

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-MOT-REV-2017/00411

In the matter between:

**OTNIEL KOUJO**

**APPLICANT**

and

**MINISTER OF MINES AND ENERGY**

**1<sup>ST</sup> RESPONDENT**

**MINING COMMISSIONER**

**2<sup>ND</sup> RESPONDENT**

**LUXURY INVESTMENTS ONE HUNDRED AND  
NINETY TWO (PTY) LTD**

**3<sup>RD</sup> RESPONDENT**

**KAOKOLAND MINING EXPLORATION CC**

**4<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Koujo v Minister of Mines and Energy* (HC-MD-CIV-MOT-REV-2017/00411) NAHCMD 260 (17 August 2018)

**CORAM:** PRINSLOO J  
**Heard:** 18 May 2018  
**Delivered:** 17 August 2018  
**Reasons:** 24 August 2018

**Flynote:** Administrative law — Administrative action — Review — Decision taken by functionary not provided with authority in terms of the enabling Act of parliament — Court to determine the intention of the Legislature — Functionary to perform duty or act as imposed by an Act of parliament.

**Summary:** The applicant applied for mining claims with the first respondent and visited the area of Otuani in the Kunene Region in order to look for a mining opportunity in that area.

The applicant then went to the relevant office of the first and second respondents to enquire about the area from an official, and was informed that the mining claims registered in the respective area concerned expired. The applicant was then equally informed that there were no other mining claims in the area concerned.

During roundabout the month of September/October 2016, the applicant pegged an area that the applicant took coordinates of and was allegedly assured that there were no other mining claims in that area. The applicant's mining claims were accordingly granted and approved on 7 February 2017 and registered in terms of s 36 (1)(a) and (c) of the Minerals (Prospecting and Mining) Act 33 of 1992.

On 31 August 2017, the first respondent, under s 44 of the Act, gave notice to the applicant of his intention to cancel the applicant's mining claims as the applicant's mining claims overlap with mining claim "69778" registered to Luxury Investment 192 (Pty) Ltd (the 3<sup>rd</sup> respondent). The first respondent further reasoned that his Ministry was obligated by s 125 of the Act to consider applications in the same order in which

they were made and received, with the third respondent's application being received during February 2016, while that of the applicant received on 25 October 2017.

The applicant made submissions to the first respondent against the intended cancellation, and thereafter received a notice of cancellation from the first respondent who in his decision gave the reason that the applicant's mining claim overlapped with that of the third respondent. The applicant then approached this court for judicial review and a declarator in which proceedings he sought to review the decision taken by the first respondent.

The first and second respondents did not oppose the applicant's application for review but the third and fourth respondents opposed and in turn submitted a conditional counterclaim if the court were to find in favor of the applicant to review, set aside and/or correct the decision to grant mining claims registered to the applicant.

Counsel for the applicant submitted that the application for review must be granted primarily on the basis that the first respondent had no power in terms of s 44 of the Act to cancel mining claims such as that of the applicant, as the power to do so belonged to the Mining Commissioner by virtue of s 44 (1) and (2)(a) to (c) of the Act.

With respect to the third and fourth respondent's counterclaim, the applicant submitted that the third and fourth defendants did not prove any claim registered for the third and fourth defendants' on 31 August 2017 when the first respondent gave notice of preparedness to cancel the applicant's mining claims. Therefore and as a matter of fact, the applicant submitted that the third and fourth respondents did not prove any claim registered in terms of s 36 of the Act.

Counsel for the third and fourth respondents argued that the applicant's argument under s 44 failed to take into account the effect of the trite principle that he who delegates does not lose the power to act personally, combined with the language of s 4 (1) of the Act, which provides that the mining commissioner shall exercise or perform his powers,

duties and functions under the provisions of the Act subject to the directions and control of the Minister. Counsel was of the view that if the first respondent could direct the Commissioner to cancel the mining claims, then the Minister could cancel them himself.

Counsel further submitted that the applicant did not comply with material requirements of the Minerals Act by failing to present truthful and accurate responses on material information statutorily required of it. This failure, counsel submitted, led to the decision makers within the Ministry being unable to detect an error on the Ministry's system. This failure, in turn led to the Ministry's failure to meet the statutory purpose sought to achieve with s 125.

Held – the Mining Commissioner operates under the direction and control of the Minister and parts of the functions of the Mining Commissioner need not exclusively be performed by the Mining Commissioner and can be delegated to other officers as may be designated by the Permanent Secretary.

Held – section 55 clearly sets out the procedure to be followed in cancellations of mining claims. The operative word in s 44 is “shall” and gives clear guidelines when determining the interpretation of s 55, guiding that any reference to the Minister must for purposes of s 44 be regarded as a reference to the mining commissioner.

Held further – the general rule is that delegated power must be exercised by the administrator or the Minister in this instance, on whom it is conferred. However, it is practically impossible for the Minister to exercise the power or perform the functions personally. For that reason it has always been open to original legislators (Parliament) to stipulate that their delegees may further delegate their powers to other administrators.

Held further – the proper functionary must be afforded the opportunity to make its determination on the matter at hand, being the mining commissioner and upon consideration of s 44 and s 55 together, the intention of the legislature is that it must be

the mining commissioner who should make the determination in cancellation of mining claims and not the Minister.

Held further that – Article 18 forms the corner stone of administrative justice, therefore if an administrative official does not act in terms of administrative law and its relevant legislation, it would be grounds for this court to review that decision. In the present matter, s 125 was not complied with due to the inability of the Ministry to detect the error in the Flexi Cadastre system. The decision making process was flawed due to the incorrect information and the decision to grant the claims of the applicant must be set aside.

---

### ORDER

---

1. The application:

- a) The decision taken by the first respondent on 9 November 2017 to cancel the applicant's claim no. 70056 and 70057 is irregular and null and void and is hereby set aside with costs.
- b) Cost to include the costs of two legal practitioners.

2. The counter-application:

- a) The decision of the second respondent to grant mining claims 70056 and 70057 to Otniel Koujo is set aside with costs;
- b) Cost to include the costs of one instructing and two instructed counsel.

3. The matter is referred back to the Second Respondent, the Mining Commissioner, to consider and comply with the principles of natural justice including the *audi alteram partem* rule.

---

## JUDGMENT

---

PRINSLOO J:

### Introduction

-

[1] This review has its origin in an urgent application in which the applicant prayed for the following relief in its notice of motion:

- '1. Condoning the applicant's non-compliance with the Rules of Court relating to service and time periods for exchanging pleadings and further seeking condonation for having the matter being heard over the weekend and hear the matter as one of urgency as contemplated in terms of Rule 73 of the Rules of the High Court.
2. Ordering the first respondent not to further implement his decision embodied in his letter dated 9 November 2017 addressed to the applicant.
3. Ordering the respondents not to, in any way, take any action purportedly on the basis that the applicant's mining claims no.: 70056 and 70057 have been cancelled.
4. Ordering that the orders under paragraphs 2 and 3 hereof serve as interim interdicts with immediate effect pending the finalisation of Part B.'

Part B consisted of the following prayers:

- '1. Reviewing, correcting and setting aside the decision taken by the first respondent on 9 November 2017.

2. Declaring that the first respondent's decision to cancel the applicant's claims No. 70056 and 70057, unlawful, irregular and null and void and setting aside such a decision.

3. Costs of suit.

4. Further and/or alternative relief.'

[2] From hearing the parties on the urgent application and the arguments made, on 14 December 2017, this court made the following order:

'1. Interim relief as prayed for in paragraphs 2-4 of Part A of the Notice of Motion is hereby granted, subject to the following:

1.1 That the Third Respondent or its agents will be permitted by Applicant to have access to mining equipment and machinery, only for purpose of removing all processed oar from the site;

1.2 The Applicant shall not be entitled to make use of any of the Third Respondent's blasted products for purpose of its mining operation;

1.3 The agreement and arrangement is without prejudice in respect of rights to the underlying area.

1.4 Costs to be cost in the cause.

2. A case management report must be filed on or before 12:00 on 15 December 2017.

3. The matter is postponed to 23 February 2018 at 10:00 for before Prinsloo J for hearing of the Application.

4. The parties must ensure that the matter is duly enrolled for such date (23 February 2018) in the ordinary cause.'

[3] This court is now called upon to determine the issues raised in Part B of the Applicant's notice of motion and depending on the outcome, there also the conditional counter-application of the third and fourth respondents, as discussed hereunder.

#### Background facts

[4] On 10 February 2016, the first respondent alerted the third respondent that its mining claims numbers 66988 to 66993 had expired.<sup>1</sup> On 24 February 2016 the third respondent applied for the registration of the same claims it held before.<sup>2</sup> During March 2016, the applicant apparently visited the area of Otvani in the Kunene Region in order to look for mining opportunity in that area.

[5] After the applicant identified a specific mining area he took the coordinates and went to the relevant office of Ministry of Mines and Energy (hereinafter referred to as the Ministry) to make enquiries and he was informed that, that area was already covered by an exclusive prospecting licence. The applicant then enquired whether or not Kaokoland Mining had any mining claims in the general area of which he took coordinates as, he had previous conversations with employees of Kaokoland Mining about possible mining areas in the vicinity. The relevant official then allegedly informed him that the Kaokoland Mining claims expired during June 2015.<sup>3</sup> The applicant states that he was further informed that there were no other mining claims in the area in respect of which he wanted to apply for the mining claims.

[6] During roundabout the month of September/October 2016, the applicant pegged an area of which he took coordinates and was again allegedly assured that there were no other mining claims in that area.<sup>4</sup> The applicant then applied for mining claims 70056 and 70057 on 21 October 2016 and his coordinates was accepted without issues.<sup>5</sup>

---

<sup>1</sup> Willem van der Plas opposing affidavit, par 7.2.1, annexure WP1; Erasmus Shivolo explanatory affidavit par 5.

<sup>2</sup> Review Record 60-68.

<sup>3</sup> Records p. 10 para 10.

<sup>4</sup> Records p. 10 para 11.

<sup>5</sup> Records p. 10 para 11.



[7] The applicant's mining claims were accordingly granted and approved on 7 February 2017 and registered in terms of s 36 (1)(a) and (c ) of the Minerals (Prospecting and Mining) Act 33 of 1992 (hereinafter referred to as the Act).<sup>6</sup>

[8] On 31 August 2017, the first respondent, under s 44 of the Act, gave notice to the applicant of his intention to cancel the applicant's mining claims as the first respondent alleged that the applicant's mining claims overlap with mining claim "69778" registered to Luxury Investment 192 (Pty) Ltd (the 3<sup>rd</sup> respondent).

[9] In the notice to the applicant the first respondent reasoned that his Ministry was obligated by s 125 of the Act to consider applications in the same order in which they were received by the Ministry. The first respondent stated in his correspondence that the third respondent's application was received during February 2016, whilst that of the applicant was received on 25 October 2017.<sup>7</sup> The applicant was therefore invited to make representations to the first respondent before a final decision in this regard was taken.

[10] The applicant made representations to the first respondent against the intended cancellation of his mining claims, but was unsuccessful and he received a notice of cancellation of the said mining claims from the first respondent dated 09 November 2017. The reason advanced for the decision to cancel was as follows:

'Be informed that your mining claims 70056 and 70057 are hereby cancelled with immediate effect as they overlap with mining claim 69778'.<sup>8</sup>

[11] The applicant then approached this court for judicial review and a declarator in which proceedings he sought to review the first respondent's decision to cancel the mining claims on five grounds of review, namely:<sup>9</sup>

---

<sup>6</sup> Records p. 19.

<sup>7</sup> Record p.147.

<sup>8</sup> Record p. 23.

<sup>9</sup> Founding affidavit of the applicant para 21.

'21.1. The first respondent does not have power in terms of s 44 of the Act to cancel a mining claim. It therefore follows that he usurped the powers he does not have. His decision is thus null and void and is of no effect in law.

21.2. The first respondent's decision is unreasonable and irrational in view of the fact that a reasonable decision maker in his position would not have made such a decision given the facts available and the background to the matter.

21.3. The first respondent did not properly apply his mind for if he did he would have realized that his decision was based on wrong factual allegations and that he did not have power.

21.4. The decision of the first respondent is inconsistent with Article 18 of the Namibian Constitution in that it is unreasonable and is procedurally unfair in that he did not avail to me all adverse information he had at his disposal in making his decision to enable me to deal with such adverse information.

21.5. The third respondent's mining claim was approved after mine and is not overlapping with mine.'

[12] The first and second respondents did not oppose the applicant's application, however the third and fourth respondents opposed the application and instituted a counter application in the following terms:

'KINDLY TAKE NOTICE that the third and fourth respondents will bring a counter-application in the aforementioned application for review by the applicant, that will only be moved should this Honorable Court grant should this Honorable Court grant the relief sought by the applicant in prayers 1 and 2 under Part B of his notice of motion. In that event, the third and fourth respondents will request the following order:

1. Reviewing, setting aside and/or correcting the decision to grant mining claims 70056 and 70057 registered to Otniel Koujo.
2. Further and/or alternative relief.

3. Cost of suit.’

Submissions of the parties

[13] Mr. Namandje, counsel for the applicant, submits that the application for review must be granted primarily on the basis that the first respondent has no power in terms of s 44 of the Act to cancel mining claims such as those of the applicant, as the power to do so was vested in the Mining Commissioner by virtue of s 44<sup>10</sup> (1) and (2)(a) to (c) of the Act.

[14] Mr. Namandje further submits that the first respondent’s decision is based solely on the ground that the area in respect of which the applicant’s mining claims were granted overlap with an area covered by mining claim 69778, belonging to the third respondent. In this regard, he submits that mining claim 69778 was not granted and registered until October 2017, which is many weeks after the first respondent issued the purported notice in terms of s 44 of the Act.

[15] In respect to the third and fourth respondent’s counter application, Mr. Namandje submits that it should fail on the following grounds:

a) The provisions of s 125<sup>11</sup> of the Act are not intended to lead to invalidity upon non-compliance.

---

<sup>10</sup> 44 **Cancellation of registration of mining claims**

(1) The provisions of section 55 shall apply mutatis mutandis in relation to the cancellation of the registration of any mining claim.

(2) For purposes of the application of section 55, as applied by subsection (1) of this section-

(a) any reference to the Minister, shall be construed as a reference to the Commissioner;

(b) any reference to the holder of a mineral licence, shall be construed as a reference to the holder of a mining claim; and

(c) any reference to a mineral licence, shall be construed as a reference to the registration of a mining claim.

<sup>11</sup> 125 **Order in which applications made in terms of this Act are to be considered**

All applications made in terms of any provision of this Act and received in the office of the Commissioner, shall be considered by the Minister or the Commissioner, as the case may be, in the same order as such applications have been so made and received: Provided that all applications so received on the same date shall be deemed to have been received simultaneously.

b) There is no overlapping of mining claim 69778 that could serve as basis for the first respondent's decision.

c) That there is no legal basis for reviewing and setting aside a decision based on overlapping of mining claims. It is submitted that overlapping of claims is neither regulated nor prohibited by the Act, especially in cases such as the one *in casu* where the mining claims of the applicant relate to semi-precious stones whereas those of the third and fourth respondents relate to base and rare metals, being different minerals altogether.

[16] With respect to the decision by the first respondent to cancel the mining claims, the Mr. Namandje submits that provisions of s 55 shall apply *mutatis mutandis* to s 44, and any reference to "the Minister" in s 44 shall be construed as a reference to "the Commissioner". In light of this, the applicant submits that it is clear that the repository power in respect of the cancellation of registration of mining claims is not for the first respondent but for the second respondent, which the latter did not do.

[17] Concluding in respect to prayers in part B of the Notice of Motion, Mr. Namandje submits that the decision to cancel the applicant's mining claims should be reviewed and set aside, alternatively be declared invalid and be set aside as sought under part B as per paragraphs 1 and 2 of the notice of motion.

[18] With respect to the conditional counter application, Mr. Namandje submits that the third and fourth respondents failed to prove that any claim was registered in its favor in terms of s 36 of the Act as on 31 August 2017 when the first respondent gave notice of his preparedness to cancel the applicant's mining claims.

[19] Furthermore, he submits that the third and fourth respondents' reliance on s 125 of the Act is wholly misplaced as the Act does not prohibit overlapping, particularly when such overlapping relates to different minerals. Mr. Namandje further argued that the

third and fourth respondents are not entitled to rely on a ground which was not cited by the first respondent as a basis for the cancellation of the mining claims.

[20] Mr. Heathcote, counsel for the third and fourth respondents, argues that the applicant's argument under s 44 loses sight of the effect of the trite principle, that he who delegates does not lose the power to act personally, and this should be read in conjunction with s 4 (1)<sup>12</sup> of the Act. Mr. Heathcote is of the view that if the first respondent could direct the Commissioner to cancel the mining claims, then the Minister could cancel it himself. He further argues that where the Commissioner acted, it would be regarded as if the Minister acted himself, therefore, the Minister may clearly act himself.

[21] With respect to the counter application Mr. Heathcote submits that in the event that the court upholds the opposition to the main application and sets it aside, the applicant would not have a valid answer to the counter application.

[22] Mr. Heathcote submits that on a balance of probabilities, the third respondent's affected claim, claim 66990, is engulfed by the applicant's claims, 70056 and 70057. It was further submitted that this is evident from Mr. Van der Plas' affidavit on behalf of the third respondent and photographs annexed thereto. He argued that having regard to the expert's affidavit and the Ministry's own records it is abundantly clear that the affected claims are registered<sup>13</sup> in favor of the third respondent and that there is an overlap.

[23] Mr. Heathcote also addresses the contention made on behalf of the applicant that an overlap alone will not render the registration of the applicant's licenses invalid as his licences are for semi-precious stones whilst the third respondent's mining claims allow it to mine base and rare metals. In this regard Mr. Heathcote submits that at the very least, the applicant would have to allege that the mining of semi-precious stones on the one hand could not have had any adverse impact on the mining of base and rare

---

<sup>12</sup> Which provides that the Mining Commissioner shall exercise or perform his powers, duties and functions under the provisions of the Act subject to the directions and control of the Minister.

<sup>13</sup> Review record p.54.

metals on the other. He submits that the applicant did not make the allegation and could not have made the allegation, as the facts demonstrate. However, had the applicant made and proven such an allegation, there would not have been any need for the applicant's urgent application and this review application.

[24] In conclusion, Mr. Heathcote submits that the applicant did not comply with material requirements of the Minerals Act by failing to present truthful and accurate responses on material information statutorily required of it. This failure, counsel submits, led to the decision makers within the Ministry being unable to detect an error on the Ministry's system. This failure, in turn led to the Ministry's failure to meet the statutory purpose sought to achieve with s 125, which then in turn led to substantial prejudice being suffered by the third respondent that had been mining in the affected claim area on a continuous basis for at least 10 years.

#### The law applicable

[25] The Mining Commissioner is appointed by virtue of s 4 (1) of the Act which states the following:

'4. (1) The Minister shall, subject to the laws governing the public service, appoint a person to be known as the Mining Commissioner who shall exercise or perform, subject to the direction and control of the Minister, the powers, duties and functions conferred or imposed upon the Commissioner by or under the provisions of this Act and such other functions as may be imposed upon the Commissioner by the Minister.' (underlined for own emphasis)

Looking at the ordinary meaning of the above, it can be determined that the role and function of the Mining Commissioner is subject to the supervision and control of the Minister, thus the powers and functions of the Mining Commissioner are an extension of the Minister. However, under s 4 (3) of the Act, it makes the role and function of the Mining Commissioner somewhat independent from the Minister's direction and control in providing that:

'(3) The powers conferred and the duties and functions imposed upon the Commissioner by or under the provisions of this Act may be exercised or performed by the Commissioner personally or, except in so far as the Commissioner otherwise determines, by any officer referred to in subsection (2) engaged in carrying out such provisions under the direction and control of the Commissioner.' (underlined for own emphasis)

In this regard, the operative word being "may" indicates that the roles and functions of the Mining Commissioner do not necessarily need to be performed by the Mining Commissioner exclusively but may elect officers determined to carry out parts of its roles and functions as well in terms of s 4 (2) which provides that:

'(2) The Commissioner shall be assisted by such other officers as may be designated by the Permanent Secretary for such purpose.'

[26] To this point, the language so far identified in the Act is quite clear and unambiguous. The Mining Commissioner operates under the direction and control of the Minister and parts of the functions of the Mining Commissioner need not exclusively be performed by the Mining Commissioner and can be delegated to other officers as may be designated by the Permanent Secretary.

[27] The contentious section for debate lies in s 44 of the Act which provides that:

**44.** (1) The provisions of section 55 shall apply *mutatis mutandis* in relation to the cancellation of the registration of any mining claim.

(2) For purposes of the application of section 55, as applied by subsection (1) of this section

(a) any reference to the Minister, shall be construed as a reference to the Commissioner;

(b) any reference to the holder of a mineral licence, shall be construed as a reference to the holder of a mining claim; and

- (c) any reference to a mineral licence, shall be construed as a reference to the registration of a mining claim.'

[28] Section 55 thus provides as follows, keeping in mind the rules of interpretation referred to in s 44:

**'Cancellation of mineral licences**

**55.** (1) Subject to the provisions of section 56 and subsections (2) and (3) of this section, the Minister may by notice in writing addressed and delivered to the holder of a mineral licence, cancel the mineral licence of such holder or, in the case of two or more persons who are the joint holders of such mineral licence or interest, cancel the mineral licence in respect of any one or more of such holders, if -

(a) any such holder fails to comply with the terms and conditions of such mineral licence or of the provisions of this Act;

(b) in the case of a company, such company is wound up in terms of the provisions of the Companies Act, 1973 (Act 61 of 1973), unless such company has been wound up for purposes of an amalgamation or reconstruction, as contemplated in that Act, and has obtained the prior approval of the Minister for such amalgamation or reconstruction;

(c) in the case of a natural person, such person's estate is sequestrated.

(2) The Minister shall not under subsection 1(a) cancel a mineral licence so referred to, unless –

(a) the Minister has by notice in writing informed the holder of such mineral licence of his or her intention to cancel such mineral licence –

(i) setting out particulars of the alleged failure; and



- (ii) calling upon such holder to make such representations to the Minister as such holder may deem necessary or expedient within such period, but not less than 30 days as from the date of such notice, as may be specified in such notice;
- (b) the Minister has considered –
  - (i) any steps taken by such holder to remedy the failure in question or to prevent any such failure from being repeated during the currency of the mineral licence; and
  - (ii) any other matters submitted to the Minister by way of the representations made under paragraph (a)(ii); and
- (c) in the case of a holder of a mineral licence who has failed to pay any amount payable by such holder in terms of this Act or by virtue of the terms and conditions of the mineral licence in question, such holder has, before the date specified in the notice referred to in paragraph (a), paid any such amount, together with any interest payable in respect of such amount.
- (3) The Minister may, on application in writing made to him or her by the holder of a mineral licence in such form as may be determined in writing by the Commissioner and on payment of such fee, if any, as may be determined under section 123, cancel by notice in writing any mineral licence.
- (4) The cancellation of a mineral licence in terms of the provisions of this section shall not affect any liability or obligation incurred in relation to anything done under or by virtue of the terms and conditions of such mineral licence.'

[29] Section 55 sets out the procedure to be followed in cancellations of mineral licences but this applies *mutatis mutandis* to s 44, which deals with cancellation of mining claims. The operative word in s 44 is "shall" and gives clear guidelines when determining the interpretation of s 55, guiding that any reference to the Minister must for purposes of s 44 be regarded as a reference to the Mining Commissioner.

[30] The question then arises as to whether s 44 intended that only the Mining Commissioner may consider and cancel mining claims as opposed to the Minister? Following on that, does it then mean that the statute has identified the Mining Commissioner as the only functionary delegated with the authority to cancel mining claims to the exclusion of the Minister, or does the Minister merely sub-delegate power to the Mining Commissioner?

[31] When Parliament conferred authority on the Minister, it is said to delegate power. Delegation is a characteristic feature of modern government.<sup>14</sup> The Mineral (Prospecting and Mining Act) is no exception to this delegation. The general rule is that delegated power must be exercised by the administrator, or the Minister in this instance, on whom it is conferred. However, it is practically impossible for the Minister to exercise the power or perform the functions personally. For that reason it has always been open to original legislators (Parliament) to stipulate that their delegees may further delegate their powers to other administrators.<sup>15</sup>

[32] The Supreme Court discussed the delegation of powers in the matter of *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC) wherein Shivute CJ made the following remarks at pg. 30:

'As Botha JA stated in *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C - D:

"The maxim *delegatus delegare non potest* is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."

---

<sup>14</sup> Cora Hoexter: *Administrative Law in South Africa* page 233.

<sup>15</sup> *Supra* at page 236.

It follows then that in the present case the Minister is the proper functionary to exercise the powers conferred on him or her by s 49(1) of the Ordinance. It was partly on that ground that my brother, O'Linn AJA, found that the purported exercise of the discretionary powers vested in the Minister by Mr Beytell in the absence of a lawful delegation was ultra vires and null and void, a finding that I respectfully endorse.

In the light of this finding that in itself disposes of the appeal, I consider that the proper functionary should be afforded an opportunity to consider and decide on the application, taking into account policy guidelines, the law and the merits of the appellant's application. This is particularly imperative in the light of the consideration that the repository of powers has not deposited to an affidavit setting out his own position.'

[33] The Act contains a delegation of power as set out in s 138<sup>16</sup> however in my considered opinion the maxim *delegatus delegare non potest* is not applicable in the matter *in casu*. The power vested in the Mining Commissioner in terms of s 44 to cancel mining claims is not a sub-delegation by the Minister to the Commissioner but power vested in the Commissioner is by virtue of the relevant legislation. The Act is quite clear when which entity would be the repository of power.

[34] It is important to look at the language of s 44 and 55 of the Act in the scheme and context of the Act overall. The various provisions should be read in relation to one another and the intention of the legislator becomes clear. The intention of the legislator is clear from placing the natural meaning on the words used in the Statute and the Court must give effect thereto and not place a forced construction thereon, which has the effect of defeating the intention of the lawmaker.<sup>17</sup>

---

<sup>16</sup> Section 138 "**Delegation of powers**".

(1) The Minister may delegate any power conferred upon him or her by this Act, excluding any power which is required to be exercised by notice in the Gazette, to the Permanent Secretary, the Commissioner or any other officer in the service of the Ministry of Mines and Energy.

(2) Any delegation under subsection (1) shall not prevent the Minister from exercising the power concerned personally.

<sup>17</sup> *Tumas Granite CC v Minister of Mines and Energy and Others* (Case No.: (P) A 2328/2006) (Case No.: (P) A 2328/2006) [2008] NAHC 29 (26 February 2008).

[35] The legislature, no doubt for good reason conferred certain limited powers to the Mining Commissioner, which are apparently to the exclusion of the Minister. The legislature made a clear distinction between the granting of a claim and granting of licence. The powers relating to non-exclusive prospecting licences<sup>18</sup> and the application and the registration of mining claims<sup>19</sup> is vested in the Mining Commissioner. The powers relating to the granting of mineral licences, which includes a reconnaissance licence, exclusive prospecting licence, a mining licence or a mineral deposit retention licence is vested in the Minister. It is clear that the Minister has the power to make the decisions with far reaching consequences whereas as the decision of the Mining Commissioner has less impact. Any person who feels aggrieved with any action or decision taken or made by the Commissioner in terms of any provision of this Act has a general right of appeal to the Minister to confirm, set aside or amend any such action or decision.<sup>20</sup>

[36] The Act substantially deals with allocation of certain powers and if one has regard to Part VI and Part VII of the Act the Mining Commissioner is the repository of the power in respect of application, registration and cancellation of mining claims and not the Minister.

*Explanatory Affidavit of Erasmus Shivolo:*

[37] The affidavit of Mr. Shivolo,<sup>21</sup> the second respondent, was filed rather belatedly on 30 April 2018 after the applicant filed his papers. On behalf of the applicant it was applied that the affidavit be struck as there was no condonation sought and no explanation offered as to the late filing of the affidavit.

[38] The first and second respondents did not oppose either of the applications and were not present in court when the matter was argued but the second respondent filed a

---

<sup>18</sup> Part V of the Act (s 16-24).

<sup>19</sup> Part VII of the Act (s 31-45).

<sup>20</sup> Section 131.

<sup>21</sup> Pages 240-244 of the Review Record.

very important explanatory affidavit. The importance of the affidavit lies in the fact that it put the whole matter into perspective by explaining the sequence of events and the changes within the Ministry's operating system, which caused errors to occur and which ultimately resulted in this matter being before this court. In order to adjudicate this matter it is important to understand the circumstances under which the Offices of the first and second respondent made certain decisions. I will therefore decline the invitation by the applicant to strike this affidavit and will allow the affidavit to stand.

[39] The affidavit of the second respondent can be summarized as follows:

- (a) the third respondent acquired transfer of six mining claims registered as numbers 66988-66993 on 30 July 2013;
- (b) these mining claims lapsed on 21 July 2015 as no application for renewal was received;
- (c) after being duly informed of the fact that the mining claims lapsed the third respondent made a new application on 24 February 2016 for six mining claims registered as numbers 69776-69781 under a non-exclusive licences registered as number 6738 for base and rare metals;
- (d) mining claims 69776-69781 bore the same coordinates as mining claims 66988-66993;
- (e) coordinates as entered into the Flexi Cadastre system of the Ministry were incorrect, mapping mining claims 69776-69781 west from the original position. This error occurred in the course of the Ministry migrating from the previous computerized Mineral Tiles Management System (CTMS) to the Flexi Cadastre system;

- (f) the application by third respondent for mining claims 69776-69781 is yet to be finalized;<sup>22</sup>
- (g) the applicant applied for mining claims 71156 and 70057 on 29 October 2016 under non-exclusive prospecting licence number 6334 for semi-precious metals. According to the applicant's application he pegged his mining claims on 21 October 2016.
- (h) the coordinates of mining claims 70056 and 70057 overlap the original area and coordinates applied for by the third respondent;
- (i) an error was identified because the coordinates in the Flexi Cadastre for the area applied for by third respondent was wrong and thus showing the area was open;
- (j) when applying for mining claims 70056 and 70057 the applicant knew the area was already taken up because on the ground there was equipment and indication that the area was already occupied.
- (k) mining claims 70056 and 70057 as issued to the applicant on 07 February 2017 and the certificate of registration of mining claims issued on 08 February 2017;
- (l) the Ministry became aware of the overlap of the mining claims after the mining claims of the applicant was registered.

*Conditional Counter- Application:*

[40] The information as set out in the second respondent explanatory affidavit is of utmost importance in considering the conditional counter application and I will elaborate more on that score hereunder.

---

<sup>22</sup> Ministry approved the third respondent's mining claims 69776-69781 on 18 October 2017.

[41] The counter application is conditional on the applicant succeeding in his application for this court to review and set aside the decision taken by the first respondent on 09 November 2017 to cancel the mining claims numbers 70056 and 70057 granted to the applicant. The purpose of the conditional counter-application is basically to restore the *status quo ante* as it was prior to the granting and the registration of the mining claims of the applicant. In order to do so the third and fourth respondents rely on the provisions of s 125 of the Act.

[42] Section 125 of the Act deals with the sequence in which the application is received by the office of the second respondent. Section 125 does not differentiate between applications for claims or licences. It states all applications received in the office of the Commissioner, shall be considered by the Minister or the Commissioner, as the case may be, in the same order as such applications have been so made and received. The only exception to this is that application on the same date will be deemed to have been received simultaneously.

[43] It is common cause between the parties and it was confirmed by the second respondent that the application by the third respondent was received on 24 February 2016 and that of the applicant on 25 October 2016. It is further common cause between the parties that the applicant's mining claims were registered on 7 February 2017 and those of the third applicant were registered on 18 October 2017. These registrations of claims, according to the second respondent, are on the same coordinates and are therefore overlapping.

[44] The issue with regards to s 125 is not the sequence of granting or registration of a claim. An applicant does not have the right to his or her claim being granted as s 33(3) provides that the Commissioner may grant an application for registration of a claim on such terms and conditions as may be determined by him. In the context of s 125 it is a question of whose application was first received and the sequence in dealing with the applications.

[45] The second respondent explains the difficulties that the Ministry experience in respect of the transfer to and the mapping on the Flexi Cadastre system and confirms that coordinates for mining claims 69776-69781 are in fact the same as that of mining claims 66988-66993, which lapsed during 2015. These submissions are also confirmed by the expert, Christo Gerrit Pieterse, who filed an affidavit in this regard.<sup>23</sup>

[46] Both Mr Pieterse<sup>24</sup> and second respondent<sup>25</sup> confirm that applicant's mining claims number 70056 and 70057 overlap the third respondent's claim. In his founding affidavit the applicant stated that the third respondent's claim does not overlap with his, however the pictures presented to court shows the contrary. The claim pegged by the applicant was clearly according to the photographs within an active mining operation. This mining operation apparently operated for the past ten years already and it is unlikely that the applicant could make a *bona fide* mistake in thinking this was a vacant land/claim.

[47] The claims of the applicant was registered based on the coordinates that he provided to the Ministry, and given the location of the pegs the said coordinates do not appear to be true and accurate. The result was that the Ministry failed to detect the overlapping of claims and proceeded to register the claim of the applicant.

[48] Having regard to the affidavits of the expert and the second defendant I have no doubt that the claims of the applicant and the third respondent indeed overlap.

[49] Considering the facts of the case, it would practically make no sense to have two mining claims registered over the same area of land. This is in light of the fact that although the mining claims are in respect of different minerals, being semi-precious stone in respect of the applicant and base and rare metals in respect of the third and fourth defendants, the mining process or activity to unearth these minerals would most

---

<sup>23</sup> Page 190-196 of the Review Record.

<sup>24</sup> Page 194 of the Review Record at para 18.

<sup>25</sup> Page 242 of the Review Record at para 12.



likely affect the mining process of the other. Hence it cannot be possible under any circumstance to have two separate mining claims registered over the same area.

[50] There were clearly two competing application for registration of mining claims on the same coordinates and the application received first should have been considered first, which in this instance is the application of the third respondent.

### Conclusion

#### *On the Application:*

[51] In *Immanuel V Minister of Home Affairs and Others* 2006 (2) NR 687 (HC), Damaseb JP made the following observations at pg. 701-702:

'Purpose of judicial review

[53] Judicial review has two aspects: First, it is concerned with ensuring that the duties imposed on decision-makers by law (which includes the Constitution) are carried out. A functionary who fails to carry out a duty imposed by law can be compelled by the High Court to carry it out. Secondly, judicial review is concerned with ensuring that an administrative decision is lawful, ie that powers are exercised only within their true limits. If a functionary acts outside the authority conferred by law, the High Court can quash his or her decision. This is the doctrine of ultra vires. If the decision is one which the decision-maker was authorised to make, the only question which can arise is whether the decision is right or wrong. This involves a consideration of the merits of the decision.

With limited exceptions, namely an error of law on the face of the record and the still-evolving doctrine of proportionality, the Courts are in principle not prepared to review the merits of the decision unless Parliament has created a statutory right of appeal.'

[52] There is no question that the Act provides for the cancellation of a mining claim and that such a decision taken would be lawful, provided this is done within the confines of the Act, however, the issue *in casu* is the functionary who took the decision.

[53] In light of the dictum by Shivute CJ in the *Waterberg* matter, the proper functionary must be afforded the opportunity to make its determination on the matter at hand, being the Mining Commissioner. I heard the arguments advanced by counsel of the third and fourth respondents that where the Commissioner acted, it would be regarded as if the Minister acted himself, therefore, the Minister may clearly act himself, however upon consideration of s 44 and s 55 together, the intention of the legislature is that it must be the Mining Commissioner who should make the determination in cancellation of mining claims and not the Minister.

*On the Conditional Counter-Application:*

[54] Article 18 of the Constitution which deals with Administrative Justice reads as follows:

'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[55] This Article in the Constitution is the corner stone of administrative justice. Therefore if an administrative official does not act in terms of administrative law and its relevant legislation, it would be grounds for this court to review that decision. In this instance s 125 was not complied with due to the inability of the Ministry to detect the error in the Flexi Cadastre system. The decision making process was flawed due to the incorrect information and the decision to grant the claims of the applicant must be set aside.

[56] My order is as follows:

1. The application:

- a) The decision of taken by the first respondent on 9 November 2017 to cancel the applicant's claim no. 70056 and 70057 is irregular and null and void and is hereby set aside with costs.
- b) Cost to include the costs of two legal practitioners.

2. The counter-application:

- a) The decision of the second respondent to grant mining claims 70056 and 70057 to Otniel Koujo is set aside with costs;
- b) Cost to include the costs of one instructing and two instructed counsel.

3. The matter is referred to the Second Respondent, the Mining Commissioner, to consider and comply with the principles of natural justice including the *audi alteram partem* rule.

---

J S Prinsloo  
Judge

APPEARANCES:

APPLICANT:

S Namandje  
of Sisa Namandje & Co. Inc., Windhoek

DEFENDANTS:

R Heatchcote (with him R Maasdorp)  
instructed by Koep & Partners, Windhoek