



10 December 2013

UPDATE – LEGAL PROCEEDINGS IN RESPECT OF PL 69/2003, THE KIHABE – NXUU PROJECT, BOTSWANA

A Notice of Motion and Founding Affidavit in regard to the decision by the Minister for The Ministry of Minerals Energy and Water Resources (MMEWR) not to renew PL69/2003 were lodged with the High Court of Botswana on 27 September 2013. These were lodged on behalf of Mount Burgess (Botswana) (Proprietary) Limited, the Applicant. Copies were also lodged with The Attorney General, as Respondent on behalf of the Minister MMEWR.

On 21 October 2013 the Applicant received a Notice of the Respondent's Intention to Oppose the Applicant's Notice of Motion and Founding Affidavit.

However, on 4 November 2013 the Applicant received a Notice of the Respondent's Intention to Raise Points of Law *in Limine* and a Notice to Strike Out paragraphs from the Applicant's Founding Affidavit. The Applicant responded on 13 November 2013 opposing both Notices (details of which are summarised below) and the matter was scheduled for a hearing in the High Court of Botswana on Friday 6 December 2013.

The Applicant duly prepared heads of argument for the hearing.

At the hearing on Friday 6 December 2013, the Respondent had not prepared heads of argument and was not ready for the hearing of the matter. As a result the Respondent was afforded the opportunity to prepare and file heads of argument on or before 13 January 2014, for a further hearing on 16 February 2014.

A summary of the Respondent's Points of Law *in Limine* and Application to Strike Out various paragraphs of the Applicant's Founding Affidavit, together with the Applicant's Response in respect of these, follows:

Points of Law

1. The Respondent maintains that in terms of Order 61 Rule 1, the Applicant has not cited the person who made the decision and that the Attorney general does not have authority to make decisions regarding mining licences. In response thereto the Applicant confirmed that sections 3(1) and 3(2) impose a legal duty on the Applicant to cite the Attorney General in this matter as actions by or against the Government shall be instituted by or against the Attorney General. The Applicant has Botswana High Court case authority to support its submissions.

2. The Respondent maintains that in terms of Order 61 Rule 8, no review shall be brought later than four months after the handing down of the decision. In response thereto the Applicant confirmed that the application was launched well within the four month period. The Applicant submits that the final decision not to extend the license was in fact made by the Government of Botswana on 9 July 2013 and that the Applicant filed a Notice of Motion and Founding Affidavit relative to that decision on 27 September 2013.

3. The Respondent maintains that the Applicant's Notice of Motion seeks for an order tantamount to specific performance contrary to section 9 of the State Proceedings Act. In response thereto the Applicant confirmed that it is not seeking an order for specific performance but an order to set aside a decision wrongly made. Specific performance is only found under the law of contract.

4. The Respondent maintains that in terms of section 12 (1) of the Authentication of Documents Act, the Applicant ought to have authenticated the Affidavits filed by the certificate of a Notary Public under signature and seal. In response thereto, the Applicant confirmed that the Affidavits filed were clearly sealed and signed by a Notary Public.

Notice to Strike Out

The Respondent requested for various paragraphs of the Applicant's Founding Affidavit to be struck out. The Applicant confirmed that in accordance with Order 12 Rule 14, an essential ingredient of allegations sought to be struck out must show that they are "scandalous, vexatious or irrelevant", as well as being prejudicial to the party seeking to strike out. None of the paragraphs sought to be struck out by the Respondent are categorised as "scandalous, vexatious or irrelevant" nor are they alleged to be prejudicial to the Respondent.

In addition, the above points as raised by the Respondent were incorrectly set before Court as the correct procedure was not followed in terms of a recent Botswana Appeal Court decision, thus the Notices cannot be acted upon by the High Court, in terms of the Appeal Court authority.

Please refer to previous announcements made on 12 September, 14 and 23 October and 25 November 2013.

Further updates will be provided as available.
