidation).

*Held that*, the view expressed in the letter of 18 October 2013 that 'when a company is liquidated, the mining rights ceased to belong to that company because the company has become unfit to hold a licence' was enough to set the decision communicated aside so that the condonation application and the renewal application could be dealt with on its merits.

*Held that*, the liquidation of Veralex did not result in the termination of its licence. This assumption was wrong in law and further that the Minister did not cancel the licence pursuant to s 55(1)(b). The Minister's non-consideration of the merits in respect of both applications was fatally flawed.

In determining what the appropriate order should be (ie whether to refer this matter back to the Minister or the court should make the final decision), this court considered the events of what the court *a quo* termed as 'evasive non-action' of the Minister, the Commissioner and the Ministry (through the relevant officials) and finds that the court *a quo* was correct to determine the issues raised instead of referring them back to the Minister for a further decision. Consideration was taken on how the respondents were treated, the clear bias against them coupled with the fact that an unjustifiable risk of prejudice would arise for the respondents if they did not have sufficient time to find a potential buyer for the licence.

The appeal is dismissed with costs.

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## APPEAL JUDGMENT

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FRANK AJA (SHIVUTE CJ and HOFF JA concurring):

### Introduction

[1] First and second respondents, as duly appointed liquidators (the liquidators) of the third respondent (Veralex) instituted an action in the High Court against the appellant (the Minister). The action relates to a mining licence issued to Veralex prior to its liquidation and which mining licence the liquidators intended to assign to fourth respondent (Tamarix). An application was made to the Minister to approve the assignment and to approve the renewal of the licence for a further ten years. I point out that the parties in the pleadings and in the court proceedings referred to this as a sale of the mining licence which is undoubtedly the manner in which such assignments are referred to by the public in general.

[2] The intended assignment of the licence had to be approved by the Minister. In addition and because of the proximity in time of the intended assignment to the expiry date of the mining licence, application for the renewal of the mining licence was also due and these two matters became interlinked and both such applications were submitted to the Minister. In the court *a quo*, the application to the Minister for the approval of the assignment of the rights and obligations from Veralex to Tamarix was referred to as the transfer application and the application for the renewal of the licence was referred to as the renewal application. In this judgment I shall follow the

nomenclature adopted by the parties *a quo* and refer to the sale or purchase of the licence and to the transfer or renewal applications as was done in the court *a quo*.

[3] In the action, the relief sought was a declarator to the effect that s 51(1)(b) of Act 33 of 1992 (the Act)<sup>1</sup> does not apply to entities in liquidation; to condone the late filing of the renewal application; to approve the renewal application as well as the transfer application. In the alternative, an order was sought to order the Minister to consider the abovementioned applications and to communicate his reasons with regard thereto to plaintiffs (first to third respondents) within 30 days together with the reasons for his decisions.

[4] By the time the matter went to trial, Tamarix had withdrawn from the agreement to purchase the licence so the respondents no longer sought the relief relating to the transfer application. The court *a quo* found for the respondents and condoned the late lodging of the renewal application with the Minister and directed the latter to renew the mining licence for a further period of ten years, ie from 5 August 2013 to 4 August 2023. A costs order, inclusive of the costs of one instructing and one instructed legal practitioner, was also made against the Minister.

[5] The appeal lies against the whole of the judgment and orders of the court *a quo*.

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<sup>1</sup> Minerals (Prospecting and Mining) Act 33 of 1992.

### Completeness of the record

[6] At the initial hearing of the matter an issue arose as to the completeness of the record. First to third respondents raised the issue in their heads of argument filed on their behalf. The gravamen of the complaint in this regard was that certain evidence of the Mining Commissioner (the Commissioner) who was the only witness for the Minister was not included in the record. This evidence certainly seemed to be potentially material.

[7] The legal practitioner acting for the Minister in response to this issue being raised in the respondents' heads of argument filed an explanatory affidavit in which she averred that the evidence was left out with the agreement of the legal practitioner for the respondents at the time the record was filed and referred to correspondence and the report filed per rule 11(10) of the Rules of the Supreme Court. The legal practitioner of the respondents in her response denied that an agreement was entered into in the terms suggested by the legal practitioner for the Minister. In essence, the alleged agreement involved that the witness statement of the Commissioner would form part of the record and not his actual evidence-in-chief.

[8] Junior legal practitioner for the Minister who appeared on his own for the Minister at the time attempted to suggest that the actual evidence led was not material but when it was pointed out that he in fact quoted from this evidence verbatim in his heads of argument, he did not persist with his submission in this regard and tendered the wasted costs of the day for the record to be completed. This

led to the postponement to the final hearing with an adverse costs order against the Minister in respect of the wasted costs occasioned by this postponement.

[9] The legal practitioner for the respondents' submitted at the initial hearing and persisted with this approach at the second hearing that the appeal should be struck from the roll as the record was not complete and no condonation application had been brought for this defect.

[10] It will serve no purpose to refer extensively to the substantial case law from this court in this regard on which counsel for the respondents relied. The cases cited generally deal with matters where the rules were disregarded wilfully or negligently but they do not deal with an issue where a party who has been alleged to have not complied with the rules avers that there was compliance. Thus, in this instance rule 11(10)(a) of the Supreme Court Rules requires parties to meet 'with the view to eliminating portions of the record which are not relevant for the determination of an issue on appeal' and to provide the registrar with a report in this regard. This was done.

[11] The fact that the alleged agreement is disputed, and the submission by the legal practitioner for respondents that this court must then either determine the matter on the respondents' version or refer the matter to evidence to decide whose version should prevail, does not seem apposite to me in the circumstances. Whereas it is correct that from the affidavits it would appear that there was no consensus as to the omission of the evidence in question and hence no agreement as averred on behalf

of the appellant, there is no basis to find that the legal practitioner for the Minister did not honestly believe that there was such an agreement in place and hence acted accordingly and that she was in fact, surprised by the allegations with regard to the record being incomplete which was raised, as mentioned, in the respondents' heads of argument.

[12] Furthermore, any prejudice that the respondents might have suffered by the late filing of the additional evidence (which was already in their possession as became evident at the initial hearing) was addressed by the order as to wasted costs given at the initial hearing.

[13] In the circumstances there was no failure to file the record but a failure to file a complete record based on the honest belief of the legal practitioner for the Minister that an agreement had been reached as to the omission of certain evidence pursuant to rule 11(10). I point out that rule 8 which deals with the filing of the record also makes provision for evidence to be omitted by agreement between the parties where apposite in terms of rule 8(3) read with rule 8(7). Rule 8(7) expressly grants this court the power to call for a full record even where the parties have agreed otherwise. This in my view is inherent in the powers this court has to adjudicate appeals and it does not matter whether the evidence is omitted pursuant to rule 8 or rule 11(10).

[14] Once it appeared that the evidence omitted from the record in this matter was potentially material to issues raised in the appeal, it did not matter whether there was or was not an agreement to omit this evidence of the record as the court needed it for

the consideration of the appeal. To in such circumstances be overly rigid and in essence conduct a formal judicial enquiry into whether there was or was not an agreement where a clear misunderstanding arose between the legal practitioners involved and where the only prejudice to respondents could be addressed by an appropriate costs order seems to me to be overly formalistic as the issue of whether or not there was an agreement is a total side issue and not relevant to the issues on appeal.

[15] However, insofar as the omission of the evidence of the Commissioner amounts to non-filing of the record (which I doubt) I am prepared to, in the special circumstances of this case, condone the late filing of the complete record as directed by the court and accordingly reinstate the appeal insofar as it was deemed to have been withdrawn. I point out that in the affidavits exchanged between the parties at the initial hearing as to whether there was an agreement or not reached in respect of the omission of the evidence in question, the Minister actually sought the condonation for filing the non-complete record and for the reinstatement of the appeal as alternative relief.

### Pleadings

[16] In the particulars of claim, the first to third respondents, after citing the parties averred that Veralex is the holder of the mining licence relevant to the dispute and as they forwarded an application for a renewal of the licence such licence remained in force until that application had been decided. They then alleged that the mining licence forms the 'major part' of the assets of Veralex and that the liquidators are

obliged to realise the assets of Veralex to the best advantage of the creditors. They further averred that Veralex concluded an oral agreement with Tamarix for the latter to purchase the mining licence of Veralex for an amount of N\$8 million conditional upon the transfer of the licence to Tamarix being approved by the Minister. It was further averred that an application was made to the Minister to condone the late filing of the renewal application and also for an approval of the transfer application which was accompanied by an application for a renewal of the licence by Tamarix. At a date subsequent to the filing of the transfer application, and when no response was forthcoming in respect of the transfer application and about three days prior to the date that the licence would expire, a renewal application was filed with the Minister on behalf of Veralex. This was followed by a response from the Minister on 18 October 2013 to the effect that as the licence of Veralex expired or lapsed upon liquidation, the application did not meet the requirements of the Act.

[17] From the aforementioned averments, according to the respondents (as plaintiffs) they were entitled to the relief sought. The particulars of claim simply do not support the relief sought. This is so for the simple reason that there is no ground stated as to why the decision contained in the letter of 18 October 2013 is fatally flawed. Furthermore, the relief simply does not follow from the averments. Even if the averments relating to the letter of 18 October 2013 is ignored then a *mandamus* to deal with the transfer and an application for renewal might have been appropriate. This is however not the way the particulars of claim are framed.

[18] Be that as it may, the above matters did not cause the appellant (the Minister) much concern as he pleaded to them without raising a hint of concern about the cause of action of the respondents. According to the plea, the licence expired on 5 August 2013 as it was not renewed; the application for transfer was flawed as it did not identify the person acting for Tamarix (s 45(7) of the Act) and as the assignment to Tamarix was not in writing it violated s 3(1)(b) of the Act; there was non-compliance with ss 91 and 96(1) and (2) of the Act; the renewal application did not comply with the provisions of s 96(2) of the Act, ie the renewal was out of time, and there was no good cause to condone the transgression of the Act. The appellant admitted the contents of the letter of 18 October 2013.

[19] During the trial, the contents of the letter of 18 October 2013 and the correctness or otherwise of the reasons contained therein were canvassed with the witnesses and the judge *a quo* also raised questions with the Mining Commissioner involving sections of the Act not referred to in the pleadings. This was without demur from legal practitioners of either of the parties. The only issue arose when the questioning of the Mining Commissioner, who testified that although the letter was signed by him, it conveyed a decision of the Minister, took a direction which sought to probe whether it was actually the decision of the Minister or that of the Commissioner. Here it was pointed out that from the pleadings it is evident that it was admitted that the letter of 18 October 2013 conveyed the decision of the Minister.

[20] In the above context, where the pleadings were accepted as they stood by the parties, the pre-trial order was based on it, and there was no objection to the

evidence or questioning (save for the one mentioned above) the parties cannot complain that the court *a quo* dealt with the matter on the basis of the evidence not before it. The court *a quo* had all the evidence and material before it to deal with the issues raised at the hearing and it 'would be idle to not determine the real issue which emerged during the course of the trial.'<sup>2</sup> I am thus of the view that the submissions from both sides that the learned judge in making certain findings deviated from the pleadings hold no merit as what was dealt with were matters that were fully canvassed and appear from the record.

#### The Minerals (Prospecting and Mining) Act

[21] The court *a quo* in its judgment under a heading 'Statutory and regulatory framework relevant to the case' sets out the applicable sections and its interrelationship to the issues pertinent to its decision. For reasons that will become apparent from what is set out below it is not necessary for this court to express a view as to the correctness or otherwise of the court *a quo*'s view as set out in the judgment *a quo*.

[22] Before I proceed to deal with the matter on the merits, it must be pointed out again that the issues surrounding the transfer application has fallen by the wayside by the time the trial commenced as by then Tamarix had withdrawn from the agreement to purchase the licence of Veralex and the court *a quo* was informed of that fact and that the relief pertinently sought with regard to this intended transfer was no longer pursued. The impact of s 3(1)(b) of the Act that prohibits the transfer of mining

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<sup>2</sup> *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433.

licences which relied on an oral agreement of assignment thus need no further mention save in the context of the manner in which the Ministry in general and the Mining Commissioner in particular acted in this matter to which I return below in this judgment.

Letter of 18 October 2013

[23] According to the pleadings, the Minister's final response to the efforts of Veralex to sell and renew its mining licence is contained in a letter from the Office of the Mining Commissioner and signed by the Commissioner to the following effect in response to Veralex's application for renewal dated 2 August 2013:

'This letter serves to explain to you the meaning of Mining License 130 as well as the difference between mineral rights and movable assets such as mining equipment. Attached to your letter was a batch of papers, which you called a renewal application for the Mining License 130.

In terms of Section 91(a) (ii) of the Minerals (Prospecting and Mining) Act, 33 of 1992, a mining license needs to have an applicant, who at the time of the application, is incorporated and registered with the Ministry of Trade and Industry in the case of a company. In case of a natural person, it has to be a Namibian, eighteen years or older. The documentation we have in our office indicates that the company in whose name Mining License 130 was issued has gone into liquidation. When a company is liquidated, the mineral rights will cease to belong to that company because the company has become unfit to hold a license. In this context, I wish to inform you that for one to qualify to apply for the renewal or transfer of a mining license, one needed to be the holder of such license.

From the aforesaid your "application" does not meet the requirements in terms of the Act. The amount of N\$1000.00 which you paid will therefore be refunded to you in due course.

I also wish to take this opportunity to remind you that not only did the Mining License 130 expire on 05<sup>th</sup> August 2013, but it in fact ceased to exist on the same day that Veralex was liquidated.'

[24] According to the submissions of the legal practitioner for the Minister, this was a final decision taken by the Minister which by implication meant the condonation application for the late filing of the renewal application as well as the renewal application itself were finally disposed of and in essence declined.

[25] The legal practitioner for the respondents submitted that the letter does not in express terms thereof state that the condonation application was considered and declined nor that the renewal application was declined and it is obvious from the tenor of the letter that neither of these applications was dealt with on the merits and these are the issues they sought to address in the action.

[26] The court *a quo*'s finding is basically in line with the submissions made by the legal practitioner for the respondents. The court *a quo* did however find that insofar as the letter of 18 October 2013 'constitutes a refusal to renew, such decision is set aside due to non-compliance by the Minister with the provisions of ss 92(4) and 96(4) (c) of the Act'.

[27] In my view, the submissions by the legal practitioner for respondents (and the reasoning of the court *a quo*) as to the nature of the decision contained in the letter is not correct. In fact, the court *a quo* in its reasoning completely ignored the point made

in the letter and dealt with issues that would only arise if a proper application was placed before the Ministry. Of course, if the merits of the application were not considered as in this case then the Minister would not have regard to the provisions of ss 92(4) and 96(4). The reason why the merits were not considered was because of the view taken, wrongly, that Veralex lost its licence upon its liquidation. This mistake in law was enough to set the decision communicated in the letter aside so that the condonation application and the renewal application could have been dealt with on their merits.

[28] However, the decision on the face thereof, finally disposes of both the application for condonation and the renewal application. If one is not the holder of the mining licence, one cannot apply for its renewal and logically also not for condonation for late filing of such renewal application. The fact that the Minister did not consider the merits of either the condonation application or the renewal application is then neither here nor there because he would not have been able to grant it. The decision of the Minister conveyed in the letter was a final one in respect of both the condonation application and the renewal application and had to be attacked and set aside to open the way for a consideration of the merits of those applications. There was no dispute and indeed it was common cause, that the liquidation of Veralex did not result in the termination of its licence and that this assumption was wrong in law and further that the Minister did not cancel the licence pursuant to s 55(1)(b). It thus follows that the Minister's non-consideration of the merits in respect of both applications was fatally flawed. The only question that remains was whether to refer

the matter back to the Minister for a decision on the merits of the application for renewal or whether the court *a quo* should have taken the decision itself.

[29] Because of what I have stated above in respect of the pleadings and what happened at the hearing, I am of the view that there is no merit in the point raised on behalf of the Minister that there is nothing in the particulars of claim to suggest that the decision contained in the letter of 18 October 2013 should be reviewed and set aside. In any event this is implied in the alternative relief to refer the matter back to the Minister for his decision. This also disposes of the need to deal with the ingenious semantic gymnastics on behalf of the respondents to attempt to explain away the final nature of the decision communicated in the letter.

[30] In short, because of the manner in which the disputes between the parties panned out at the hearing which included the validity of the underpinning reason for the decision conveyed in the letter of 18 October 2013, the court was in possession of all the material and evidence relevant to the dispute and it would have been 'idle for it not to determine' this dispute which was the real issue on the merits for determination.<sup>3</sup>

[31] The court was thus correct to set the decision aside despite it not being part of the relief sought as this was a prerequisite to the granting of the final relief. Furthermore, as pointed out, there is really no dispute about the fact that the decision

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<sup>3</sup> *Collen supra.*

is based on a legal assumption which was wrong and which, hence, was material to it.

Refer back to the Minister or for the court to decide?

[32] The court *a quo* decided to deal with the condonation application and the renewal application itself due to the 'evasive non-action', the fact that there was no response to the initial transfer and renewal applications resulting in the prospective purchaser losing interest and to an 'in general' dereliction of duties by the Ministry over a period of ten years to perform statutory duties in the hope that the mining lease would expire. According to the court *a quo*, the Commissioner was allowed 'to hijack the applications and to do nothing until the appellant and the Mining Commissioner were erroneously satisfied that the mining licence 130 has expired'.

[33] It is necessary to discuss the turn of events in some more detail to place the actions of the Minister, the Commissioner and the Ministry (through the relevant officials) in context so as to determine the appropriate order in the circumstances.

[34] Veralex was liquidated on 21 November 2008. First and second respondents were appointed as liquidators of Veralex on 28 November 2008. From the evidence it is clear that the liquidators do business in a company known as Investment Trust Company (Pty) Ltd (Investment Trust). The Commissioner testified that as far as he was aware, the liquidators were the only liquidators in Namibia. On liquidation Veralex was the holder of the mining licence that was to expire on 5 August 2013.

[35] Per letter dated 19 December 2008, Mr Goldstein, the director of Fourth Mining Company (Pty) Ltd, addressed a letter to the Permanent Secretary of the Ministry to seek permission for the transfer of the mining licence from Veralex to Fourth Mining Company (Pty) Ltd. In this letter the Ministry is advised that Veralex had been placed under liquidation and that Investment Trust (Pty) Ltd was appointed as the liquidators and that 'an Agreement was reached with the liquidators as per attached correspondence to acquire such rights'. The Commissioner admits that he knew about this letter and that it came to his knowledge.

[36] During 2010 an exploration licence was granted to a company known as Rhino Mining and Exploration CC (Rhino) for the same minerals as covered by Veralex mining licence. The Mining Commissioner explained in his evidence that the area granted to Rhino encompassed the area of Veralex's mining area and this meant if Veralex's licence was still validly in place that its area was excluded from the area of Rhino as one cannot have overlapping licences in respect of the same minerals. Once, however, the licence of Veralex ceases to exist the area taken up by it will become subsumed into the area of the licence of Rhino.

[37] Also during 2010, Veralex's licence disappeared from the Ministry's register of licences. When the liquidators made inquiries they were informed that Veralex's licence had been cancelled. This must be viewed in light of the Commissioner's evidence that prior to the present matter, he was under the impression that a company loses its mining licence when it gets liquidated. This means, that at the time, the Ministry's records would indicate that Rhino's licence covered an area inclusive of

the one covered by Veralex's licence. Subsequent to the liquidators being informed in 2020 that the licence of Veralex had been cancelled, they approached the Office of the Commissioner and the licence was reinstated. This fact, in my view, questions the credibility of the Commissioner's evidence as to when he realised he was wrong in his view as to the effect of liquidation on a mining licence. In his evidence, he states that he only discovered, after obtaining legal advice, subsequent to the refusal to renew the Veralex's licence as per the letter of 18 October 2013, that mining licences do not automatically expire upon the liquidation of a company. In any event, from the reinstatement of the licence of Veralex during October 2010, the Ministry, at least, must have known that a liquidation does not lead to the termination, expiry or cancellation of any licence.

[38] For reasons unknown, the intended transfer of the licence from Veralex to Fourth Mining Company did not materialise but a potential new purchaser for the licence of Veralex appeared on the scene during 2012. Thus, in the letter dated 15 August 2012 the liquidators forwarded a letter on the letter head of Investment Trust and signed by them both to the Permanent Secretary of the Ministry. In the letter they stated that 'following previous discussions' between them, they advised the Ministry that the transaction they had with Mr Goldstein had been cancelled. They mentioned that they had obtained a reputable potential buyer with the necessary finance who would be able to commence operations virtually immediately. They further mentioned that the licence was due for renewal application which they, as liquidators, were not in a position to do. In view of the time needed to finalise the agreement with the potential new purchaser, they sought condonation for the late filing of a renewal

application in this regard and an extension of four months was sought. It must be borne in mind that a renewal application for a mining licence 'shall be made not later than 12 months before the date on which such licence shall expire if it is not renewed or such further date, but not later than such expiry date, as the Minister may on good cause shown allow'.<sup>4</sup>

[39] In a letter dated 3 September 2012 signed by the Commissioner on behalf of the Permanent Secretary there is the following cryptic response to the letter seeking an extension to apply for the renewal of the mining licence:

'Our records indicate that neither yourselves nor the company you represent (on the letterhead) are/is the holder of mining licence 130. It is therefore not possible for the Ministry to discuss matters pertaining to renewal of a specific mining licence with third parties.'

[40] The response of the Ministry under the hand of the Commissioner on behalf of the Permanent Secretary is clearly uncalled for and is indicative of the disdain shown to the liquidators and Veralex in this matter as will also become apparent from the events that unfolded later. The Commissioner knew exactly who he was dealing with. He said, rightly or wrongly, the signatories to the letter were the only liquidators in the country. They signed the request as liquidators and the request at the outset in its heading refers to 'Veralex (Proprietary) Limited (In liquidation), Mining Licence 130'. For the Commissioner to, in his evidence, simply laconically ask whether he was not supposed to ask for the official appointment of the liquidators is a lame excuse for his deliberate obstructionist response to the application for an extension of the period to

<sup>4</sup> Section 96 of the Act.

file a renewal application. On his version, he should simply have acknowledged the letter and advised the liquidators that without a copy of their appointment on record the Ministry would not be able to deal with their request. The conduct of the Commissioner is clearly not what one would expect from a civil servant of his standing and as will also appear from what is stated hereinafter he appears to be of the view that a bureaucrat's job is to be obstructive towards licence holders and potential licence holders when dealing with them so as to impress on them in no uncertain terms who calls the shots when it comes to mineral licences and how they should be acted upon.

[41] The liquidators reacted to the letter of 3 September 2012 from the Ministry and attached a copy of the mining licence and then arranged a meeting for 18 September 2012 with the deputy Minister which did not materialise as the Commissioner was not available to attend that meeting. Thereafter further meetings were arranged with the deputy Minister or Minister which did not materialise as these meetings were cancelled by officials from the Ministry because of the unforeseen unavailability of the Minister or the deputy. This lack of progress led the process into 2013 and made the approval of a potential assignee of the mining rights ever more urgent seeing the expiration of the lease on 5 August 2013. All that needs to be stated further in respect of the application for an extension of the time within which to apply for the renewal of the licence was that it was never honoured by a response. It must also be mentioned that the liquidators in their attempts to obtain meetings did point out that the matter required urgent attention in view of the ever shrinking time period to apply for the renewal of the licence.

[42] On 18 March 2013, the liquidators informed the Permanent Secretary of the Ministry that they had a new purchaser for the licence, namely Tamarix, and that the latter will apply for the renewal of the licence and an application was made for an approval for the assignment of the licence from Veralex to Tamarix. A completed application for the approval of the assignment of the mining licence to Tamarix accompanied this letter.

[43] About a month later and on 19 April 2013 the liquidators wrote to the Ministry to point out that there had been no answer yet as to the application to extend the deadline for the application for renewal already submitted to the Ministry just over a year earlier and it was critical to know what the decision in this regard was as the expiry date of the licence was nearing. Also on 24 July 2013, a renewal application was filed on behalf of Tamarix.

[44] Tamarix was obviously not inclined to pay Veralex N\$8 million which was the agreed price to transfer the licence from Veralex to Tamarix just to lose the licence on 5 August 2013 if it is not renewed. Tamarix was interested to ensure that it could continue with operation in accordance with the licence subsequent to 5 August 2013 pursuant to a renewal of the licence for a further 10 years. The liquidators who were on the cusp of selling it were also not interested to continue with mining but obviously, in line with their duties as liquidators, were obliged to sell the licence to raise funds for the benefit of Veralex's creditors. Hence the liquidators' correspondence to the effect that Tamarix would be the entity that would seek to do the renewal application. It was

thus important for Tamarix to have the fate of the application for transfer of the licence and of the renewal thereof determined in tandem and failure on either score would not be acceptable to it. This of course, the Commissioner feigned not to understand as will become apparent. At the time the trial started, Tamarix had withdrawn from the deal as it 'had lost interest' by that time according to the court *a quo*. This finding of the court *a quo* is criticised by the legal practitioner for the Minister as an inference unwarranted by the facts. The criticism of the judgment *a quo* is without merit. If one considers the facts that led to the ultimate dismissal of the renewal application, then it is only an obtuse person with no understanding of the English language that would not have lost interest and would have been happy to proceed with the knowledge that going forward it would have to deal with an unreasonable bureaucracy.

[45] The liquidators received no response to the application for an extension to file a renewal application, the transfer application or the application for the renewal application filed on behalf of Tamarix. Against this backdrop the liquidators, to ensure that the renewal application would be dealt with, as a last desperate step or avenue decided to file a renewal application on behalf of Veralex three days prior to the expiry of the licence.

[46] The only response by the Ministry to all the efforts by the liquidators to transfer and renew the mining licence is contained in the letter of 18 October 2013. The Commissioner responded in a letter on behalf of the Ministry. According to the Commissioner this letter, although written by him, is in fact the response of the Minister to the renewal application. That this is indeed the response of the Minister is

common cause on the pleadings and must be accepted. This however means that the Minister, who did not testify at the trial, must suffer the consequences of the conduct of the officials within the Ministry.

[47] The first paragraph quoted above from the letter is clearly meant to be snide and condescending. The rest of the letter is wrong in law as a mining licence does not cease to exist or expire upon liquidation and hence Veralex was still the holder of the licence when the renewal application was filed. The problem I have with the reasoning of the Minister is that on 18 October 2013 the Ministry must have known that this reasoning was wrong as they in 2010 restored the licence of Veralex to their register. In fact in my view, the probabilities are that the Commissioner knew this on 18 October 2013 for it is highly unlikely that the licence would have been restored to the register without his knowledge. If the Minister really took the decision on this basis as stated in the letter why did the Commissioner not advise him that this approach was wrong? I have alluded to the fact that the Commissioner has no inkling of the meaning of civil servant or public servant and his idea, in this issue at least, was to see what points he could take against the liquidators so as to obstruct their task to realise the mining licence to the benefit of the creditors of Veralex. If he had any inkling of what his role as civil servant was and really believed that Veralex lost its licence upon liquidation why did he, or the officials of the Ministry, not simply reply to the correspondence from the liquidators and pointed out to them that Veralex had no mining licence and hence it would be a futile exercise to deal with their application for an extension to bring the renewal application, the transfer application and the renewal applications for both Tamarix and Veralex. The reason for this is obvious. The

liquidators or Tamarix would then have been able to obtain legal relief to compel the Minister to consider the applications. The late response was to ensure that the time to file a new application had finally expired. The Commissioner was simply never interested in the problems of Veralex and was determined to obstruct their attempts to obtain a renewal of the licence for reasons only known to him. An inference of improper motive and bias is inescapable.

[48] I point out as the last aspect with regard to the conduct of the Commissioner that he also on 18 October 2013 wrote to Tamarix that its application for the renewal of the mining licence was declined as they were not the holders thereof. Why did he not inform them of this fact earlier after accepting their application on 24 July 2013 is nowhere explained as what one would have expected in the ordinary course from any civil or public servant. The liquidators were thus correct in their assumption as to what would happen to this application for renewal. The Commissioner, on the other hand, must have been unpleasantly surprised when the renewal application was filed by Veralex two days before the expiry of the licence as they took away his safe option for declining the renewal application. He had to find another reason for declining the application which he clearly decided at a very early stage he would do and hence the obstructionist and unreasonable conduct from him and the officials at the Ministry.

[49] The conduct of the officials at the Ministry and in particular that of the Commissioner was not only a 'could not care less' or lackadaisical one in this case. It went further than that and it became one of intentional obstructive behaviour to thwart the attempts of the liquidators to properly deal with the mining licence of Veralex

which was/is its most important asset. As already indicated this means that the Commissioner not only acted in bad faith when it came to his dealing with the liquidators but an inference of an improper purpose and bias arises.

[50] In my view, the court *a quo* was correct to determine the issues raised itself instead of referring it back to the Minister for a further decision. In view of how the liquidators (and hence Veralex) were treated and the clear bias against them coupled with the fact that an unjustifiable risk of prejudice would arise for the respondents if they did not have sufficient time to find a potential buyer for the licence, it was simply not a case to refer back to the Ministry that takes more than a year to even answer a letter. They would probably, in view of their attitude and reluctance to grant the licence simply sit on the matter and again refuse it seeing that Tamarix had withdrawn from the agreement.

[51] As far as the application for the extension of the time period within which to file the renewal application is concerned, there was simply no reason for the court *a quo* to refer it back to the Minister as the conduct of the Ministry was such that there was no way it could be granted. Veralex had a potential purchaser with necessary resources who could eventually operate within the conditions and terms of the licence as initially approved by the Minister. It was simply a question of putting the paperwork together, which was done and submitted prior to the expiry of the licence. Further, the Ministry had raised no objection to the assignment to this entity (Tamarix) in the proceedings. The result of this application for extension was thus a foregone conclusion as correctly found by the court *a quo*. Whereas the issue of the oral

agreement instead of a written agreement might have arisen, the probabilities are that this would have been resolved by providing a written agreement of assignment as it is clear that Tamarix had prior to the transfer managed to obtain the necessary finance for the transaction and for the continued operational expenses to exploit the licence.

[52] The question as to the renewal of the licence is more complex. This is so because of the statutory criteria involved which requires a special skillset to properly consider the geological data and the reasonable expenditure to operate which courts do not possess. Some of the same considerations will apply to an assignment as the Minister must be satisfied in considering such assignment that the assignee will be able to execute on the original mining plan or program of the existing licence holder.

[53] What is known is that Veralex must have satisfied the requirement for a licence initially as it was granted a licence and that Tamarix as assignee would have taken over the responsibilities of Veralex in this regard and they were prepared to do so and had the finances to execute on Veralex's mining operational plans. Because of Veralex's liquidation, it was clear that Veralex could not adhere to its obligations going forward. As the licence of Veralex was not cancelled one can infer that the Minister would allow the assignment of the licence to a suitable purchaser. In other words, the Ministry would afford Veralex the time for the remainder of the term of its licence to seek a purchaser for the licence on its then current terms and conditions and if the purchaser could adhere to these terms and obligations and there was a sound commercial reason for it, this new holder (Tamarix) would be entitled to renew it. Here it must be borne in mind that s 96(4) of the Act seems to grant a security of tenure for

mining right holders who adhere to their programmes of mining operations and terms and conditions when it comes to renewals.

[54] The present matter is highly unusual in that it deals with a position where the Ministry through its conduct made it impossible for the holder of the mining licence (Veralex) to apply for the renewal of the licence in the ordinary course as the Ministry intentionally obstructed the liquidators in their task to assign this licence. As the matter turned out to be a review of the Minister's decision set out in the letter of 18 October 2013, the remedy falls within the discretion of the court and must be an appropriate and equitable one in view of the facts of this matter. As it has been stated it is 'in essence a question of fairness to both sides.'<sup>5</sup>

[55] In my view, the only equitable relief that will not be prejudicial to either Veralex or the Minister is to place the parties as near as possible back in the positions they were prior to the Ministry starting with its obstructionist activities. In other words, to again, afford the liquidators time to attempt to seek a purchaser for the licence of Veralex. As the liquidators will not conduct operations in the meantime this cannot prejudice the Ministry as it was in the same position when Veralex sought the assignment of the licence to Tamarix. If the purchaser is found the Minister's consent will be needed for the assignment and the Minister can thus ensure that the assignee will act in accordance with the terms and conditions of the licence. In this manner the interests of the Ministry as well as that of Veralex will be met. The former, because the assignee will have to operate within the parameters of the assignment agreed to

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<sup>5</sup> *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349.

by the Minister and Veralex because it would have realised its most valuable asset for the benefit of its creditors. Further, justice is done to all involved and there is no transgression of the provisions of the Act. This outcome in fact validates the original decision of the Minister to grant Veralex a mining licence which now will be in a position to transfer to someone else seeing its liquidation. The only way this could be done was to do what the court *a quo* did and after the time taken to litigate this matter up to this court this remedy is now even more appropriate. It will afford the liquidators about two years to seek a suitable buyer for the mining licence and to comply with the necessary formalities so as to give effect to such intention which is not much longer than the time that should have been afforded to Veralex to finalise its transaction with Tamarix.

[56] In fact, the court *a quo*, was kind to the Ministry when describing their conduct in the terms it did. The conduct of the Commissioner was in fact egregious and not only was a special costs order arguably warranted but also a special order to hold the Commissioner personally responsible for the costs. This was however neither sought nor granted and there is no appeal against the costs order *a quo* and I shall leave it at that.

[57] It follows from what is stated above that the appeal stands to be dismissed and the only question relates to the costs order. Respondents do not seek a special costs order but only a costs order that includes the costs of an instructing and two instructed legal practitioners. The appellant also engaged an instructing and two instructed legal practitioners and I am of the view that this case warranted the

engagement of three legal practitioners. As mentioned above, it was not necessary to deal with the interpretation of the court *a quo* in respect of the various sections of the Act and their interrelationship and the orders *a quo* in this regard will be thus be set aside.

[58] In the result the following order is made:

- (a) The appeal is dismissed.
  
- (b) The order of the court *a quo* is set aside and the following order is substituted for that order:
  - '(i) The failure of third plaintiff (through first and second plaintiffs) to apply for the renewal of Mining Licence 130 not later than 12 months prior to the expiry of the said licence in terms of s 96(2) of the Minerals (Prospecting and Mining) Act 33 of 1992 is condoned.
  
  - (ii) Mining Licence 130 is renewed for a period of 10 years, effective from 5 August 2013 to 4 August 2023.
  
  - (iii) First defendant shall pay the costs of the action, including the costs of one instructed and one instructing legal practitioner.'

- (c) The appellant is to pay the costs on appeal of first, second and third respondents inclusive of the costs of one instructing and two instructed legal practitioners.

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**FRANK AJA**

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**SHIVUTE CJ**

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**HOFF JA**

APPEARANCES

APPELLANT:

A W Corbett (with him S Akweenda)

Instructed by Government Attorney

RESPONDENTS:

R Heathcote (with him A van Vuuren)

Instructed by Ellis Shilengudwa Inc