

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2023/00188

In the matter between:

XINFENG INVESTMENTS (PTY) LTD

APPLICANT

and

MINISTER OF MINES AND ENERGY

1st RESPONDENT

MINING COMMISSIONER

2nd RESPONDENT

ENVIRONMENTAL COMMISSIONER

3RD RESPONDENT

Neutral citation *Xinfeng Investments (Pty) Ltd v Minister of Mines and Energy* (HC-MD-CIV-MOT-REV-2023/00188) [2023] NAHCMD 356 (27 June 2022)

Coram: MAASDORP AJ

Heard: 23 May 2023

Delivered: 27 June 2023

Flynote: Applications and motions – Urgent application – Interdict – Requirements for interim interdict satisfied.

Administrative law — Administrative action — Review — *Functus officio* doctrine – Extended *Oudekraal principles* — Whether fraud vitiates a decision taken by functionary — Whether a finding by the functionary of fraud by the beneficiary entitles the functionary to itself revoke the decision in the absence of statutory authorisation and without approaching a court for appropriate relief – Functionary not entitled to revoke decision in the absence of statutory authority without approaching a court for appropriate relief.

Summary: the applicant was the holder of a lithium mining license which the first respondent revoked on the grounds that the applicant obtained the license fraudulently by deliberately including misleading, untrue, and incorrect information in the licence application documents. The first respondent took an administrative decision to revoke the mining licence and to direct the applicant to stop all operations, leave the mining site, and hand back the licence by 31 May 2023. The applicant disputes the fraud allegations and asserts that the Minister did not have the power to revoke the license without approaching a court to do so. Dissatisfied with the decision, the applicant sought an urgent interim interdict to suspend the implementation of the first respondent's decision to revoke its license pending a review of the decision.

Issues:

Did the first respondent prove prima facie that the applicant had committed fraud?

Did the first respondent have the power to revoke the decision in the presence of fraud, without express or implied authority to do so under the governing legislation, without having to approach a court for appropriate relief?

If the court finds the first respondent proved fraud on a prima facie basis but did not have the power to revoke the decision without approaching a court for appropriate relief, should the court still grant an interim interdict provided the applicant met all other requirements for interim relief?

Findings:

The first respondent proved prima facie that the applicant committed fraud in the process of applying for the mining licence.

The first respondent did not have the power to revoke the mining licence without express or implied authority to do so under the governing legislation but was required to approach a court for appropriate relief.

Despite finding fraud proven prima facie, the absence of authority for the first respondent to revoke the mining licence himself, meant that the applicant had established a prima facie right.

As the applicant satisfied all the other requirements for an interim interdict, the court granted the interim interdict.

ORDER

1. The applicant's non-compliance with the Rules of Court relating to form, service, and the time periods for the exchange of pleadings is hereby condoned and the application under Part A is heard as one of urgency in terms of Rule 73.
2. Pending the final determination of Part B of this application, the respondents are interdicted and restrained from implementing in any manner the first respondent's decision taken on or about 28 April 2023 to revoke his decision to grant to the applicant mining licence ML243.
3. The first respondent is directed to pay the applicant's costs of suit in respect of Part A, including the costs of one instructing and two instructed legal practitioners.

4. The matter is postponed to **7 July 2023** at **10h00** for a status hearing on the way forward in respect of the review application.

JUDGMENT

MAASDORP AJ

Introduction

[1] Mining licence ML243 was issued by the Minister of Mines and Energy (first respondent or the Minister) to Xinfeng Investments Pty Ltd (applicant or Xinfeng) on 6 September 2022. Between 26 October 2022 and 29 March 2023, the Minister invited and received representations from Xinfeng on at least three occasions, on why the Minister should not, at first, cancel, and later, revoke, ML243. The Minister extended the invitations because it appeared to him that Xinfeng had acted fraudulently during the mining licence application process by deliberately including misleading, untrue, and incorrect information in the documents Xinfeng supplied to the Minister, with the intention to mislead the Minister in his consideration of Xinfeng's mining licence application. Xinfeng disputed that it had committed fraud and asserted that even if it did, the Minister did not have the power to revoke ML243; the Minister would have had to approach a court to decide on the fate of the licence. The Minister concluded that Xinfeng's written and oral representations did not dispel his concerns and confirmed his view of the fraudulent nature of Xinfeng's conduct. On 29 April 2023, the Minister revoked ML243 and instructed Xinfeng to cease all operations on-site and hand over the licence by 31 May 2023.

[2] Xinfeng launched its application for review, coupled with an urgent application for an interim interdict, on 8 May 2023. The Minister delivered an answering affidavit on 17 May 2023 that dealt with all allegations in Xinfeng's founding affidavit and set out his case in support of a conditional counter

application. Xinfeng delivered a replying affidavit on 19 May 2023. The court heard the urgent application on 23 May 2023.

[3] From the affidavits and papers filed in the urgent application, and the arguments presented by the parties, there are two main contentious issues. They are both related to Xinfeng's duty to make out a *prima facie* right to relief. First, Xinfeng challenges the Minister's decision to revoke on the basis that the Minister had already made and communicated to Xinfeng a final decision to grant a licence and had thus discharged his official function. He was *functus officio* in respect of the decision to grant the licence. He could only revoke the decision himself if the Minerals (Prospecting and Mining) Act, 33 of 1992 ('the Minerals Act') granted the Minister specific powers to revoke his decision. In this case, the Minister states that his decision is not based on his statutory powers to cancel a mining licence as prescribed in s 55 of the Act. According to Xinfeng, because the Minister does not rely on express statutory power, the only lawful way the Minister could have caused the cancellation or revocation of a mining licence was to approach the High Court in an application for self-review. Thus, the first challenge is primarily a legal question.

[4] Second, Xinfeng argues that even if the Minister has, in law, the authority to revoke a licence based on fraud by the licence holder during the licence application process, in this case, the Minister has not proven fraud. The parties agree on the legal test the Minister has to satisfy to prove fraud at this interim stage. They disagree about the result of the application of the test to the facts. Thus, the second challenge is primarily a factual question.

[5] This judgment only deals with the urgent application for the interim interdict. In addition to the two main disputes which the court must address at this stage, the Minister disputes that Xinfeng has justified the degree of urgency with which it launched and prosecuted the application for interim relief. The Minister claims Xinfeng did not allow him enough time to deal with this complex matter. And the Minister claims Xinfeng has not been mining since December 2022 because he has not approved Xinfeng's application for a revised work program. Xinfeng maintains that the case is urgent, and the short timelines

appropriate in the circumstances, because the Minister chose the critical date: he directed Xinfeng to stop all operations, leave the mining site, and hand back the licence by 31 May 2023. Xinfeng effectively argues that the Minister was the cause of his inconvenience in having to prepare his case in opposition on such an urgent basis. It will also be necessary to deal with the existence, or not, of adequate alternative relief, with the incidence of the balance of convenience, and with the considerations relevant to the exercise of the court's discretion.

[6] The judgment is structured as set out in the next chapter.

Structure of the judgment

[7] The rest of the judgment is divided into the following chapters:

- (a) The parties
- (b) The material background facts
- (c) The issues
- (d) Analysis: Urgency – has Xinfeng made out a case for the degree of urgency with which it approached the court?
- (e) Analysis: Prima facie right (1) - has the Minister of Mines proven *prima facie* that Xinfeng committed fraud in the process of applying for mining licence ML243?
- (f) Analysis: Prima facie right (2) – does the Minister of Mines have the power to himself revoke a mining licence if the licence holder committed fraud of the sort alleged in this matter, without having to approach a court for an appropriate remedy?
- (g) Conclusion: prima right

- (h) Does the balance of convenience favour Xinfeng?
- (l) Does Xinfeng have any adequate alternative remedies?
- (i) How should the court exercise its discretion?
- (m) The order

The parties

[8] The applicant is Xinfeng Investments (Pty) Ltd. It is a private company registered on 10 August 2021 in Namibia. Its mining licence application form reflects its registered shareholders on 16 December 2021 as Yuqing Liu (85%), Yiming Xie (10%), and Likulano January Sauiyele (5%). In the application form, the three individual shareholders, and Yue Yang, are listed as Xinfeng's directors. In a report produced by Xinfeng to the Minister on 26 October 2022, Xinfeng indicates that it 'is a subsidiary company of Tangshan Xinfeng Lithium Industry Co, located in China.' Tangshan appears to be a part of Xinfeng Group. Xinfeng Group 'has a lithium processing plant in China, but their plant is only designed to process spodumene and not lepidolite.'

[9] The first respondent is the Minister of Mines and Energy in his official capacity. Under the Minerals Act, the Minister is the ultimate decision-maker on applications for mining licences. The Minerals Act specifies several aspects which the Minister must consider before he may award a mining licence. The considerations on which the parties rely are found throughout ss 48 to 99 of the Minerals Act. The most relevant provisions at this stage are found in ss 47, 48, 55, 76, 91, 92, 93 and 99.

[10] Xinfeng and the Minister are the main disputing parties. Xinfeng seeks relief only against the Minister. Xinfeng cited the second and third respondents, the Mining Commissioner, and the Environmental Commissioner, only for the interest they may have in the matter.

[11] The next Chapter details the material background facts. The Chapter focuses on the factual averments that are undisputed or not properly disputed. Unusually for judgments of this nature, it will contain several quotes from the affidavits and supporting documents furnished by the parties, because of the seriousness of the express and implied allegations, the technical nature of some of the averments, and the limited time available for the parties and for the court to carefully summarise all the material facts as would normally have been expected of the legal practitioners and the court. Where there are disputes on the facts, they will be identified and then addressed later under the Chapter dealing with the analysis of the facts.

Material background facts

[12] The lithium mining project at the centre of this dispute is located approximately 45km west-northwest of Omaruru, a town in central Namibia. In March 2019, the Ministry granted exploration licence No 7228 over the relevant area. On an undisclosed date in 2021, Xinfeng took over the rights to EPL 7228. According to Xinfeng's reports to the Minister, the transfer in 2021 'was followed by an intense exploration programme which led to the discovery of a substantial mineral resource that resulted in the application for the mining licence'. Whether there was indeed 'intense exploration' before the application for ML243 forms part of the core dispute.

[13] On 17 December 2021, Xinfeng submitted its mining licence application to the Minister. Below are some of the material information extracted directly from Xinfeng's mining licence application form.

- (a) The period applied for: 25 years;
- (b) The minerals group(s) applied for: base and rare materials;
- (c) Mineral reserves applied for: Commodity – lithium; Mineral form: spodumene, petalite, lepidolite, amblygonite; Grade – 0,53 Li₂O; Tonnage – 7,79 Mt (resource);

(d) Total expenditure on exploration during the exploration phase – N\$2,137,200;

(e) Estimate of effect which proposed mining will have on the environment and proposed steps to be taken to prevent or minimise resulting damage: ‘The pit and supporting infrastructure will change the landscape and slightly modify ecological patterns. Environmental impact assessments will be carried out and an Environmental management plan will be drafted to mitigate the envisaged impacts’;

(f) List of consultants (if applicable): empty;

(g) Financial resources available to fund the project: ‘financier profile and proof of availability of funds are attached;’

(h) Section H - Mining Programme:

‘Envisaged mine development *

Date of commencement of	
– mine development	April 2023
– mining	October 2024
– ore treatment	November 2024
Capacity production	340k tpa year 3 and 400k tpa from year 5
Scale of operations	medium scale

* Documents detailing technical viability, mine planning, forecasts of estimated expenditure and financial feasibility studies, with application plans to be attached. ¹

Mining method

Conventional open pit mining technique
Conventional shovel operation with drilling and blasting to loosen ore and waste rock

¹ Documents detailing technical viability, mine planning, forecasts of estimated expenditure and financial feasibility studies, with application plans to be attached.

Bench heights will be up to 10 metres with 6m berms ²
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Ore treatment method

Beneficiation processes which will involve crushing, grinding, sorting, dense medium separation, gravity separation, magnetic separation, electrostatic & magnetohydrostatic methods, further purification and washing to refine the ore.

Ore processing involves the crushing of mined ore, Li-mineral concentration via floatation, roasting at ~ 1,050°C, and treatment with sulfuric acid and a second roasting at ~ 200°C to produce a lithium concentrate. The lithium concentrate is processed into Li ₂ CO ₃ or LiOH H ₂ O via multi-step processes involving leaching, liquid-solid separation, and impurity removal via precipitation and ion exchange. ³

[14] Dr Siseho is a geologist within the Ministry of Mines. He was primarily responsible for the evaluation of Xinfeng's mining licence application. According to him, Xinfeng's application form of 17 December 2021 was accompanied by a report. The Minister attached 'relevant extracts' from what he believes to be the relevant report, as TKA11. Xinfeng does not deny that it had submitted a report with its application form. Xinfeng describes TKA11 as 'a comprehensive 66-page report supported by numerous annexures'. This report and its annexures, and the inferences that may or may not follow from the contents, form part of the core factual dispute.

[15] Some of the events that followed between 17 December 2021 and 27 July 2022 in connection with the licence application are undisputed, but many are not as clear.

[16] The parties agree, and the documents show, that Xinfeng paid the licence application fee on 13 January 2022.

² Bench heights will be up to 10 metres with 6m berms.

³ The lithium concentrate is processed into Li₂CO₃ or LiOH H₂O via multi-step processes involving leaching, liquid-solid separation, and impurity removal via precipitation and ion exchange.

[17] According to Xinfeng,

- (a) it inadvertently printed and submitted an incorrect technical report to the Minister on 22 March 2022;
- (b) on 19 April 2022, it submitted an updated licence application with new data from exploration activities after 17 December 2021;
- (c) on 15 June 2022, it submitted a corrected and final technical report; and
- (d) on 27 July 2022, the Ministry's geologists requested Xinfeng to submit borehole collar data, logs and Geochem data to the Commissioner.

[18] In his answering affidavit, the Minister explains that he cannot deal with or effectively deny Xinfeng's allegations about the submission dates of the allegedly incorrect technical report, 'updated' application, or the 'corrected and final report.' This is why he cannot do so: the Minister has in his possession various iterations of reports from Xinfeng, but none of the reports carries a date stamp from the Ministry of Mines. For context, the Minister describes the normal receiving and recording process for a mining licence application as follows. An applicant will normally submit their mining licence application to the front office within the Ministry's Windhoek office. Here, a dedicated administrative officer who occupies that office will receive the documents and date stamp the documents on the front page. If Xinfeng has an extra copy of the application, the officer will stamp the copy as proof. If Xinfeng does not have a copy to be stamped, the officer will allow Xinfeng to take a photo of the date stamp. Next, the officer will forward the application documents to the Ministry's cartographers, and then to the Ministry's geologists. The geologists will check the documents for completeness and capture the relevant data on a computer register. The geologists will return the documents to the cashier. The cashier will request Xinfeng to pay the application fee. A geologist will be assigned to conduct a pre-evaluation of the application. Once Xinfeng has paid the application fee, the documents will be delivered to the assigned geologist. This geologist will

prepare a spreadsheet and a recommendation on the application. The spreadsheet will be placed before a team of geologists in the Mineral Rights and Resource Development Division, to consider the application against the requirements of the Minerals Act. The team will make a recommendation to the Mineral and Licencing Advisory Committee. The Committee will make a recommendation. Its recommendation, along with the team of geologists' recommendation, will be placed before the Minister. The Minister will consider the application itself, and the recommendations, and decide to grant or refuse the application.

[19] The application for ML243 did not follow the normal process. Xinfeng's documents in the Minister's possession are not date-stamped by the Ministry. Xinfeng claims it delivered the documents, or at least some of them, directly to Dr Siseho. Dr Siseho cannot recall exactly when he received which documents. Several reports are undated, while others, which are similar but not identical, have the same digital dates (March 2022) in the footer. These factors exacerbate the Minister's problem with identifying the documents.

[20] Xinfeng's approach in its affidavits has not assisted in resolving the Minister's difficulties. Xinfeng agrees that its documents are not date stamped by the Ministry. It accepts that it submitted documents to ministerial officials 'other than at the front desk', and its technical reports directly to Dr Siseho. It claims that no one had objected to this before the Minister raised his concern. Xinfeng accepts that it supplemented its reports 'a number of times with information requested by the Ministry's officials.' Disquietingly, while Xinfeng claims to have filed reports on specific dates and asserts that ministerial officials 'signed off the documents Xinfeng submitted', Xinfeng has not attached any document that reflects that a ministerial official has 'signed off the documents'. Or supplied the court with any other proof of the precise dates on which it claims to have submitted documents. The relevance of the contents of the reports and the dates on which the reports were filed, will be addressed in the analysis section.

[21] Whatever may have happened with the submission of documents by Xinfeng between 17 December 2021 and 27 July 2022, there are fewer disputes on the evaluation process within the Ministry. Dr Siseho conducted the initial valuation of two applications for mining licenses by Xinfeng: ML242 and ML243. ML243 is relevant to the present dispute. Dr Siseho prepared a spreadsheet which is attached as annexure 'TKA 3' to the Minister's affidavit. In his spreadsheet, Dr Siseho listed the resources identified by Xinfeng as '8,3 million tons @ 1.04% Li₂O' and the envisaged scale of annual production as 340 to 400Ktpa (kilotons per annum). Dr Siseho stated that resources were enough for 20 years, that Xinfeng was seeking 25 years, that he proposed a 15-year life of mine for regulatory and policy adherence, and that mine development was scheduled for July 2022. Dr Siseho confirmed that an environmental clearance certificate had been submitted. Dr Siseho recommended granting the licence.

[22] The next level of evaluation disagreed with Dr Siseho's recommendation. According to a spreadsheet attached to the Minister's affidavit as 'TKA4', the Ministry's team of geologists recommended that the Ministry request Xinfeng to 'submit borehole coordinates'. Two of the Chief Geologists in the Mineral Rights and Development Division confirmed they were not satisfied with the borehole collar data, locks, and geochemical data.

'According to them, it was incongruous for Dr Siseho to recommend the grant of the license, since the borehole drawings did not even have any data indicating the direction in which it was drilled, nor the depth or what, minerals, if any were intersected. There were not even co-ordinates to indicate where the boreholes were drilled. The geologist thus recommended to the Committee that the application be placed on hold and the applicant be required to submit the above information.'

[23] In reply, Xinfeng correctly states that these averments by the Minister are not apparent from the spreadsheet. Xinfeng also provides more information, which appears to be a response to the next stage of the evaluation.

[24] In the next stage of the evaluation, the Mineral Licensing Advisory Committee (MLAC) did make remarks that aligned with the Chief Geologists'

evidence. Annexure 'TKA4A' contains the minutes of the MLAC meeting of 2 July 2022. The minutes record that:

'Xinfeng indicated that they have 8.3 million tons @1.04% Li₂O in reserve, enough to last for 20 years and mine development is scheduled for July 2022. The ECC is attached to the application. However, Xinfeng failed to attach documentary proof on how the reserves were determined. Information such as borehole collar, borehole locks and Geochem data were not attached. Therefore, it is recommended that Xinfeng should submit the supporting documents before the application can be finalized.'

[25] In reply, Xinfeng asserts that it 'proceeded to submit a corrected technical report to the Minister on 15 June 2022 at Dr Siseho's office.' Importantly, Xinfeng claims that 'it was only at this time that Xinfeng realised it had submitted the wrong technical report on 22 March 2022.' Xinfeng did not supply this corrected report or identify such a report amongst the many reports and documents disclosed by the Minister in his answering affidavit. In its reply, Xinfeng also points out that the geologist did not suggest Xinfeng had submitted fraudulent or misleading reports or that the license should be refused. The geologist and MLAC merely sought additional information.

[26] According to the Minister, Xinfeng submitted its technical reports, including data sheets, directly to the former Mining Commissioner, Mr Shivolo, on or around 27 July 2022. According to Xinfeng, an official from the Minister's office had requested this information from Xinfeng in an email dated 27 July 2022. Xinfeng attached the email to its replying affidavit as 'LSJ.1'.

[27] Xinfeng did not attach or clearly identify the report or documents which it claims to have submitted on 15 June 2022. It also did not attach or identify the report or documents which it supplied in response to the email of 27 July 2022. Xinfeng does not state in either of its affidavits whether it responded to the email of 27 July 2022 at all.

[28] Nevertheless, it appears common cause that some new data had been submitted and that Mr Shivolo requested Dr Siseho to analyse the new data. Dr Siseho did so and recommended ML243 for granting. His one-page review note was attached as annexure 'TKA5'.

[29] It is common cause that the Mineral Licencing Advisory Committee met on 5 August 2022. According to Xinfeng, it made representations to the MLAC through its geologist, in particular on the technical information and exploration work conducted in the application area. Following the representations, the MLAC, with Mr Shivolo as chairperson, recommended granting ML243 for 20 years. The MLAC qualified its recommendation as follows:

'The submitted information clearly shows that Xinfeng has conducted sufficient work on a smaller portion of the mining license area. The borehole collar, borehole logs and Geochemical data were attached. However, the tax and royalty parameters used in financial calculations are those of the United States of America. **The members recommend this application for granting on the following conditions:**

- **The applicant reduces the area**
- **The applicant must submit the new updated financial calculations.'**

(emphasis in original)

[30] Xinfeng's deponent to the replying affidavit adds the following context regarding the 5 August 2022 meeting:

'When I and others on behalf of Xinfeng made representations to the Committee, the Committee had in its possession Xinfeng's correct technical report submitted in June 2022 as supplemented between June 2022 and August 2022 as well as the application itself. We as representatives of Xinfeng answered questions asked and were assured that the Minister and his officials had fully and carefully considered the application and the information included therein. We were in particular asked about the size of the land and the financial model. Changes were recommended by the officials.'

[31] The parties agree that Xinfeng submitted to the Minister the reduced shape of ML243 and the coordinates, as well as an updated financial model. Neither party attached nor otherwise identified the documents so submitted.

[32] On 23 August 2022, the Ministry informed Xinfeng of its preparedness to grant ML243 subject to Xinfeng agreeing to the conditions in the notice. Xinfeng completed the requested paperwork the next day. On 6 September 2022, the Minister issued ML243. The relevant documents are attached to the founding affidavit as annexures "A" and "B".

[33] The troubles that led to the eventual revocation of ML243 started toward the end of September and the beginning of October 2022. Xinfeng describes it as follows:

'During October 2022, a misunderstanding arose between Xinfeng and the Minister concerning details and progress over the construction of a lithium processing plant in Namibia. The media reported and certain community members made public comments regarding Xinfeng exporting unprocessed lithium ore for processing in China while Xinfeng was awaiting the construction and development of its lithium processing plant in Namibia, which is presently underway.'

[34] On 29 and 30 September 2022, Ministerial officials conducted inspections at Xinfeng's mining site. On 10 October 2022, following the inspections, a meeting took place between unidentified persons, presumably ministerial officials and Xinfeng representatives. On 26 October 2022, the Minister wrote to Xinfeng:

'I refer to a recent inspection by my officials on 29 and 30 September 2022 on the abovementioned license as well as the meeting held on 10 October 2022.

The meeting highlighted that your current activities on ML243 are inconsistent with the mining program that was approved by the Ministry, in particular the export of huge volumes of unprocessed pegmatite ore to China. The meeting further concluded that you made written submissions addressing all issues raised. To date you have failed to make such submission. It has now further been established that

you continue to remove and transport ore from the mine to the Walvis Bay Port without any removals/transport permit. Your act constitutes a violation of Section 19(1)(d) of the Minerals (Prospecting and Mining) Act, 33 of 1992.

I hereby give notice of my intention to cancel ML243 as provided for in terms of Section 55(2). You are afforded the opportunity, in terms of paragraph ii of the aforesaid section, to make representations within 30 days of the date of this letter. In addition you are requested to stop any operations at the mine until further notice.'

[35] The letter of 26 October 2022 is annexure "C" to the founding affidavit.

[36] Xinfeng responded on 30 October 2022, when it informed the Minister that no timeline had been set for a written report to the Minister on the financial and economic implications regarding the lithium processing at its mine. It confirmed that the report had been submitted on 27 October 2022. It reminded the Minister that Xinfeng had all the required documents for the ore it had removed and transported. And Xinfeng sought an urgent meeting with the Minister on 1 November 2022. Its letter is annexure 'D' to the founding affidavit. To its letter, Xinfeng attached its 27 October 2022 report as 'X1', and the removal permit as 'X2'. I will return to 'X1' and 'X2' later on in this judgment.

[37] On 1 November 2022, the Minister withdrew his notice to cancel ML243. In his letter of withdrawal, he instructed Xinfeng to stop exporting unprocessed crushed ore and to only export lithium concentrate. His letter is annexure 'E' to the founding affidavit.

[38] On 3 November 2022, Xinfeng submitted its application to the Minister for a revised work program. This is the full text of the application:

'Terms and conditions of the issue of ML 243 given under Part 2, section 3 subsection 3.2 of the Notice of intention to grant the mining licence states that:

The holder of the mining licence shall, where there is material deviation in work programme, schedule and budget which in the opinion of the licence holder is necessitated by the nature of the results of mining operation apply in writing for

approval of the revision of such work programme, schedule and budget as provided for by Section 99 of the Minerals Act.

Xinfeng as the holder of ML 243 herewith applies for approval of a revised mining programme. The deviation is mainly on the timelines of the work programme and is necessitated by the lack of availability of a technology to process the dominant mineral (lepidolite) at the Kohero deposit. Metallurgical studies have commenced in China on the ore that was exported from the deposit recently. These studies are aimed at engineering and refining a technology for a beneficiation plant that will be constructed in Namibia to process ore from Kohero and it is envisaged that ore beneficiation in Namibia would commence towards the end of 2025, which is three (3) years from now. Given below are both the initial proposed mining programme and the revised mining programme:

Initially proposed mining programme

Date of commencement of - Mine development: April 2023

- Mining: October 2024

- Ore treatment: November 2024

Capacity of production - 340k tpa (year 3 and 400k tpa from year 5)

Revised mining programme

Date of commencement of - Mine development: September 2022

- Mining: September 2022

- Ore treatment: December 2025

Capacity of production (ROM) - 1200k tpa (1st 3 years and 1800k tpa from year 4)

Directions as per the Honourable Minister's letter dated 01 November 2022 to only export lithium concentrate can only be realized once the construction of the beneficiation plant has been completed and this will only be in 3 years' time.

Additionally, the beneficiation plant will require a considerable amount of water (around 5000 tons per day) during operations and the deposit's location as well as the surrounding areas host very little water, as such a desalination plant would have to be set up to supply the required sufficient water to the beneficiation plant. Both the beneficiation plant and the desalination plant are very costly to set up.

The designing, engineering of the beneficiation plant and refining of metallurgical properties of the beneficiation system will need a flow of ore through the system. The cash flow generated through this exercise will also assist in sustaining Xinfeng's operations in Namibia during the envisaged construction period. Through provisions of Section 100(1)(b)(ii), the Honourable Minister may limit Xinfeng's export quantity for the first three years during beneficiation plant setting period with aim of fulfilling two conditions: 1) To provide feed for the designing and engineering of beneficiation plant, 2) to sustain operations during the construction period of the beneficiation plant and the desalination plant.

TRADE-OFF

To show its commitment towards the construction of a beneficiation plant in Namibia, Xinfeng would commit to commence the construction of a desalination plant within a few months with timelines to this effect shared with the Honourable Minister. Since technology for a desalination plant already exists commencing with construction of such will save as a trade-off and in the same vein show Xinfeng's commitment towards setting up a beneficiation plant in Namibia. In turn Xinfeng's request is for export of ore not to be put on hold as it will save as a catalyst to entire process as in providing the necessary feed for designing the beneficiation plant, cash flow to sustain the construction of the beneficiation plant and desalination plant as well prevent job losses that may result from terminating the exports of ore.'

[39] The impact of this application for a revised work program is part of the core factual dispute in this application and will be examined later in this judgment.

[40] Regarding the application for a revised work program, the Minister states the following:

'This revised program only indicated a change in the timeline and extraction rate, but the mining method remain the same. The Committee (MLRC) then decided to re-assess the technical and feasibility reports which the applicant submitted in support of its application for ML243, to verify the exploration work and feasibility studies that supported the initial mining program and to establish whether same could justify the revised mining program.'

[41] As Xinfeng does not have personal knowledge of this part of the internal process, it does not dispute the Minister's explanation of the MLRC's reasoning behind its decision to re-assess Xinfeng's reports. Instead, Xinfeng only adds the following:

[43] I note that Xinfeng provided a comprehensive and reasonable explanation for the revised mining program in annexure 'TKA9', which the Minister has omitted to deal with in his affidavit.

[44] There is no legal impairment in Xinfeng exporting the lithium ore, nor does the Minister suggest that Xinfeng's act of doing so is unlawful.'

[42] Xinfeng is mistaken in its belief that the Minister has not dealt in his answering affidavit with Xinfeng's explanation for the revised mining program. To avoid disturbing the chronology, I will deal with the Minister's response later.

[43] The MLRC met on 25 November 2022 to discuss Xinfeng's application for a revised work program. According to the Minister, it was during the process of re-assessment in November 2022, that the Minister and the MLRC discovered the discrepancies based on which he eventually revoked ML243. Xinfeng pleads no personal knowledge of the process of re-assessment but denies the allegation and puts the Minister to the proof therein. Xinfeng also denies the existence of any 'discrepancies'. The details of the 'discrepancies' which the Ministry identified from the various technical and feasibility reports for ML243, will be discussed in more detail later. According to the Minister, the MLRC ultimately concluded on 25 November 2022 that 'it could not establish the actual exploration work carried out by the applicant.' Xinfeng pleads no personal knowledge of these allegations, denies them, and put the Minister to the proof thereof.

[44] On 1 December 2022, the Minister sought legal advice from the Attorney-General. The Minister believed he would be authorised by s 55(2) of the Minerals Act to cancel ML243 unless Xinfeng could provide a satisfactory

explanation for the information in the reports which the Minister and the MLRC believed misleading. As such, on 8 December 2022, the Minister invited Xinfeng to make representations on the discrepancies and the Minister's intention to cancel ML243 under his s 55(2) powers. The Minister's letter is annexure 'G' to the founding affidavit.

[45] In letters dated 19 December 2022, 4 January 2023 and 31 January 2023, Xinfeng denied the factual averments in the Minister's letter of 8 December 2022. In the letters, Xinfeng pointed out that the Minister's averments lacked particularity on the exact nature of the alleged discrepancies. And Xinfeng reminded the Minister that the evaluation process in his Ministry had been comprehensive. Xinfeng advised the Minister that, even if the allegations were accurate, the Minister does not have the power to cancel ML243 under s 55(2) on this factual basis. According to Xinfeng, the Minister's remedy lay in approaching the High Court for review. Xinfeng's letters of 4 and 31 January 2023 are annexed as 'H' and 'I' respectively. The letter of 19 December 2022 is not attached to either party's papers.

[46] The Minister shared Xinfeng's letter of 4 January 2023 with the Attorney-General. On the Attorney-General's advice, the Minister addressed a further letter to Xinfeng on 16 February 2023. The content of this letter demonstrates that the Minister and his advisors took seriously Xinfeng's preceding letters. The Minister's letter includes details of the factual discrepancies. Additionally, the Minister accepted one part of Xinfeng's legal advice – the Minister accepted that he could not rely on s 55(2) to cancel ML243 considering the nature of his concern. However, the Minister did not accept Xinfeng's advice that the Minister's remedy lay in approaching the High Court. Instead, the Minister believed he had the power to revoke his decision to grant ML243 on the basis that it is *void ab initio*. The Minister's letter is annexure 'J' to the founding affidavit.

[47] Xinfeng made representations on 17 March 2023. The representations are attached as annexure 'K' to the founding affidavit. Xinfeng also made oral representations to the Minister on 28 March 2023.

[48] The Minister was not convinced by the representations. On 28 April 2023, the Minister informed Xinfeng of his decision to revoke ML243. The Minister's letter is annexure 'L' to the founding affidavit.

[49] The content of the letters of 16 February 2023, 17 March 2023 and 28 April 2023 provide the clearest insight into the parties' contrasting positions on the disputed issues. Although quite long, I quote the letters fully in the next three paragraphs.

[50] On 16 February 2023, the Minister wrote to Xinfeng:

1. All our previous correspondence and communication in this matter refers.

2. I have considered the representations made by Xinfeng on 19 December 2022 and its representations made through its legal representatives contained in the letters dated 04 and 31 January 2023 respectively.

3. In its representations, Xinfeng fails to address a critical matter, namely, my reference (in the notice of intention to cancel of 8 December 2022) to misleading and untrue/incorrect information. This information is contained in what appears to be fraudulent reports which were submitted together with Xinfeng's application for the mining licence as follows:

3.1 The technical report required pursuant to the provisions of Section 91 (g) of the Minerals (Prospecting and Mining) Act. 1992 (Act No. 33 of 1992) (the Act) was not authentic, but was a copy of a report titled 'Technical Report on the Pre-Feasibility Study for the Thacker Pass Project, Humboldt County, Nevada, USA' written in August 2018. The latter report was copied and misrepresented as work done by or for Xinfeng under EPL 7228;

3.2 Furthermore, the reports regarding the exploration work, mineral resource estimate and mining methods, (also contemplated by Section 91 (d), (e), (f) and (g) read with Section 76 (l)(e)(i) of the Act), were copied from NI 43-101 Technical Report

done by Desert lion Energy on a Lithium Project which is located south southeast of Karibib and the project (ML 243) is located 45km northwest of Omaruru. The distance between the two projects are approximately 138km apart;

3.3 The report describing exploration strategy in detail was extracted from a report titled 'Tools and Workflows for Grass Roots Li-Cs-Ta (LCT) Pegmatite Exploration' by Benedikt M. Steiner which was published in 2019;

3.4 The mining and ore processing methods were also copied from 'Mineral Deposit Model for Lithium-Cesium-Tantalum Pegmatites' by US Geological Survey published in 2010.

4. These reports were required pursuant to the provisions of Section 91 of the Act, and I had to take them into account in my decision on whether to grant or to refuse to grant the license and to consider the conditions, if any, that I would impose, pursuant to Section 92 of the Act.

5. The technical reports did not indicate that the work copied was literature reviews and was presented as reflecting work done during the exploration stage by Xinfeng under EPL 7228.

6. I may therefore revoke my decision to grant ML 243 on the basis that it is void ab initio and a nullity. A revocation on that basis would not be effected under Section 55 of the Minerals (Prospecting and Mining) Act. 1992 (Act No. 33 of 1992), and I am not invoking this Section herein.

7. In view of the above, I call on you to make written and in person representations to me, within 30 days from the date of this notice, why I should not revoke my decision to grant ML243, and mining licence ML243, on the above basis...'

[51] On 17 March 2023, Xinfeng responded to the Minister:

'1. We confirm that we are still acting herein for and on behalf of Xinfeng Investments (Pty) Ltd ('our client').

2. We are writing on behalf of our client regarding your correspondence notifying them of the notice of intention to revoke their Mining Licence (ML) 243, dated 16 February 2023. Our client appreciates the opportunity to respond to the allegations made concerning the technical reports submitted during the application for ML 243. We write to plead for your reconsideration and reversal of the decision to revoke our client's license for the following reasons:

AD PARAGRAPH 3.1

3. Our client vehemently denies that the report submitted was fraudulent or misleading. Due to an oversight by our client, the report was erroneously submitted, and our client apologizes for any confusion that may have arisen as a result of this error.

4. Our client can confirm that the technical report submitted on 22 March 2022 was never presented as work undertaken by it. Our client concedes that the report was erroneously submitted, but it was merely used as a framework for the compilation of a technical report on the Kohero lithium pegmatite deposit. It was never our client's intention to present the report as forming part of the exploration work carried out on EPL 7228. The watermark on this report was strictly for our client's internal filing purposes without any fraudulent intentions.

5. Moreover, as soon as our client became aware of the mistake, they submitted the correct technical report on 15 June 2022, before the decision to grant the mining license was made. Thereafter, our client got the opportunity to make a presentation to the Ministry on the correct report before the decision to award the license to our client was made. Our client has complete faith and belief that the correct report formed the basis for the awarding of their license.

AD PARAGRAPH 3.2

6. Our client denies using the reports submitted by Desert Lion Energy for exploration works, mineral resource estimate, and mining methods. Our client made reference to these reports only for literature review purposes. This reference was made because of the similarities in geological characteristics between the lithium deposit in ML 243 and the lithium deposit in the report submitted by Desert Lion Energy, which is also located in the Damara Orogenic Belt in Namibia. Our client acknowledges the

similarities where applicable and has provided references to the source. However, our client consulted with a team of highly experienced experts in the field to come up with their own technical report. Our client is confident that the correct report submitted accurately reflects the geology and mineral potential of ML 243, and the revocation of their license based on allegation of improper use of Desert Lion Energy report is unwarranted.

AD PARAGRAPH 3.3

7. Our client denies that the exploration strategy was extracted from the book by Benedikt Steiner. Our client has adopted some of these methods during exploration works. To ensure that a proven exploration strategy was followed, for the purpose of delineating additional lithium ore bodies, it was imperative to follow known successful lithium exploration methods from around the world. It is common practice for mineral exploration companies to follow new technological developments in mineral exploration methods. The specific strategy adopted would depend on various factors, including the type of mineral being searched for, the geological characteristics of the area, available resources, and the goals and objectives of the exploration project.

AD PARAGRAPH 3.4

8. The lithium production industry is relatively new and still growing. Various technological developments for processing lithium ore worldwide are still on-going. The current lithium processing technology is centred around spodumene which is not common at the Kohero mine found within the mining licence. The main lithium mineral at the Kohero lithium project is lepidolite and not spodumene. Lepidolite is a mica with a complex and variable composition. Considering that lithium minerals, such as lepidolite, are extremely complex to process and there is limited information available on lepidolite processing methods, our client was inclined to use the limited information available. Including the report compiled by Benedikt Steiner for its literature review.

9. We would like to emphasize that the Ministry is comprised of highly competent professionals with extensive knowledge and expertise in the mining industry. These professionals rigorously evaluate all applications and supporting documents, including technical reports, to ensure the accuracy and veracity of the data submitted. It is highly improbable that the Ministry would have granted the mining

licence to our client without thoroughly verifying the submitted reports and confirming their accuracy. Our client has always adhered to providing accurate and reliable data, which has been diligently assessed by the Ministry's experienced professionals during the decision-making process.

10. Our client further wants to stress the significant investment it has made in advancing the exploration and development of ML 243 which now currently stands in excess of N\$ 800 Million. Our client has always conducted its operations in compliance with applicable laws and regulations. The revocation of our client's licence will not only result in significant financial losses for our client but also for the Namibian economy as a whole, as the mining sector is a significant contributor to the country's GOP.

11. Based on the above, it is therefore clear that revoking our client's mining licence would be unjust, disproportionate and contrary to the principles of natural justice.

12. Our client remains committed to collaborate with the Ministry to ensure that all regulatory requirements are met and that their operations are conducted in full compliance with the Minerals (Prospecting and Mining) Act, No. 33 of 1992.

13. Based on the above reasons, we respectfully request that you reconsider your decision to revoke the Mining Licence (ML 243) belonging to our client. Furthermore, our client would appreciate the opportunity to meet with the Ministry and present additional information such as the progress they have made in their quest to build a beneficiation plant with construction set to commence in the last quarter of this year, to support their plea for the license to be maintained.

14. This letter is without waiver to any of our clients' rights, remedies, and/or defences, all of which remain expressly reserved.'

[52] On 25 April 2023, the Minister concluded the correspondence:

'All our previous correspondence and communication in this matter refers, in particular my letter to Xinfeng dated 16 February 2023 in which I have granted Xinfeng an opportunity to make representations why I should not revoke my decision

in which I have granted ML 243 regarding Exclusive Prospecting License Area 7228 (EPL 7228).

I have now considered all the relevant aspects of this matter as well as the representation dated on 13 December 2022 from Xinfeng. I have also considered the written representations made by Xinfeng through its legal representatives contained in the letters dated 04 and 31 January 2023 as well as the oral representations made to myself on 28 March 2023, in coming to my decision hereunder.

I hereby inform Xinfeng of my decision to revoke ML 243 (regarding the area of EPL 7228), issued to Xinfeng on or about 6 September 2022 for the following reasons:

3.1 During the application for ML 243, Xinfeng deliberately included misleading, untrue and incorrect information as pointed out in paragraph 3 my letter dated 16 February 2023.

3.2 In order to grant Xinfeng an opportunity to explain the misleading, untrue and incorrect information, Xinfeng came and make oral representations to myself on 28 March 2023.

3.3 The explanations given by Xinfeng in both the written and oral representations have not shown that the information pointed out as misleading, untrue and incorrect were indeed truthful, correct and not misleading and further that there was no intention not to mislead the Minister in granting ML 243. In fact, same confirmed the fraudulent nature of the information on which the decision to grant the aforementioned licence, was premised.

3.4 The misleading, untrue and incorrect information as was pointed out, was a material and relevant consideration in deciding whether to grant ML 243. Consequent to the afore decision, you are instructed to cease any and all operations related to the granting of ML 243 in the EPL 7228 area by 31 May 2023.

You are furthermore instructed to surrender the physical ML243 (document) on 31 May 2023 to Ms Isabella Chirchir the Mining Commissioner, at the Head Quarters of the Ministry of Mines and Energy located on 6 Aviation road Windhoek, Namibia.'

[53] In addition to their utility to the context behind this dispute, the last three letters exchanged between the parties summarise the two fundamental issues for determination at this stage of the litigation.

The issues

[54] The two key issues both relate to Xinfeng's obligation to establish a *prima facie* right. The first issue is whether the Minister of Mines has proven *prima facie* that Xinfeng committed fraud in the process of applying for mining licence ML243. The second key issue is whether the Minister of Mines has the power to himself revoke a mining licence if the licence holder committed fraud of the sort alleged in this matter, without having to approach a court for an appropriate remedy.

[55] There are four further issues the court must address: (1) has Xinfeng justified the degree of urgency with which it approached the court; (2) does Xinfeng have an adequate alternative remedy; (3) does the balance of convenience favour Xinfeng; and (4) how should the court exercise its discretion.

[56] The next section resolves these issues by setting out the law on each issue as far as necessary, and then applying the law to the relevant facts, starting with the dispute on urgency.

Urgency – has Xinfeng made out a case for the degree of urgency with which it approached the court?

[57] To succeed with the urgent leg of this application for an interim interdict, Xinfeng must prove that it has met the requirements of High Court rule 73. Many Namibian authorities explain the application of this rule. A Full Bench of the High Court in *Stocks & Stocks Leisure (Namibia) (Pty) Ltd v Swakopmund Station Hotel (Pty) Ltd t/a the Swakopmund Station Hotel and Entertainment Centre and Others*⁴ recently summarised many of the key principles from the earlier judgments. Fortunately, in this case, the only dispute on urgency is the degree with which Xinfeng brought its application for interim relief.

⁴ *Stocks & Stocks Leisure (Namibia) (Pty) Ltd v Swakopmund Station Hotel (Pty) Ltd t/a the Swakopmund Station Hotel and Entertainment Centre and Others* 2020 (4) NR 1117 (HC)

[58] The key part of the legal test on the appropriate degree of urgency is set out in the classic judgment of *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*⁵.

'Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith.'

[59] The facts that are relevant to the resolution of this part of the case are largely common cause. The Minister informed Xinfeng of his decision to revoke the licence on 28 April 2023. He gave Xinfeng a month to wrap up all operations, leave the site, and hand back the licence. Xinfeng immediately briefed its legal team, took advice on the team's view on the lawfulness of the Minister's decision, and launched this application within nine calendar days and three business days. In urgent applications, an applicant chooses the timelines for the exchange of pleadings and the hearing date (with the assistance of its legal practitioners, if represented). If the court should find the timelines inappropriate, Xinfeng will suffer the consequence: at best for Xinfeng, the application may be postponed at its costs to allow the respondent adequate time; at worst, the application may be struck from the court roll with costs. This is one reason for the warning quoted above from *Luna Meubel Vervaardigers*. Xinfeng set 15 May 2023 as the date for the delivery of the Minister's opposing affidavit. Xinfeng committed to delivering its replying affidavit by 18 May 2023. Which would have left the parties and the court five calendar days to prepare for the hearing scheduled for 23 May 2023.

[60] I agree with Xinfeng that the shortened timelines it chose were commensurate with the exigencies of the matter. The company, its employees, its creditors, and its other stakeholders needed some assurance that Xinfeng would not have to leave the mining site by 31 May 2023 without having had the

⁵ *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137E-F.

opportunity to put its case before a court for interim relief. It makes no difference to this legitimate demand for assurance, that Xinfeng has not been mining since December 2022 while it awaits the Minister's decision on its application for a revised work program. Without an application before the court by 31 May 2023, the Minister could have approached the court urgently for Xinfeng's eviction. The Minister argues that Xinfeng could have raised a collateral attack against the eviction application or launched an urgent counter application. While these options would have been possible, both would have come at the expense of certainty and substantial risk for Xinfeng, its employees, its creditors, and its other stakeholders. In my view, Xinfeng could legitimately choose either to approach the court urgently with a direct challenge or wait until the Minister tried to enforce his decision and resist it collaterally. Xinfeng cannot be faulted for its choice.

[61] I am also satisfied from the history as recited earlier that the Minister ought reasonably to have known, since latest 28 April 2023, that Xinfeng would be launching an urgent application and would have known what facts and legal contentions Xinfeng would be relying on. The Minister was in a fair position to answer Xinfeng's challenge within the time set by Xinfeng.

[62] Thus, I find that the answer to the first disputed issue is yes, Xinfeng has made out a case for the degree of urgency with which it has approached the court for interim relief.

[63] In the next Chapter, I will analyse whether Xinfeng has proven that it has a *prima facie* right to the relief it seeks in the main application.

Prima facie right - has the Minister of Mines proven that Xinfeng committed fraud in the process of applying for mining licence ML243?

[64] For Xinfeng to succeed with its application for an interim interdict, Xinfeng must meet an overall test long established in Namibia. A neat summary of the test is set out in the South African judgment of *Hix Networking Technologies v*

*System Publishers (Pty) Ltd*⁶ since approved in several Namibian judgments, including *Nakanyala v Inspector-General Namibia and Others*.⁷

'The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are:

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

To these must be added the fact that the remedy is a discretionary remedy and that the court has a wide discretion.'

[65] There is no dispute in this case about the overall test. There is also no dispute about the degree of proof that is required to prove a prima facie right and the manner in which a court must evaluate the evidence to establish whether an applicant has made out a prima facie right. In *Nakanyala*,⁸ the court approved another succinct summary from South Africa, this time by Justice Harms in *The Law of South Africa* Vol 11 (2 ed) at 420:

'The degree of proof required has been formulated as follows: The right can be prima facie established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient but a weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set up

⁶ *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) at 398 – 399.

⁷ *Nakanyala v Inspector-General Namibia and Others* 2012 (1) NR 200 (HC) at para 36.

⁸ *Ibid*

in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case the latter cannot succeed. . . .'

[66] The parties agree that in this case, the onus is on the Minister to prove that Xinfeng has committed fraud in the process of applying for ML243. As such, in this case, the test quoted from *Law of South Africa in Nakanyala* must be recast as follows:

- (a) Take the Minister's factual allegations of fraud;
- (b) Add Xinfeng's factual allegations of fraud that the Minister cannot dispute;
- (c) Assess whether, on these combined factual allegations, and measuring them against the inherent probabilities, the Minister should succeed in proving fraud at the trial;
- (d) If the outcome of the assessment is negative for the Minister, the enquiry must end here as Xinfeng would have proven a *prima facie* right;
- (e) The enquiry can only proceed to the next stage if the outcome of the assessment is positive for the Minister;
- (f) The next stage is the investigation of the factual allegations by Xinfeng about the alleged fraud that contradict those of the Minister on this topic -
 - (i) If Xinfeng's allegations cast serious doubt on the veracity of the court's ability to accept the Minister's factual allegations necessary to prove fraud, the Minister will have failed to satisfy his onus at this interim stage. Xinfeng would have established at least a *prima facie* right.
 - (ii) However, if Xinfeng's allegations of fraud do not cast serious doubt on the Minister's allegations, the Minister would have satisfied his onus to prove fraud on the test that applies at this interim stage.'

[67] Regarding the evaluation of whether the Minister has met his onus, the parties agree the following principle applies, as approved in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*⁹ ‘... the more serious the allegation or its consequences, the stronger must be the evidence before a court will find the allegation established.’

[68] Perhaps a more practical statement of this part of the test is found in *Loomcraft Fabric CC v Nedbank Ltd and Another*.¹⁰ Summarised, the court confirmed that fraud will have to be clearly established, that the onus is the ordinarily one to be discharged on a balance of probabilities, but, that fraud ‘will not lightly be inferred’.

[69] And the parties agree that these are the elements the Minister must establish to prove fraud: an intentional misrepresentation, of material facts, with an intention to induce another party, to act to his prejudice.¹¹

[70] I move to apply the law to the facts.

The Minister’s factual allegations of fraud

[71] The Minister’s allegations of fraud appear in his letters of 8 December 2022, 16 February 2023 and 25 April 2023. In particular, in paragraphs 3, 4 and 5 of the second letter, and paragraph 3 of his third letter. The relevant letters have been quoted earlier and are not repeated.

[72] The Minister particularised his allegations of fraud in his answering affidavit: in paragraphs 7 to 16 (the statutory context), 17 to 22 (the procedure for receiving and recording documents), 23 to 43 (the factual context), 44 to 59 (an analysis of the various reports submitted by Xinfeng against the reports

⁹ *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2013 (21) NR 390 (HC) par 200

¹⁰ *Loomcraft Fabric CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A) at 817F-H.

¹¹ See: Gibson. *South African Mercantile & Company Law*, 7th ed. Juta 1997 at p.66 para 4.1.

which the Minister claims Xinfeng copied, with specific reference to large sections that are identical and others with only minor variations), and paragraphs 60 to 67 (the process the Minister followed in the revocation decision, including the analysis by the various Committees and the results of Xinfeng's representations to the Minister). The Minister's allegations are further explained in paragraphs 9 to 25 and 48 to 55 of the heads of argument delivered on his behalf, with reference to more comparisons of the similarities between Xinfeng's reports and those reports and documents produced by others. The Minister attached the relevant reports and documents to his answering affidavit.

[73] It appears to me that the Minister's allegations of fraud can be summarised as follows:

- (a) the Minister's obligations, his rights, and the qualified prohibitions – decisions he may not make unless certain conditions are present – when considering applications for mining licences, are stipulated under ss 47, 48(1), 48(4) 48(5), 91(d) to (g) read with ss 76(1)(e), and 92(2);
- (b) the information that Xinfeng supplied to the Minister for him to exercise his statutory function in respect of the application for ML243 is contained in the documents that Xinfeng supplied to the Minister, including Xinfeng's mining licence application form and the various supporting reports Xinfeng submitted to the Minister;
- (c) Xinfeng's documents contain important information clearly copied from various reports produced by other authors without any indication by Xinfeng that its documents were effectively complete reproductions, with only slight changes;
- (d) Xinfeng's documents containing large and important parts of the works of others, were put up by Xinfeng or its agents as Xinfeng's work;
- (e) Xinfeng's documents contain misleading, untrue, and incorrect information;

(f) Considering the information in the various iterations of Xinfeng's reports and feasibility studies and the overlap in material respects with reports by others, and the substantial change in Xinfeng's works programme with which it started immediately after the grant of the licence and only applied for permission on 3 November 2022, the Minister could not establish the actual exploration work carried out by Xinfeng prior to applying for ML243 on 17 December 2021;

(g) Despite several opportunities, Xinfeng has not provided reasonable written explanations for the significant similarities in material issues between its reports and the reports by the original authors;

(h) Xinfeng's oral representations revolved around work Xinfeng executed after ML243 was granted and did not address the circumstances under which the (allegedly) false representations were made to the Minister;

(i) The parts of the reports to which the Minister has referred, contain material misrepresentations, misleading information and untruths on matters he was required to consider and of which he had to be satisfied pursuant to the provisions of the Minerals Act, in particular, the provisions of ss 91 and 92(2);

(j) Xinfeng knew the information was misleading;

(k) Xinfeng knew the purpose for which the documents were required and produced them for this purpose.

[74] At this preliminary stage of the evaluation of the evidence, I find that the annexures attached to the Minister's affidavit support his factual allegations in the sense that his allegations, when compared to the annexures, are not so farfetched, incredible, or improbable that I should reject them out of hand.

[75] The next part of the evaluation of the evidence of fraud as set out in *Nakanyala* and adjusted as agreed between the parties, is the extraction of Xinfeng's evidence on fraud which the Minister cannot dispute.

Xinfeng's factual allegations on the issue of fraud, which the Minister cannot dispute.

[76] The essence of Xinfeng's opposition to the allegations of fraud is contained in its letter to the Minister dated 17 March 2023. Xinfeng repeated most of this evidence in its founding and replying affidavits. In the replying affidavit, it added what I believe to be material information which it had not previously advanced. It was not possible for the Minister to deal with the information in the replying affidavit. When the allegations are viewed in the context of the Minister's answering affidavit, they are contested. Consequently, I will investigate them in the final stage of the evaluation of the evidence of fraud.

[77] The Minister disputes almost all the applicant's evidence on fraud. The only allegations that I found that the Minister has not disputed or cannot dispute, are the following extracts from the letter of 17 March 2023:

'To ensure that a proven exploration strategy was followed, for the purpose of delineating additional lithium ore bodies, it was imperative to follow known successful lithium exploration methods from around the world. It is common practice for mineral exploration companies to follow new technological developments in mineral exploration methods. The specific strategy adopted would depend on various factors, including the type of mineral being searched for, the geological characteristics of the area, available resources, and the goals and objectives of the exploration project.

... and

The lithium production industry is relatively new and still growing. Various technological developments for processing lithium ore worldwide are still on-going. The current lithium processing technology is centred around spodumene which is not common at the Kohero mine found within the mining licence. The main lithium mineral at the Kohero lithium project is lepidolite and not spodumene. Lepidolite is a mica with a complex and variable composition.'

[78] From the affidavits, the only relevant allegations that the Minister has not disputed or cannot dispute, are that the applicant handed in various reports directly to Dr Siseho and that no one had complained of this procedure until the Minister raised it.

Would the Minister succeed in proving fraud at a trial on these combined factual allegations, measuring them against the inherent probabilities and the overall onus?

[79] In my view, the Minister would succeed in proving fraud based on these combined factual allegations at a trial. The Minister's factual averments and the documents he produced, and the inferences that arise, accord with the inherent probabilities (in other words, they accord with my understanding of common sense and human nature in the circumstances of this case). His factual averments and the evidence he produced to back up his averments, meet the high threshold accepted in *Rally for Democracy*¹², and *Loomcraft*¹³, and satisfy all the elements of fraud – an intentional misrepresentation, of material facts, with an intention to induce another party, to act to his prejudice.

[80] The facts that the Minister cannot deny do not reduce the force of the Minister's evidence. First, the averments about the need to follow proven exploration methods and the emerging lithium production industry technology around lepidolite do not explain the identical nature of several other aspects of the reports submitted by the applicant. The averments do not explain why there was no attribution to the authors of the original reports. The averments do not explain why the applicant has been so unnecessarily vague and failed to produce the best evidence when the circumstances clearly called for it. The averments do not address why the applicant has not stated exactly when the applicant realised that the mining programme it proposed on the date of application in December 2021 was not workable, and why it did not immediately inform the Minister of this change, before he made his decision on ML243 in August 2022.

¹² *Rally for Democracy 2013 (2) NR 390 (HC) par 200.*

¹³ *Loomcraft 1996 (1) SA 812 (A) 817 F-H.*

[81] Secondly, Dr Siseho may very well have accepted some or even all of the applicant's documents without demur. This does not affect the Minister's case. In his answering affidavit, the Minister confirms that the direct contact between Xinfeng and Dr Siseho, while he was the geologist assigned to evaluate the applicant's application, '... is a rather unsatisfactory situation which is presently under investigation at the Ministry.' The Minister stated that Dr Siseho's recommendation to approve ML243 at every stage, when it ought to have been clear to him that the application had been incomplete in material respects, was 'incomprehensible'. Whatever the case may be, Dr Siseho's acceptance of the documents directly from Xinfeng does not mean that anyone else, or even Dr Siseho, knew about the similarities between the Xinfeng documents and the reports from which the Xinfeng documents had been copied. The fact that Dr Siseho may have received the documents directly would also not explain why the applicant has not produced its proof of submissions, or attached the correct documents when the applicant has known since February 2023 at the latest that the submission dates and the precise identification of its documents would be fiercely disputed issues.

[82] The next stage of the evaluation is the investigation of the allegations of fraud that the applicant set up in contradiction to the Minister's on fraud, to assess whether the applicant's allegations cast serious doubt on the Minister's allegations.

Do Xinfeng's factual allegations about the alleged fraud set up in contradiction to the Minister's allegations of fraud, cast serious doubt on the Minister's allegations?

[83] Addressing this stage of the evaluation, the court held as follows in *Webster v Mitchell*¹⁴:

'The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining

¹⁴ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of the interdict.' (my emphasis)

[84] Applying the overall test as agreed between the parties to the question of fraud – essentially the opposite of the normal test where Xinfeng bears the onus – to this stage of the evaluation, I must assess whether Xinfeng has offered a convincing explanation in contradiction to the Minister's case on fraud.

[85] Xinfeng disputes that it committed fraud. Xinfeng argues that the mere fact that it is disputing the Minister's allegation of fraud, is sufficient for it to defeat the Minister's case of fraud at this interim stage. I disagree. As I understand the authorities, a court must follow the steps above. A court must consider not only the allegations in the affidavits. Instead, a court must consider the allegations and the *proof* furnished by the litigant to support its allegations. Depending on the circumstances, a court should draw inferences from the failure of a litigant to support its allegations with proof that ought to have been readily available when the affidavits were prepared, especially on matters where disputes ought to have been foreseen when the affidavits were being prepared. In certain circumstances, this may be the only way a court could fairly decide an urgent case that would, almost invariably, have to be decided on the papers only, without the benefit of discovery or oral evidence.

[86] In the leading textbook on interdicts, CB Prest¹⁵ provides his view of the correct meaning of a prima facie case:

'An applicant is required to furnish proof which, if uncontradicted and believed at the trial, would establish his right. The use of the phrase 'prima facie established though open to some doubt', however, indicates that more is required than merely to look at the allegations of the applicant, but something short of weighing up of the probabilities of conflicting versions is required.'

¹⁵ *The Law & Practice of Interdicts* 9th Impression, Juta 2014 on page 55.

[87] After this passage, the author discusses the court's approach in the face of a dispute of fact on the papers before the court. The approach is identical to the test set out by Justice Harms in *LAWSA* and approved in *Nakanyala*, quoted earlier in this judgment.

[88] The authorities have explained in some detail what will amount to a genuine dispute of fact in motion proceedings. For example, In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*¹⁶, a judgment often approved in Namibia including by the Namibian Supreme Court, the court explained in paragraph 13 what is considered a genuine dispute of fact in motion proceedings (in that case, for final relief):

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

¹⁶ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

[89] Xinfeng has failed to furnish proof for most of its critical allegations about fraud. It has been unnecessarily vague in many respects. In many respects, it has been unnecessarily vague and failed to furnish any proof when it would have been easy and obviously necessary. What follows are examples of the instances where the applicant was unnecessarily vague or failed to supply any proof when the proof must have been readily available to it.

17 December 2021

[90] It is common cause that Xinfeng submitted its mining license application on 17 December 2021. It is common cause that Xinfeng had to comply with s 91 of the Minerals Act. It is common cause that s 91 of the Minerals Act requires an applicant to submit documents to support various of its submissions in its application form. The most relevant parts of s 91 as relied upon by the Minister and not disputed by the applicant are found in ss 91 (d) to (g):

'91. An application by any person for a mining licence -

...

(d) shall contain a detailed geological description of the area of land to which the application relates –

(i) in which the mineral or group of minerals to which such application relates is set out;

(ii) which includes an estimate, substantiated by documentary proof or such other proof as may be required by the Commissioner, of the mineral reserves in such mining area and properly illustrated by way of plans and maps drawn according to scale; and

(iii) which, in the case of an application made consequent upon prospecting operations or mining operations carried on in terms of an exclusive prospecting licence, mineral deposit retention licence or on a mining claim of which the person applying for the mining licence was the holder, the report and the separate report, if any, referred to in section 45(1)(f)(i), 76(1)(e)(i) or 89(1)(d)(i), as the case may be;

(e) shall contain particulars of –

(i) any licence, including any mining claim, held, whether alone or jointly with any other person, and the mineral or group of minerals to which such licence or mining claim relates; and

(ii) any prospecting operations and mining operations carried on by such person alone or jointly with any other person outside Namibia, Republic of Namibia 89 Annotated Statutes Minerals (Prospecting and Mining) Act 33 of 1992 on the date of such application and during a period of 10 years immediately preceding such date;

(f) shall contain particulars of –

(i) the condition of, and any existing damage to, the environment in the area to which the application relates; (ii) an estimate of the effect which the proposed prospecting operations and mining operations may have on the environment and the proposed steps to be taken in order to minimize or prevent any such effect; and

(iii) the manner in which it is intended to prevent pollution, to deal with any waste, to safeguard the mineral resources, to reclaim and rehabilitate land disturbed by way of the prospecting operations and mining operations and to minimize the effect of such operations on land adjoining the mining area;

(g) shall be accompanied by a complete technical report on the proposed development, mining and ore treatment activities, including –

(i) the dates of commencement of development, mining and ore treatment activities;

(ii) the capacity of production and scale of operations; and

(iii) the overall mining of ore and minerals or groups of minerals and the nature thereof;'

[91] The Minister states in his answering affidavit that he does not know if Xinfeng submitted the necessary documents with its application on 17 December 2021. He explains why he does not know. From the undisputed background, as set out earlier, it is clear that the contents of the documents that accompanied Xinfeng's original application form – along with proof of the exact date of delivery and what exactly was delivered - are pivotal to the Minister's

case of fraud. Xinfeng says it did submit the documents but does not attach them to its affidavits or letters. It also does not explicitly identify the relevant documents in response to the Minister's allegations in his answering affidavit.

[92] To defeat this part of the Minister's case or at least cast serious doubt on the Minister's case, the deponent to the applicant's affidavits only had to say something along these lines:

(a) These are the documents, which we submitted on 17 December 2021. I attach the documents as 'A'. They comply with s 91.

(b) The documents were prepared on this date by B. Here is the supporting affidavit of B.

(c) The documents were submitted on 17 December 2021, by C. Here is the supporting affidavit of C.

(d) The documents were submitted to D. Here is proof of submission.

(e) The relevant parts of the document that show that the necessary exploration work was done prior to the application for ML243 - which is the Minister's main concern – are found in pages 1 to 10 (for example) of the documents attached as A.

(f) The exploration and drilling were done by E. Here is the supporting affidavit by E.

(g) The data was captured by F. Here is his supporting affidavit.

(h) Because the court probably would not have any mining experience, the data on the relevant pages were extracted [like this].

(i) Properly interpreted, the data means [this]. Here is the supporting affidavit of the person with the expertise to interpret the data.

[93] Instead, throughout the affidavits and its letter prior to the litigation, the applicant avoids committing to the detail of who exactly did what, when, and where is the proof.

22 March 2022

[94] Xinfeng claims it submitted a technical report to the Minister on this date. It claims it had done so 'in accordance with the procedure and direction of the Minister's officials.' Xinfeng does not identify the procedure or the source of the procedure to show convincingly that the Minister's version of the proper procedure should be disbelieved. Xinfeng does not identify the Ministerial officials whom it claims directed Xinfeng to submit a technical report. Xinfeng does not explain why it failed to provide the details on such a critical issue.

[95] In its founding affidavit, Xinfeng claims the first technical report submitted on 22 March 2022 'was incorrect as a wrong document was inadvertently printed and submitted.' In its replying affidavit, Xinfeng again claims the document submitted on 22 March 2022 was submitted in error, and that it realised this sometime between 22 March and 15 June 2022. It claims the technical report was merely used as a framework and it claims that 'the watermark on the report was strictly for Xinfeng's internal filing purposes.' Xinfeng does not explain who made the error. Xinfeng does not explain who discovered the error, or how. Xinfeng made these allegations already in its correspondence prior to the litigation. The Minister rejected the explanation. That the Minister rejected the explanations is at least a clear implication from his letters. It was incumbent on Xinfeng to provide a full explanation in its founding papers, or at the very least in its replying papers since the Minister had again rejected the explanation in his answering affidavit.

[96] The potentially exculpatory watermark is one example of Xinfeng's unwillingness to deal fully with the Minister's case on fraud. In his answering affidavit, the Minister states that he is not aware of any watermark on any

technical report. In reply, Xinfeng did not direct the court to the relevant watermark. I have not found any watermark on any of the reports.

[97] Another example is the manner in which Xinfeng deals with the technical report, or rather the technical reports, attached as annexure 'TKA18A' to the Minister's answering affidavit. This annexure includes almost 400 pages. On closer inspection, there are two reports with the same date in the footer – March 2022. The first report starts at indexed page 442 and the other at 648.

[98] At first glance, the reports appear to be replicas. They are not. One difference, in respect of an apparent critical part of the technical report for the present inquiry, is the information under the heading 'Mineral Resource Estimate'. The first paragraph is different – the first document indicates the estimate was obtained from 23 reverse circulation holes and the 87 channel samples; the second stipulates 32 reverse circulation holes and 178 channels.

[99] Another seemingly important difference is 'Table 1: Mineral Resources for Hard Rock as of April 2022'. Table 1 has two subheadings: 'Reserve Calculation for ML 243' and 'Probable Reserves'. Then follow four columns. The first column heading is 'Pegmatite', the second column heading is 'Cutoff Grade Li20%', the third column heading is 'Average Grade Li20%', and the final column is labelled 'Tons'. A comparison between Table 1 in the two reports reveals the following. The variables in the first and fourth columns are different. The second column has only one value in both tables – 0.50. While the values in the third column are not identical, they might as well have been. Table 1 in the first document contains five more rows than Table 1 in the second document. Other than the values under the five additional rows, Table 1 in the second document contains every value from Table 1 in the first document.

[100] Table 6 is the 'Mineral Reserves Table'. It appears on page 71 of the first report and page 68 of the second report. The subheading for this table is 'Probable Reserves', as it is for Table 1. The information in Table 1 and Table 6 in the first report is identical. This makes sense considering they both illustrate the 'Probable Reserves' for ML243. Logically, Table 1 and Table 6 in the

second report ought to contain identical information for the same reason. They do not. Instead, Table 6 in the second report, is identical to Tables 1 and 6 in the first report.

[101] There are other differences that are not necessary to discuss at this stage. Perhaps one of the documents under annexure TKA18A is the 22 March 2022 technical report, and the other is the 15 June 2022 technical report, or perhaps one of them is the technical report as supplemented on 27 July 2022. There may yet be reasonable explanations for these anomalies, as there will be a disclosure of the complete review record and full exchange of affidavits in the pending review application. Whatever the case may be eventually, at this stage the point is that Xinfeng was the only party that could explain, and was thus obliged to explain, why the inferences for which the Minister contends, and which appear to be most likely inferences from the documents, should not be drawn.

[102] In the absence of a full explanation, without Xinfeng providing any reason why it could not produce a full explanation, I am not satisfied that Xinfeng has put up a convincing explanation to the Minister's factual averments and the documents as well as the inference that follows from them, sufficient to cast serious doubt on the Minister's allegations about the 22 March 2022 report.

Plagiarism

[103] The applicant denies that it plagiarised any of the original documents to which the Minister referred in his letters and answering affidavit. Xinfeng effectively claims there is nothing wrong in the mining industry to copy the works of others without attribution and without informing the Minister of the copying. Xinfeng claims that it included references to the sources cited by the authors of the original report, which shows that it did not have any intention to mislead the Minister and claimed that it merely used the reports as frameworks and literature reviews. I cannot agree with these submissions.

[104] Firstly, it is plagiarism to copy without attribution various pages from the works of others, in some instances verbatim, in other cases with slight changes, and present it as one's own. According to the *Oxford Advanced Learner's Dictionary of Current English*, Oxford University Press¹⁷ to plagiarize means to 'take and use somebody else's ideas, words, etc as if they were one's own'. According to *Black's Law Dictionary*¹⁸, plagiarism is 'The deliberate and knowing presentation of another person's original ideas and creative expression as one's own.' Despite Xinfeng denial that it presented the work of others as its own, there is no factual basis for this denial, and it must be rejected. If the author of the reports explained why this inference should not follow, the outcome for Xinfeng might have been different.

[105] Secondly, while it is correct that Xinfeng copied the sources cited by the original authors of the original reports and the dissertation, this does not make it better for Xinfeng, as it argued. If Xinfeng had left out those sources on which the original authors relied, the reader of Xinfeng's reports might have become suspicious. Including the sources enhanced the apparent credibility of the copied material, thus increasing the likelihood of fooling the reader of the report.

[106] When viewed in isolation, the obvious plagiarism and intention behind it may not have been so significant to the Minister's case of fraud. However, when the other facts of which the Minister complains are added to the mix, the proven plagiarism, inferred intention, and Xinfeng's refusal to acknowledge plagiarism assumes a more prominent role in the fraud enquiry. In the absence of a credible explanation, supported by the persons who did the work, drafted the reports, and submitted them, or those who allegedly made the mistake, I find that the applicant has not provided a convincing explanation to cast serious doubt on the Minister's averments on plagiarism.

The explanation for the difference between the approved work program as submitted by Xinfeng on 17 December 2021 and approved by the Minister on 23

¹⁷ *Oxford Advanced Learner's Dictionary of Current English* Oxford University Press, AS Hornby with AP Crowie.

¹⁸ *Black's Law Dictionary* Eight Edition, Thomson West Brian A Garner, Editor in Chief.

August 2022, compared with the revised work plans submitted on 3 November 2022

[107] This is the final topic under the investigation of Xinfeng's allegations which are contrary to the Minister's regarding fraud.

[108] It is undeniable that Xinfeng had the right under the terms and conditions of its mining license to apply for a revised mining program. However, the inferences that arise from the vast differences between the two programs, viewed in isolation or combined with the concerns already discussed, support the Minister's position.

[109] The full text of Xinfeng's application for a revised work program appears earlier in this judgment. In summary, these are the main differences between the two programs:

- (a) Mine development: April 2023 vs. September 2022.
- (b) Mining: October 2024 vs September 2022.
- (c) Ore treatment: November 2024, vs December 2025,
- (d) Capacity of production: 340k tpa over the first three years and 400k tpa from the fourth year, vs 1200k tpa over the first three years and 1800k tpa from year four.
- (e) In the documents submitted in support of the approved program, there is no mention that Xinfeng will require 5000 tonnes of water per day in order to sustain its operations if it were to build the beneficiation plant. Under the revised plan, Xinfeng acknowledges that the mine is located in a very dry area. Xinfeng claims it will have to build a desalination plant at a cost of approximately N\$100 million to overcome this obstacle,
- (f) Under the revised program, Xinfeng claims that it needs to export large quantities of unprocessed lithium ore, not lithium concentrate as agreed in the original program. The purposes are, firstly, for 'studies aimed at engineering and refining technology for beneficiation plant', and secondly, to fund the

desalination plant, the beneficiation plant, and the mine's operations for the next three years. In Xinfeng's 'Financial and Economic Implications for Lithium Mineral Processing on the Kohero Mine' report, submitted to the Minister on 27 October 2022, Xinfeng claims that it would have to export 120,000 tonnes of unprocessed lithium ore every month.

[110] The estimated value of 60,000 tonnes of unprocessed lithium ore was N\$50,040,000 (Fifty Million and Forty Thousand Namibian Dollars) on 29 September 2022. These figures appear from the removal permit attached to Xinfeng's founding papers as X2. Using these figures for illustrative purposes only and accepting that the price of lithium may have changed since September 2022, Xinfeng sought permission to export unprocessed lithium ore with an estimated value of N\$100 million every month (120 000 tons), N\$1,2 billion every year (1, 440, 000 tons), and N\$3,6 billion over three years (4,320,000 tons). According to Xingeng's 27 October report:

'We deem this a reasonable request as during our due diligence exercise, we were advised that there is no law in Namibia that prevents exporting of lithium ore and it was on that basis that we aligned our affairs and decided to invest with the hope that we would be able to sustain our business operations in that manner while in the process of undertaking the necessary beneficiation exercise such as setting up a lithium beneficiation plant. We however reiterate that although we know of no law preventing shipping of lithium ore, shipping of lithium is not our permanent business strategy and we only want to do it for a period of three years, which is the reasonable period we require to set up a lithium processing plant in Namibia.'

[111] Xinfeng does not explain when exactly it did its due diligence and learned of the absence of a prohibition on exporting unprocessed lithium ore, when it decided to plan its operations accordingly, or when exactly it informed the Minister of this change from its mining program.

[112] In its replying affidavit, the applicant asserts that the Minister didn't deal with the application for the revised mining program in his answering affidavit. This was an oversight on the applicant's part. The Minister addresses the

application for the revised mining program in paragraphs 90, 101 and 106 of his answering affidavit.

[113] In paragraph 90 of his answering affidavit, the Minister states:

'I however point to annexure F [the application for a revised work program on ML243] which clearly demonstrates that the technical reports contained misleading information. It is only during the course of mining operations, post prospecting operations in terms of EPL 7228, that it was realized that the proposed mining program was unrealistic because the dominant mineral is lepidolite rather than spodumene. Instead of exporting lithium concentrate as per the initial program, the applicant was now proposing to export huge volumes of crushed ore for a period of three years with the view to study same, in order to engineer and refine technology for a beneficiation plant. This should however have been done during the exploration stage, and it is a matter on which I should have been satisfied before ML243 was granted. I could not be so satisfied due to misleading reports.'

[114] In its reply to paragraph 90 of the Minister's affidavit, Xinfeng states:

'I dispute these contentions. ML243 contains lithium elements such as spodumene, pedolite and lepidolite/ this is what was discovered during the exploration stage which in any event does not represent every detail about the mineral deposit in the area but is meant to confirm that there are sufficient and/or valuable mineral deposits in the area for mining. It just so happened that after Xinfeng opened the pit, lepidolite and pedolite were the more dominant lithium commodities on ML243. It is therefore not surprising that the conditions for Mining License make provision for Xinfeng to submit a revised work program, which it did and which the Minister has to date not dealt with.' (my emphasis)

[115] The underlined portion could have been a complete answer to the Minister's case. Xinfeng must have known the potential of this assertion, yet only includes it in its replying affidavit. And even then, Xinfeng fails to be specific. It does not explain when the pit was opened, who opened the pit, or what exactly the results were; and it fails to supply any proof for its allegation

when it must have had easy access to the documents that could substantiate this critical allegation.

[116] Xinfeng only reveals in its replying affidavit the identity of the agents it claims did the drilling and exploration and prepared the relevant reports. The applicant claims that in-house geologists, whom it does not identify by name, analysed the data and were satisfied with the results. Yet Xinfeng does not attach any affidavits from any of its agents or in-house geologists. The Minister correctly pointed out that the sole deponent to Xinfeng's affidavits does not claim that he did the relevant work, that he is a geologist, or that he possesses any expertise in drilling, exploration, or any other relevant field.

[117] In paragraph 106 of his answering affidavit, the Minister states:

'I believe this to be an appropriate case for an urgent review but not urgent interdictory relief which will enable Xinfeng to rely on an unlawfully obtained mining licence. I, in any event, am not inclined to accede to the revised mining program, considering the large volumes of ore Xinfeng intends to export without knowledge of whether there will be any left after three years to carry out further mining activities on the site. It will be best that new applications be submitted, proposing a new mining program that would secure the lithium resources for Namibia.'

[118] In reply, Xinfeng states only:

'I have already made out a case as to why interim relief is warranted in this matter. Legal submissions shall be made by counsel in support of this contention.'

[119] Although it is arguable that the drafter of the replying affidavit was at this stage of the replying affidavit focused on the issues of urgency and interim relief, Xinfeng's failure to grapple with the underlined portions means the Minister's allegation that he could not know whether there would be any lithium ore left after three years of Xinfeng exports has not been seriously challenged.

[120] If the Minister had known before approving ML243 on 23 August 2022 of the conditions Xinfeng tabulated on 27 October 2022 and 3 November 2022, and the reasons for the conditions, the Minister would not have been able to complain about misleading or untrue information. If Xinfeng had given the Minister this information before 23 August 2022, it ought to have been able to prove it without any difficulty.

[121] I considered the possibility that perhaps my evaluation is overly critical of the manner in which Xinfeng opposed the Minister's case of fraud. Firstly, perhaps Xinfeng was justified in failing to attach the documents because it believed the documents would be disclosed as part of the review process. Secondly, because of the high bar to prove fraud as confirmed in *Loomcraft* and *Rally for Democracy*. Ultimately the outcome of my evaluation appears justified.

[122] Regarding the first possible justification for Xinfeng's approach. In its founding affidavit, the applicant itemises the dates on which it claims to have submitted documents between paragraphs 31 to 34. When it prepared the founding affidavit, the applicant knew that the Minister had claimed during several meetings and correspondence with Xinfeng between November 2022 and April 2023 that Xinfeng had committed fraud. Xinfeng knew that it was going to move for an application *inter alia* on the basis that the applicant did not commit fraud. Thus, Xinfeng must have known that precision regarding the documents would be critical to the outcome of the fraud enquiry. As such, the fact that the Minister would eventually have to disclose documents as part of the review record is not a justification for Xinfeng's failure to attach the relevant documents to either of its affidavits at this interim stage.

[123] The second possible justification is also not supported by the facts or the law. The serious nature of the allegations against Xinfeng, the proof supplied by the Minister, the Minister's limitations that explain why he has not offered further proof, the inferences that arise from the Minister's averments and documents he produced, the absence of a full explanation by the person or persons with direct evidence about the allegations, and the fact that Xinfeng had retained legal representation as early as 4 January 2023, lead me to conclude that Xinfeng

must have known and accepted the risks of failing to present a full explanation for the various allegations against it when it prepared its affidavits. One of the risks of such an approach was that the court would have little choice but to accept the facts set out by the Minister and the inferences for which the Minister contends.

[124] It is perhaps also arguable that the requirement to set out a full, serious, and unambiguous version of disputed facts may be less stringent in urgent applications. By analogy, in urgent applications, hearsay may be allowed because it may be impossible for an applicant or respondent to secure necessary confirmation in the short time available to it to either launch or oppose the urgent application. But even then, the courts have strictly enforced the rule that the deponent must state the source of the information and why he believes the information to be true and correct.¹⁹ In this case, Xinfeng has not suggested that it was unable to secure the participation of the persons with direct knowledge of the disputed allegations. It did not give any other reasonable excuse for failing to present full explanations when the circumstances demanded full explanations.

[125] On the papers before the court at this interim stage, I find that Xinfeng's allegations that contradict those of the Minister on fraud, do not cast serious doubt on the Minister's version. It follows that the Minister has satisfied his onus to prove fraud on the part of Xinfeng for the purpose of the application for an interim interdict.

[126] The next Chapter is a discussion of the main legal issues in this case – whether the Minister could himself revoke ML243 without applying to a court for appropriate relief, and even if he could not, what is the impact of a finding of fraud at this interim stage, on the applicant's entitlement to an interim interdict.

Prima facie right (2): does the Minister of Mines have the power to himself revoke a mining licence if the licence holder committed fraud of the sort alleged

¹⁹ *Mahamat v First National Bank of Namibia Ltd* 1995 NR 199 (HC) at 203 – 204; *Galp v Tansley, NO and Another* 1966 (4) SA 555 (C) 559 G-I

in this matter, without having to approach a court for an appropriate remedy? Even if he does not have the power, can the court grant an interim interdict to a beneficiary of an administrative decision where the court has found on a prima facie basis that the beneficiary's fraud played a role in securing the benefit in the first place?

[127] This Chapter is structured as follows:

- (a) Brief introduction to administrative law
- (b) The parties' submissions
- (c) Functus officio
- (d) The four *Oudekraal* principles
- (e) The extension of the first *Oudekraal* principles in South Africa
- (f) The reception of the *Oudekraal* principles in Namibia
- (g) Auas Diamond Company
- (h) China Construction
- (i) Xinfeng Investments
- (j) Conclusion on prima facie right

Brief introduction to administrative law

[128] A very basic introduction of this branch of the law may assist to contextualise the discussion that follows. According to Hoexter and Penfold²⁰

'Administrative law has been described broadly as a branch of public law that regulates the legal relations of public authorities, whether with private individuals and organisations or with other public authorities. In South Africa today, however, it is more accurate to regard administrative law as regulating the activities of bodies that *exercise public powers or perform public functions*, irrespective of whether those bodies are public authorities in the strict sense. The Constitutional Court has described administrative law as 'an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government.'

²⁰ Cora Hoexter and Glen Penfold *Administrative Law in South Africa* 3rd Ed, Juta, 2021 at 2 - 3

[129] The same can be said of the position in Namibia today.

[130] In their introductory discussion of the numerous aspects and categories of administrative law,²¹ the authors explain that it is wrong to equate administrative law with the more well-known concept of judicial review. The former is much broader than the latter. Unlike judicial review, administrative law is not focused primarily with 'the judicial detection and correction of maladministration'. Instead, 'administrative law has a more positive side: it is concerned not merely with tracking down instances of bad administration, but with the empowerment of administrators, the facilitation of administration and with methods of encouraging good decision-making.'

[131] Regarding the broad reach of administrative law, the authors clarify²² that administrative law is potentially relevant in just about every area of government activity. These areas include 'public procurement, all forms of licensing, town planning, expropriation, the provision of education and health services, the allocation of welfare benefits, the collection of taxes, the prosecution of criminal suspects, the protection of the environment and the regulation of the economy.' Considering the broad reach of administrative law, and the continued expansion of the power and influence of governments in modern society, the rules of administrative law and their application are clearly significant to the daily lives of just about every citizen.

[132] Hoexter and Penfold explain that there are masses of rules and principles where administrative bodies are concerned, and there is often disagreement on the extent to which the law, and the courts, ought to regulate administrative process.²³ The core dispute between the Minister and Xinfeng is such a disagreement: could the Minister make the decision to revoke ML243, or did he have to approach a court to decide whether it is appropriate to revoke ML243.

²¹ Cora Hoexter and Glen Penfold *Administrative Law in South Africa* 3rd Ed, Juta, 2021 at 10 to 12

²² *Ibid* 12 to 15

²³ *Ibid* 12

The parties' submissions

[133] Xinfeng argues that the Minister has made a final decision and could not revoke the decision himself since he is *functus officio*. Xinfeng also argues that the Namibian superior courts have adopted the first *Oudekraal* principle as extended in South Africa. The effect of this extended principle is that no favourable administrative decision that is alleged to be defective can be revoked, cancelled, or varied without statutory authority or a court order. It does not matter what the alleged defect is in the decision. Xinfeng therefore submits that the Minister is guilty of impermissible self-help. Xinfeng relies mainly on the Supreme Court decision in *Hashagen v Public Accountants and Auditors Board*,²⁴ the High Court judgment in *Xinfeng Investments (Pty) Ltd v Chief Executive Officer of Business and Intellectual Property Authority*,²⁵ and the various South African Constitutional Court judgments that followed *Kirland*.²⁶

[134] The Minister argues from the overall premise that 'fraud unravels all'. He argues that fraud cannot found or maintain any claim by Xinfeng to relief. The argument has four main components. First, if it is found at this interim stage that Xinfeng has not cast sufficient doubt on the Minister's claim of fraud, then Xinfeng would have failed to prove that it obtained a valid mining licence and must have known at the time when it received the license that the license was not valid. For this argument, the Minister relies on *Auas Diamond Company (Pty) Ltd v Minister of Mines and Energy*²⁷. Secondly, the Minister argues that the presence of fraud meant that there was no decision to grant ML243 at all. The decision to grant ML243 was induced by fraud, which makes it a nullity,

²⁴ *Hashagen v Public Accountants and Auditors Board* 2021 (3) NR 711

²⁵ *Xinfeng Investments (Pty) Ltd v Chief Executive Officer of Business and Intellectual Property Authority* (HC-MD-CIV-MOT-REV-2022/00330) [2020] NAHCMD 459 (2 September 2022)

²⁶ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC). Several of the leading subsequent judgments are carefully analysed in Daniel Malan Pretorius *Oudekraal After Fifteen Years: The Second Act (Or, A Reassessment Of The Status And Force Of Defective Administrative Decisions Pending Judicial Review)* Stell LR 2020

²⁷ *Auas Diamond Company (Pty) Ltd v Minister of Mines and Energy* 2017 (2) NR 418 (SC)

from which nothing can flow. The Minister relies on various judgments and authors that appear to support the proposition that the common law permits a decision maker to revoke his decision if the decision was induced by fraud, irrespective of any statutory authorisation. Thirdly, the Minister argues that the first *Oudekraal* principle is not engaged at all. Even if it is engaged, the Minister argues that there is no basis for the acceptance of the extension to the first principle in Namibia. It is argued on the Minister's behalf that the recent judgment in *Xinfeng Investments v CEO of BIPA*²⁸ is distinguishable and thus not binding in this case.

Functus officio

[135] Under the *functus officio* doctrine, a functionary generally cannot change her mind and cancel, revoke, or amend his decision once she has made a final decision. Generally, a final decision is one that is not stated or implied as being only a preliminary decision, and it becomes final once it is published, announced, or otherwise conveyed to those affected by it. Generally, the decision maker can only reopen or revoke her final decision if authorized by statute.²⁹

[136] The reason for the rule is to allow 'both the decision maker and the subject to know where they stand. At its core, therefore, is fairness and certainty.'³⁰

[137] When the general principles of the *functus officio* rule are applied, the parties agree that the Minister would not have had the power to revoke ML243 because the decision to grant was not a preliminary decision and it was communicated to Xinfeng. On the general principles, the Minister could only revoke the decision if he had statutory authorisation. However, the Minister argues that there are exceptions to the general principles.

²⁸ *Xinfeng Investments (Pty) Ltd v Chief Executive Officer of Business and Intellectual Property Authority* (HC-MD-CIV-MOT-REV-2022/00330) [2020] NAHCMD 459 (2 September 2022)

²⁹ *Hashagen v Public Accountants and Auditors Board* 2021 (3) NR 711 SC par 27 and 84.

³⁰ *Ibid* par 27

[138] One of the exceptions, the Minister argues, is 'where a decision has been reached on the basis of perjured or fraudulent information supplied by Xinfeng.' In such circumstances, 'the decision maker may revoke the decision' since 'fraud, as Denning LJ put it, unravels everything'.³¹

[139] Xinfeng countered this part of the Minister's argument by referring to paragraphs 27 and 84 of the *Hashagen* judgment. There, the Supreme Court held that 'a decision cannot be reopened or revoked by the decision maker unless authorized by law, expressly or by necessary implication'.³² In paragraph 84 of the main judgment, Frank AJA stated that 'a statute may, of course, provide for deviation from the above general principle where it authorizes a revocation or variation by the original decision maker or by a higher authority'. As I understand Xinfeng's argument, the implication is that the Supreme Court does not regard fraud as an exception.

[140] On the other hand, Xinfeng appears to accept that the '*functus officio* doctrine is not absolute'. Xinfeng relied in argument on the findings in paragraph 99 of the recent High Court judgment in *Xinfeng Investments v CEO of BIPA*.³³ There, the court acknowledged that the *functus officio* rule is not absolute. The court found it was not necessary to identify the exceptions because it believed it bound by the Supreme Court judgments that followed *Oudekraal*.

[141] Xinfeng also relies on the South African Constitutional Court judgments in *Kirland*,³⁴ *Merafong*³⁵ and the line of South African superior court judgments that followed *Kirland and Merafong*.

³¹ Lawrence Baxter *Administrative Law*, 1994, Juta & Co, Cape Town 375

³² Damaseb DCJ, in his concurring judgment at paragraph 27

³³ *Xinfeng Investments (Pty) Ltd v Chief Executive Officer of Business and Intellectual Property Authority* (HC-MD-CIV-MOT-REV-2022/00330) [2020] NAHCMD 459 (2 September 2022) par 99

³⁴ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC)

³⁵ *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC)

[142] Subsequent sections of this Chapter deal with the Minister's retort to this last proposition, as well as with the judgments on which Xinfeng relies and their application to this dispute. The remainder of this section will deal only with the Minister's proposition that fraud is an exception to the *functus officio* rule (although there is some unavoidable overlap).

[143] As the starting point, it indeed appears that the Supreme Court has not yet had to deal head-on with the question of whether fraud is an exception to the *functus officio* rule. The *Hashagen* judgment, for example, did not engage at all with the possible fraud exception since it was not an issue. The Supreme Court instead stated that 'the law is fairly straightforward and there is no dispute between the parties as to the law.'³⁶

[144] Turning to the essence of the authorities on which the Minister relies for the proposition that fraud is an exception to the *functus officio* rule in administrative law.

[145] The Minister relies on the judgments in *Stewart v Johannesburg Liquor Licensing Board*³⁷, *Bronkhorstspuit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd*³⁸, *Thompson, trading as Maharaj and Sons v Chief Constable Durban*³⁹, and *Trans Air (Pty) Ltd versus National Transport Commission*⁴⁰. Other than *Stewart*, the cases all revolved around the powers of statutory bodies to revoke their own decisions, or to apply to court to revoke their decisions, on account of various defects in the decision-making that had led to the grant or renewal of licences issued by those bodies. Although fraud was alleged in some of the cases, fraud was not proven in any. Importantly, in all the judgments after *Stewart*, the courts appear to have accepted that *Stewart* is the

³⁶ *Hashagen supra* par 84.

³⁷ *Steward v Johannesburg Liquor Licensing Board* 1914 WLD 130, 132

³⁸ *Bronkhorstspuit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd*, 1950 (3) SA 598 (T), 601 F – G,

³⁹ *Thompson trading as Maharaj and Sons v Chief Constable Durban* 1955 (4) SA 662 (D) 667E-F, 669F

⁴⁰ *Trans Air (Pty) Ltd versus National Transport Commission* 1977 (3) SA 784 (A), 792D – E.

authority for the proposition that fraud is an exception to the *functus officio* rule for administrative bodies. In my reading of *Stewart*, it is not.

[146] According to the headnote in *Stewart*: 'Where a renewal of a licence is refused after due hearing, a licencing court is *functus officio* and has no power to hear an application for renewal in the absence of perjury or fraud.' The headnote is not an accurate summary of the judgment by Bristowe J.

[147] The applicant in *Stewart* had held a liquor licence for many years. In December 1913, its application to renew the licence was refused because of an objection by the police. The applicant applied to a judge in chambers for a review of the decision to refuse his renewal application. The application failed, as did a subsequent appeal. In June 1914, the applicant applied to the licencing court to rehear his application for renewal or to grant him a new license. The applicant claimed the evidence presented by the police in December 2013 had been wrong in several material respect. The licencing court found it had no jurisdiction to grant a new license and that it was *functus officio* regarding the renewal, unless otherwise directed by a superior court. The matter then came before Bristowe J.

[148] Bristowe J dismissed the application. These are the relevant parts of his reasons:

'I assume without deciding that a licencing court is not an inferior court within the meaning of sections 18 and 27 of Proclamation 14 of 1902, and that the case is within my jurisdiction.'

and

'Whether a decision of the licensing court can, like a judgment, be set aside for fraud or perjury, I do not know. I should be loth to think that no remedy could be found to meet a case of that kind. But no such relief can be obtained on this application. In the first place there is no evidence of fraud or perjury, though there are allegations of error, and

in the second place such relief could only be obtained in an action where viva voce evidence could be taken.' (emphasis supplied)

[149] In my understanding of the judgment, Bristowe J did not finally express himself on the question of fraud being an exception to the *functus officio* rule. Therefore, despite the unequivocal headnote, *Stewart* is not an authority for the proposition that fraud is definitely an exception to the *functus officio* rule for administrative bodies. Instead, on my reading of *Stewart* and the subsequent judgments cited by the Minister in support of the proposition, there was uncertainty in South Africa judgments about the correctness of this proposition.

[150] Turning to the casebooks and academic articles. Adv Narib, counsel for the Minister, referred to several South African publications where the authors address the general principle that an administrator ought to be permitted to withdraw an invalid administrative decision, provided the beneficiary has not challenged the decision before a court or acquired rights and powers from the invalid decision. Most of the authorities do not address favourable administrative decisions secured by fraud. Counsel did cite three South African authorities that appear to support the Minister's proposition.

[151] In *Administrative Law*⁴¹, Lawrence Baxter argues that the decision-maker may indeed revoke an administrative decision that has been reached on perjured or fraudulent information supplied by the beneficiary. According to Baxter, 'legal opinion appears unanimous even though no case on point is to be found.' Baxter relies on the judgments discussed above.

[152] JR De Ville⁴² is not as unequivocal as Baxter. Instead, as the Minister's counsel put it, 'De Ville argues that the principle of legality serves to justify the withdrawal of unlawful administrative act, whereas the principle of legal certainty (legitimate expectation) requires that the administrative decision be kept in place. He however advocates for the power of an administrative body to

⁴¹ *Administrative Law*, 1994, Juta & Co, at page 375

⁴² *Judicial Review of Administrative Action in South Africa*, Revised First Ed, 2003. LexisNexis Butterworths at p79, para 2 2 3 2.

withdraw or revoke an unlawful administrative decision, particularly one obtained through deception, fraud or bribery.⁴³ My consideration of the passages from De Ville on which the Minister relies, as well as the author's discussion of the relevant principles, suggests that the author was not sure whether the law in South Africa, in 2001, was that an administrator may revoke a favourable decision secured by fraud. Rather, as the author states at p77, par 2 2 3: 'The current position in so far as the revocation of decisions is concerned is mired in uncertainty. This is especially the case in so far as the revocation of valid (favourable) decisions and invalid decisions are concerned.'

[153] The most recent authority on which the Minister relies, is R Henrico '*The Functus Officio Doctrine and Invalid Administrative Action in South African Administrative Law: A Flexible Approach*'.⁴⁴ The author returned to Baxter's unequivocal position. At 117, the author argues that an administrator will not be entitled to revoke a final decision without statutory authority, except where the administrator did not have the competence to perform the act, or 'where the action was fraudulently performed on the basis that fraud unravels everything.'

[154] Adv Maleka SC, Xinfeng's counsel, argued that *Port Edward Town Board v Kay*⁴⁵ on which Henrico relies for his proposition, does not support the proposition. Having considered the judgment on *Port Edward*, I agree with Adv Maleka. *Port Edward* deals with the law on setting aside a court judgment on the basis of fraudulent evidence. It does not address the effect of fraud in administrative decision-making.⁴⁶

⁴³ Between pages 77 to 82 of his work, the author does not present any authority for his argument, other than a comparison with the German administrative law. However, earlier in the text, on page 72, the author cites *Bronkhorstspuit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd, 1950 (3) SA 598 (T), 601 F – G* as the sole authority.

⁴⁴ R Henrico '*The Functus Officio Doctrine and Invalid Administrative Action in South African Administrative Law: A Flexible Approach* Speculum Juris Vol 34 No 2 (2020) Published 29 January 2021 ISSN 2523-2177.

⁴⁵ *Board v Kay* 1994 1 SA 690 (D).

⁴⁶ It may be that the author explains the basis for the proposition in the textbook cited in the article. Unfortunately I did not have access to that work.

[155] In his written argument, Adv Narib referred the court to one Australian High Court judgment - *Minister for Immigration and Multicultural Affairs v Bhardwaj*⁴⁷. In oral argument counsel handed up one Australian article - *Don't think twice? Can administrative decision makers change their mind?*⁴⁸ and one Canadian article - *Doctrine of Functus Officio: The changing face of finality's old guard.*⁴⁹

[156] *Don't think twice?*⁵⁰ incorporates a detailed commentary on the *Bhardwaj* judgment. Although the article crisply summarises the position in Australia and England in this contested area of the law, and perhaps gives the clearest insight into the thinking behind the approach adopted by the Minister in this case, time does not allow me to do justice to the authors by attempting to summarise the content. Instead I will extract from the *Bhardwaj* judgment and the article, what I found most relevant to this part of the case:

(a) Unlike the application of the *functus officio* doctrine in the judicial context, the authors believe there is no overarching principle in administrative decision-making that 'once an administrative decision is made it cannot be re-opened, varied or revoked. Rather in each case it is necessary to consider what the powers of the decision maker are in this regard. This generally requires the application of administrative law and statutory interpretation principles.' (p13)

(b) There are two opposing approaches to the question of whether an administrator could treat a decision as invalid and make it again without involving a court – the absolute invalidity approach, and the relative invalidity approach. Both enjoyed judicial support; (p15)

⁴⁷ *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11.

⁴⁸ Robert Orr and Robyn Briese. *Don't think twice? Can administrative decision makers change their mind?* AIAL Forum No. 35.

⁴⁹ Anna SP Wong. *Doctrine of Functus Officio: The changing face of finality's old guard.* The Canadian Bar Review [Vol 98. 2020] 543-582.

⁵⁰ Robert Orr and Robyn Briese. *Don't think twice? Can administrative decision makers change their mind?* AIAL Forum No. 35.

(c) The absolute invalidity approach is essentiality based on the view that a decision made by a decision maker who acts outside of their jurisdiction can simply be ignored as it is invalid from the time it is made, for all purposes. This approach 'pays significant deference to the principle of legality...'(p15)

(d) Under the absolute invalidity approach, there is Australian authority for the proposition that 'a decision, tainted by fraud or misrepresentation, does not in fact have the character of a decision and can simply be ignored. It does not have to be revoked because it is a nullity, and does not require a judicial determination that it is a nullity.' (p16)

(e) On the other hand, the essence of the relative invalidity approach is that 'there is no such thing as an absolute invalidity; decision are only invalid if a court determines that they are invalid.' (p17)

(f) *Bhardwaj* 'clearly leans towards the absolute theory of invalidity..' (p38);

(g) At the time of the publication of the article (which, I must add was pre-*Oudekraal* and the extensive developments in this area of law that followed in South Africa and Namibia as discussed later in this judgment), the position in Australia on whether an administrative decision 'can be varied or revoked is essentially a question of statutory power.' (p38) and

(h) 'In *Bhardwaj*, Justice Kirby noted that the debate about the invalidity of administrative decisions presents one of the most vexing puzzles in administrative law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction.' (*Don't think twice?* p15, par 2).

[157] It appears Justice Kirby's observation aligns with the position adopted by the South African Constitutional Court in *Kirland*,⁵¹ *Merafong*⁵² and the

⁵¹ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).

⁵² *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC).

judgments that followed the majority line in those cases.⁵³ Justice Kirby dissented in *Bhardwaj*. The South African and Namibian courts lean towards the relative invalidity theory. However, similar to the outcome in *Bhardwaj*, our courts have not completely abandoned one theory in favour of the other.

[158] Turning to the Canadian article - *Doctrine of Functus Officio: The changing face of finality's old guard*. The author summarises the development of the *functus officio* doctrine in Canadian law between 1989 and 2019. From the article, I extract two issues that appear relevant to the dispute between Xinfeng and the Minister. Both are grounded in the leading Canadian Supreme Court case in this area, *Chandler v Alberta Association of Architects*.⁵⁴

[159] One proposition drawn from this article supports part of the Minister's case. At 552, the author argues that a decision can only be final 'when the decision maker has completely fulfilled her task in disposing of the issues raised in the proceedings.' The passage from *Chandler* on which the author relies, holds that 'if the Tribunal has failed to dispose of an issue fairly raised in the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its task.'⁵⁵ It supports the Minister's case in the sense that the Minister argues that he was unable to perform his function under s 92(2) of the Minerals Act, because he did not have the correct information before him.

[160] The other proposition is against the Minister. According to the Canadian Supreme Court in *Chandler*, there are only three existing exceptions to *functus officio* in Canada. Fraud is not listed as an exception.⁵⁶

⁵³Several of the leading subsequent judgments are carefully analysed in Daniel Malan Pretorius *Oudekraal After Fifteen Years: The Second Act (Or, A Reassessment Of The Status And Force Of Defective Administrative Decisions Pending Judicial Review)* Stell LR 2020 1.

⁵⁴ *Chandler v Alberta Association of Architects* [1989] SCR 848.

⁵⁵ *Ibid* 862.

⁵⁶*Chandler v Alberta Association of Architects* [1989] SCR 848 at 861-862; Anna SP Wong. *Doctrine of Functus Officio: The Changing face of finality's old guard*. The Canadian Bar Review [Vol 98. 2020] 543-582 at 573.

[161] As I have hopefully demonstrated, there is no consensus in the authorities on which the Minister relies - South African, Australian or Canadian – for the Minister’s proposition that fraud is always an exception to the *functus officio* doctrine in administrative law.

[162] Outside of administrative law, counsel for the Minister sought support for his argument in the Supreme Court’s approach to fraud in the law of civil procedure and private law. Counsel referred to the decisions of *Willem Petrus Swart v Koos Brand*⁵⁷ and *Moolman v Jeandre Development*.⁵⁸

[163] In *Swart*, the court quoted with approval the famous dictum by Lord Denning in the case of *MacFoy v United Africa Co. Ltd*:⁵⁹

‘If an act is void, then in law it is a nullity. It is not only bad, but is incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without further ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.’

[164] The dictum in *MacFoy* did not apply in the case before the Supreme Court because the Magistrate Court’s Act requires a person aggrieved by a judgment it considers void, to apply for it to be set aside.

[165] In *Moolman*, counsel argues, the court accepted in the context of a fraudulent contract that fraud unravels everything. As such, he argues, once fraud is established, ML243 is a nullity and cannot maintain any rights.

[166] In my view, neither of the judgments supports the Minister’s proposition that fraud is an exception to the *functus* doctrine in administrative law. There are numerous differences between the different areas of the law under investigation in the two Supreme Court cases and the one now before court,

⁵⁷ *Willem Petrus Swart v Koos Brand* SA 17/2002 (SC).

⁵⁸ *Moolman v Jeandre Development* CC 2016 (2) NR 322 9SC) at 340C.

⁵⁹ *MacFoy v United Africa Co. Ltd* (1961) 3 ALL E.R.

under the common law and under the Namibian Constitution. As such, it may not be appropriate to transplant the principles from those areas of the law into this area as it has developed up to now, without careful reflection on the differences. In addition, even in the private law context, fraud may very well unravel all, but it is not a time machine or a magic wand. As demonstrated by the outcomes of both judgments, the court does not only ask 'is fraud established' and, and once the question is answered in the affirmative, everyone goes home. Unless the private parties agree otherwise, what exactly should happen with the bundles of rights and obligations acquired as a matter of fact even under a fraudulent judgment or contract, must be determined by a court, within the applicable statutory framework.

[167] The *functus officio* rule did not originate in administrative law. It was received into this branch of the law in parts from the law of civil procedure and the law of arbitrations. However, the authorities show that not every principle regarding the finality of, for example, court judgments, has found its way into administrative law. While the *functus officio* rule does play a significant role in administrative law, the rule is primarily applied in administrative law to further the values (or principles) of finality and certainty. As indicated, I have not found binding authority for the proposition that fraud is definitely an exception to the *functus officio* rule in Namibian administrative law.⁶⁰ If one considers the

⁶⁰ For an opposing view, see Daniel Malan Pretorius, *The Origins Of The Functus Officio Doctrine, With Specific Reference To Its Application In Administrative Law* (2005) 122 SALJ 832; Daniel Malan Pretorius, *The Status And Force Of Defective Administrative Decisions Pending Judicial Pronouncement* (2009) 126 SALJ 537. The author's illuminating discussion of the origins and development of the *functus officio* doctrine and the authorities that he cites (at least those which time and availability allowed me to peruse) did not lead me to an unequivocal conclusion that fraud is indeed an exception to the *functus officio* rule in our administrative law. The English judgments on which the author relies deal with immigration law, where legislation empowers the functionaries to change certain decisions on discovering fraud. Two of the articles he cites, one Australian and the other Canadian (Campbell, 1990 and McDonald, 1979, respectively) argue for the reception in administrative law of the fraud - exception as applied with respect to judicial decisions but do not, in my reading, go as far as arguing that the exception is indeed part of the law in those jurisdictions. To paraphrase Justice Kirby in *Bhardwaj*, I agree with the author that 'principle seems to pull one way', yet I find that 'practicalities seem to pull in the opposite direction'. Also see: Wade & Forsyth. *Administrative Law* 11th Ed, 2014. Oxford

purpose of the application of the rule in administrative law, and the recent developments in this area it appears that fraud should not be an exception here.

[168] As I understand the argument for the Minister, if fraud is recognised as an exception, a decision procured by fraud should be seen as no decision at all, leaving the decision open to revocation or substitution by the administrator who made the decision, without the need to approach a court for relief, provided only that the administrator gives the beneficiary a fair opportunity to make representations before deciding on the next step. I do not agree that this is an accurate statement of the law in its current state of development.

[169] In *Thompson*,⁶¹ the court held ‘The general rule is that, in the absence of special statutory provision, once a judicial or quasi-judicial decision has been given, the Court or officer giving it is *functus officio* in respect of the matter to which it relates. There are rare exceptions to this rule, but the tendency to-day is to restrict rather than to extend the scope of the exceptions.’ Considering the solutions the South African and Namibian courts have shaped to deal with the tension between the constitutional values of finality and certainty on the one hand and legality on the other, as discussed in the next sections of this Chapter, I decline to accept that fraud is an exception to the *functus officio* rule as far as the *functus officio* rule applies in Namibian administrative law.

The four *Oudekraal* principles

[170] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁶² ‘is probably the most the annotated [and debated] SCA judgment of recent times in the field of administrative law.’⁶³ While the authors are referring to the position in South Africa, the *Oudekraal* judgment has been applied and debated in several Namibian judgments as well.⁶⁴ To avoid adding to the confusion that surrounds University Press, at 193.

⁶¹ *Thompson, Trading as Maharaj & Sons v Chief Constable, Durban* 1965 (4) SA 662 (D) 668D.

⁶² *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

⁶³ Cora Hoexter and Glen Penfold *Administrative Law in South Africa* 3rd Ed, Juta, 2021 at 760.

⁶⁴ Focussing just on reported Supreme Court judgments, see *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) paras 51 and

this judgment and its application, I will not attempt to summarize the facts and findings of *Oudekraal* and will instead refer to the main issues: the four *Oudekraal* principles, the extension of the first and third principles, and their reception in Namibia.

[171] The essence of the four *Oudekraal* principles, the judicial disagreements about them and the academic debates about their foundations and application, including all of the South African cases to which both parties referred during argument, are accurately summarised and parsed in at least two sources. I drew substantial guidance from these sourcing in trying to resolve Xinfeng's and the Minister's disputing positions. The first source is the appropriately titled article *Oudekraal After Fifteen Years: The Second Act (Or, A Reassessment Of The Status And Force Of Defective Administrative Decisions Pending Judicial Review)*.⁶⁵ The second source is the 3rd Edition of *Administrative Law in South Africa*.⁶⁶

[172] Hoexter and Penfold, with reference to Mahlangu,⁶⁷ discuss the four *Oudekraal* principles in detail. I will focus on a brief introduction to each principle and on the original formulation of the principles as far as possible. I will deal with the relevant extensions in the next section.

68; see *Auas Diamond Company (Pty) Ltd v Minister of Mines and Energy* 2017 (2) NR 418 (SC) (where the SC provides a more extensive summary and discussion of the judgment); *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC); *Namibia Airports Co Ltd v Fire Tech Systems CC and Another* 2019 (2) NR 541 (SC); *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others* 2020 (1) NR 60 (SC); and *China State Engineering Construction Corporation v Namibia Airports Co Ltd* 2020 (2) NR 343 (SC).

⁶⁵ Daniel Malan Pretorius *Oudekraal After Fifteen Years: The Second Act (Or, A Reassessment Of The Status And Force Of Defective Administrative Decisions Pending Judicial Review)* Stell LR 2020 1.

⁶⁶ Hoexter and Penfold *Administrative Law in South Africa* 3rd Ed, Juta, 2021, where the passages most relevant to this part of the dispute are found at 380 to 388, and 758 – 780.

⁶⁷ Siyabonga Mahlangu, *Balancing Legality and Certainty: The Oudekraal Principles and their Development* (PhD thesis, University of Witwatersrand, 2020).

[173] The first *Oudekraal* principle appears to be the most prominent principle and is material to the resolution of this dispute. It holds that ‘until an ‘act’ (the usefully neutral term used in *Oudekraal*) is set aside, it exists in fact and is capable of having legal effects. This means that in the interests of certainty and in order to avoid self-help, even an act that appears unlawful cannot simply be disregarded as a non-act’.⁶⁸

[174] The second principle pronounces the proper enquiry: ‘The proper enquiry in every case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts.’⁶⁹

[175] The third principle affirms that the availability, under specified circumstances, of a collateral challenge. It means that a person affected by an ‘act’, may sometimes lawfully wait until the state or administrator attempts to compel her to do or refrain from doing something, and only then ‘challenge the validity of the underlying act in an indirect or collateral manner.’⁷⁰

[176] The fourth principle concerns the remedies available to a court when faced with a dispute on review. Although a court must consider setting aside an action for which the applicant has made out a review ground as the default remedy, sometimes a court may refuse to set the act aside. In such a case, a court may find the importance of legality – that all who exercise public power must do so only if and as authorised – must take a back seat to equally important but ‘competing considerations such as certainty, finality and practicality.’⁷¹

The extension of the first *Oudekraal* principle in South Africa

⁶⁸ Hoexter and Penfold *Administrative Law in South Africa* 3rd Ed, Juta, 2021 760 – 761.

⁶⁹ Ibid 764; *Oudekraal* par 31.

⁷⁰ Hoexter and Penfold *Administrative Law in South Africa* 3rd Ed, Juta, 2021 766.

⁷¹ Ibid 773 – 774.

[177] In 2009, Pretorius⁷² analysed the effects of *Oudekraal* on the South African administrative law with a focus on the status and force of invalid administrative decisions. Due to ‘the plethora of ensuing judgments that have sought to explain and apply “the *Oudekraal* principle” – not always in pellucid terms’, the author revisited and explored the landscape in 2020⁷³. Only one of the issues he explored is immediately relevant.

[178] Pretorius considered whether *Oudekraal* is authority for the following proposition: ‘that an organ of state that has performed an administrative action which is prima facie unlawful is bound by that action, and must give effect to it as though it were lawful and valid, unless and until it is declared invalid and set aside on judicial review.’ He summarises his conclusion as follows: ‘as a general proposition, and absent statutory indications to the contrary, the author of seemingly unlawful administrative action may not disregard that action despite its legal infirmities.’⁷⁴ At page 5, the author briefly introduces some of the forceful constitutional, policy and doctrinal reasons why organs of state should not be allowed to disregard prior administrative decisions, even if such decisions are evidently defective.

[179] Of special importance to this part of this case is the author’s further observation that

‘The Constitutional Court has repeatedly grappled with issues arising from the *Oudekraal* paradox. In doing so, the Court has adopted an interpretation of *Oudekraal* broader than, if not incompatible with, the analysis propounded in my initial article. In particular, the Constitutional Court has interpreted the *Oudekraal* doctrine as extending

⁷² Daniel Malan Pretorius *The Status And Force Of Defective Administrative Decisions Pending Judicial Pronouncement* (2009) 126 SALJ 537.

⁷³ Daniel Malan Pretorius *Oudekraal After Fifteen Years: The Second Act (Or, A Reassessment Of The Status And Force Of Defective Administrative Decisions Pending Judicial Review)* Stell LR 2020 1.

⁷⁴ Daniel Malan Pretorius *Oudekraal After Fifteen Years: The Second Act (Or, A Reassessment Of The Status And Force Of Defective Administrative Decisions Pending Judicial Review)* Stell LR 2020 1 at p4.

“well beyond second-actor cases and [as admitting] of no exception, even in cases involving clear illegalities’.”⁷⁵

[180] Pretorius explains⁷⁶ the foundation of this conclusion with reference to the Constitutional Court’s majority judgment in *Kirland*, and concludes after discussing the various criticisms levelled at the majority judgment, that:

‘It is clear from *Kirland*, unsatisfactory though that decision is in some respects, that the author of a facially invalid decision is, in the absence of statutory authorisation, not entitled to reverse or disregard that decision himself. If he doubts the validity of his own decision, he must take it on review, failing which it remains effective *pro tempore*. It is debatable whether *Oudekraal* provided authority for the principle; but the principle now seems established. The question remains whether the principle applies across the board, even in the exceptional instances in which, at common law, it perhaps did not apply.’⁷⁷

[181] With respect to the final sentence of the quoted statement, the author suggests that these *exceptional instances* may include where the decision was induced by fraud, as he proposed in his 2009 article.⁷⁸ While I agree with the author that there may be exceptional circumstances when the principle would not apply, I am unable to agree that fraud may be an exception, for the reasons already advanced in this judgment, and because of what was held by the Constitutional Court in *Merafong* and, even later, in a decision to which the parties in the present dispute both referred – *Magnificent Mile*.⁷⁹

[182] Although lengthy, I think it is necessary to quote from the judgment of Justice Madlanga, writing for the majority in *Magnificent Mile*.⁸⁰ As Adv. Maleka SC argued on behalf of Xinfeng in this case, these passages address the main legal issue in this case head-on:

⁷⁵ Ibid at 14.

⁷⁶ Ibid at 17 to 20.

⁷⁷ Ibid at 20.

⁷⁸ Ibid at footnote 68.

⁷⁹ *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and Others* 2020 (4) SA 375 (CC).

⁸⁰ *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and Others* 2020 (4) SA 375 (CC) paras 50 to 58.

[50] What appears to be at the heart of the concurring judgment's concerns is what the rule of law dictates. The concurring judgment makes the point that it would be at variance with the rule of law to enforce unlawful administrative action. It is true — as the concurring judgment says — that the Magnificent Mile award, which was made contrary to statutory prescripts, is inconsistent with the principle of legality, an incident of the rule of law. It is also true that the supremacy clause of our Constitution decrees that '(t)his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. Crucially though, the Oudekraal rule itself is informed by the rule of law. Imagine the spectre of organs of state and private persons ignoring or giving heed to administrative action based on their view of its validity. The administrative and legal chaos that would ensue from that state of affairs is unthinkable. Indeed, chaos and not law would rule.

[51] It is for this reason that the rule of law does not countenance this. The Oudekraal rule averts the chaos by saying an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside. The operative words are that it exists 'in fact'. This does not seek to confer legal validity on the unlawful administrative act. Rather, it prevents self-help and guarantees orderly governance and administration. That this is about the rule of law is made plain by Kirland:

'The fundamental notion — that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside — springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom* —

"(t)he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process."

'For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help.' [Emphasis added.]

[52] The concern of the concurring judgment that the effect of the Oudekraal rule is to enforce constitutionally invalid administrative action is ameliorated by the fact that the action is open to challenge through the court process. Until a court process has taken place, the rule of law must be maintained. The alternative of a free-for-all is simply not viable.

[53] I read the concurring judgment to say, the rule that an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside, needs to be qualified. It accepts the necessity of the rule. It says:

'(W)e must acknowledge the principle that, just like laws, administrative actions are presumed to be valid until declared otherwise by a court of law. What this means is that any person who disregards such law or action does so at his or her own peril should it turn out that the law or action is valid.'

[54] But, says the concurring judgment, this presumption — like others — is rebuttable; and '(i)n a case like the present where facts establish that the administrative action in question was illegal, it must be taken that the presumption has been rebutted'. It continues and says '(t)here can be no justification for treating what has been proven to be invalid as valid'. (Emphasis added.) Although the focus of the concurring judgment is Kirland, I do not see how the view of that judgment in this regard cannot apply to Oudekraal as well. For that reason and to avoid confusion, I will continue to refer to the Oudekraal rule.

[55] I understand the qualification proposed by the concurring judgment to be that the rebuttal of the presumption may take place without any court process. My immediate practical, if not legal, difficulties are manifold. Who rebuts the presumption? Who — outside of a court process — determines that the invalidity of the administrative action has been proven and that, therefore, the presumption has been rebutted; and how do they do that? What if there is disagreement on whether the illegality has been proven? The approach of the concurring judgment has the potential of taking us to the very realm of uncertainty from which the Oudekraal rule removes us. It takes us to the real possibility of a free-for-all. Kirland tells us that ignoring irregular administrative action on the basis that it is a nullity —

'invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be

imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.'

[56] An argument analogous to the qualification proposed by the concurring judgment was rejected in *Merafong*. That argument is captured thus:

'*Merafong* argued it should be permitted to raise a reactive challenge to AngloGold's attempt to enforce the Minister's ruling because there is a fundamental distinction between decisions that fall within the scope of powers with which a public official is clothed, but are merely wrongly taken, and those that are palpably and obviously beyond the powers of the decision maker. In the latter case, where a decision "lacks the facial imprimatur of lawfulness", a person subject to the decision is entitled to ignore it until, as a matter of process, that decision is sought to be enforced against it. At that point the nullity of the decision may be raised as a defence. Counsel contended that decisions of this nature "on their face fall beyond the ostensible scope of the powers conferred upon a public officer [and] have no validity and should be treated as such even though they have yet to be set aside on review".'

[57] The court held:

'If we were to sustain *Merafong's* argument that it was entitled to ignore the Minister's decision until it was sought to be enforced, this must extend to all cases of patent invalidity. This would suggest that an official may ignore a decision, taken under statutory power (*intra vires*), that is tainted by patently improper influence or corruption. But that is precisely what happened in *Kirland* — and the self-help argument was not countenanced. What is more, not only would what is or is not "patently unlawful" be decided outside the courts, but there would be no rules on who gets to decide and how. If failure to review a disputed decision is defensible on the basis that the decision was considered patently unlawful, the rule of law immediately suffers. So the argument is not tenable.'

[58] In similar vein *Aquila* says 'legal remedies are the province of the courts, and the courts alone'. And 'no official is entitled to pronounce a decision a nullity without going to court'. Of course, this applies to private persons as well.'

The reception of the *Oudekraal* principles in Namibia

[183] This section highlights the basic treatment of the *Oudekraal* principles in the reported Supreme Court judgments:

(a) In *Rally for Democracy*,⁸¹ the Supreme Court approved the first *Oudekraal* principle, arguably already in its extended form, if one considers the passage from *Oudekraal* quoted by the Supreme Court at the conclusion of paragraph 51.

(b) In *Auas Diamond Company*,⁸² accepted the first *Oudekraal* principle and distinguished it from the case before court.

(c) In *Anhui*,⁸³ the Supreme Court adopted the first *Oudekraal* principle.

(d) In *Fire Tech Systems*,⁸⁴ the Supreme Court applied the first and fourth *Oudekraal* principles.

(e) In *Hollard*,⁸⁵ the Supreme Court approved the third principle.

(f) And in *China State Engineering*,⁸⁶ the Supreme Court approved the extended first *Oudekraal* principle.

⁸¹ *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) paras 51 and 68.

⁸² *Auas Diamond Company (Pty) Ltd v Minister of Mines and Energy* 2017 (2) NR 418 (SC) paras 34 to 38 and 43.

⁸³ *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC) paras 42 to 44.

⁸⁴ *Namibia Airports Co Ltd v Fire Tech Systems CC and Another* 2019 (2) NR 541 (SC) paras 47 to 54.

⁸⁵ *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others* 2020 (1) NR 60 (SC) par 78.

⁸⁶ *China State Engineering Construction Corporation v Namibia Airports Co Ltd* 2020 (2) NR 343 (SC) par 5.

[184] The one High Court judgment on which both parties presented argument, is *Xinfeng Investments v CEO of BIPA*.⁸⁷ There, the court appears to have applied the first *Oudekraal* principle, in its extended form. That judgment is treated in a separate section below, as are the two Supreme Court judgments in *Auas Diamond Company* and *China State Construction*.

Auas Diamond Company

[185] In *Auas Diamond Company*⁸⁸, the appellant had applied for a second renewal of a mining licence. The Minister of Mines and Energy refused the second renewal. The appellant challenged the refusal in the High Court. In those proceedings, from the appellant's own papers it was clear that the person who signed the documents allegedly on behalf of the appellant, was never authorised by the appellant to have done so. According to the appellant, it did not know how that individual came to believe that he could act for the appellant. On the strength of the appellant's allegations, the respondents took the point that the appellants did not have legal standing to litigate. The appellant lacked standing, so the argument went, because the appellant had no rights. It had no rights, because the Minerals Act required an applicant for a second renewal to have been in possession of a valid first renewal. The applicant never had a valid first renewal because the person who purported to act as its duly authorised officer was not in fact authorised. As such, the appellant 'did not accept the grant of the first renewal and the terms and conditions attached to such grant as required by the peremptory provisions of the Act.'⁸⁹

[186] The appellant relied on the first *Oudekraal* principle to claim that the first renewal had legal consequences until set aside and could not simply be ignored. The Supreme Court rejected the argument.

⁸⁷ *Xinfeng Investments (Pty) Ltd v Chief Executive Officer of Business and Intellectual Property Authority* (HC-MD-CIV-MOT-REV-2022/00330) [2020] NAHCMD 459 (2 September 2022).

⁸⁸ *Auas Diamond Company (Pty) Ltd v Minister of Mines and Energy* 2017 (2) NR 418 (SC).

⁸⁹ *Ibid* 428B.

[187] Counsel for the Minister argues that the *ratio* of *Auas Diamond Company* is a complete answer to Xinfeng's case, if the court should find that Xinfeng has not cast serious doubts on the Minister's allegations of fraud. I disagree.

[188] The Minister's argument relies on two extracts from the judgment:⁹⁰

[39] In my view, it is not necessary to declare any administrative act unlawful, void or a nullity for the purposes of establishing whether the appellant had disclosed an exigible right to the relief sought and thus has legal standing in the review proceedings. Other than his decision to grant the first renewal subject to the acceptance of the terms and conditions, there is no evidence that the minister performed any other administrative act. As already noted, the decision to grant the first renewal application was subject to the provisions of s 48(5) which requires that an applicant for a mineral licence or its renewal should agree, in writing, within one month from the date of the notice to accept the terms and conditions set out in the notice. I agree with counsel for the minister that a court cannot unquestionably give effect to an invalid administrative act, where the court is called upon to determine not the validity of the act or decision, but the rights of a party to litigate, where these rights are affected by the administrative act in question. In this respect, it was observed, rightly in my respectful view, by Jones J in *Majola v Ibhayi City Council* 1990 (3) SA 540 (E) at 542F – G that:

'It is quite another thing to say that the courts must unquestionably give effect to an invalid administrative action or decision when they are called upon to determine, not the validity of the administrative action or decision per se, but the rights and obligations of parties to litigation where those rights or obligations are affected by the administrative action or decision. In these circumstances, it is in my opinion competent for the courts to enquire into the validity or otherwise of an administrative decision.'

and

[44] The first renewal lapsed by operation of law in terms of s 48(6). The second renewal would have been based on the validity of the first renewal. The effect of the lapsing of the first renewal is that no second renewal could occur. The first renewal

⁹⁰ Paras 39 and 44.

application having lapsed, the appellant thus retained no residual rights to apply for the second renewal...”

[189] The argument is that similar reasoning can be applied to the facts of this case, which will lead to the same conclusion. The argument proceeds as follows if the court should find even on a prima facie basis that Xinfeng committed fraud in applying for ML243, it follows that Xinfeng knew that it committed fraud in its application for ML243, and as such Xinfeng knew it never had a valid licence, since ‘fraud unravels all’. This is effectively the same as the appellant in Avas Diamond Company: it knew it did not have a valid first renewal at the time of applying for the second because the person who signed the terms and conditions necessary to accept the first renewal on its behalf, did not have authority to sign. In law, this meant that the appellant had never signed the terms and conditions. Thus, by operation of law in terms of s 48(6) of the Minerals Act, and without the need for intervention by the Minister, the first renewal lapsed. The second renewal could only be granted if the appellant had a valid first renewal. The appellant did not have a valid first renewal. As such the appellant had no rights to even apply for a second renewal. If Avas Diamond Company had no rights, Xinfeng had no rights.

[190] In my view, the flaw in the argument is that the outcome of Avas Diamond Company’s appeal was determined by applying its own facts to the provisions of the Minerals Act. There was no dispute about the ‘defect’ in the first act, and there could not be any real argument on the effect. Here, there is a material dispute about the existence of a defect, and the effect even if a defect should be found. There is no governing provision similar to s48 (6). Here, it may yet follow that despite eventually finding fraud at the conclusion of the main proceedings, the court would not set aside ML243. What would happen if the court should uphold the applicant’s point that the Minister delayed unreasonably and has not provided a reasonable excuse? I am not suggesting this will be the outcome, or even that such an outcome is probable. The fact is that undue delay has been raised and a court could refuse to hear the counter application on this basis.⁹¹

⁹¹ Contrary to the Minister’s argument in his supplementary note on argument, the counter

[191] A core premise for the Minister's argument in this regard is fraud unravels all in this area of the law. As explained, I do not agree that fraud necessarily or automatically unravels all in our administrative law in its current state of development.

[192] In addition, the current proceedings, where the court is called upon to determine the validity of the act or decision, are exactly the type of proceedings which the Supreme Court was very careful to distinguish in *Auas Diamond Company*.

[193] There is a further reason I disagree with the submission that the dictum in *Auas Diamond Company* supports Xinfeng's case. If Xinfeng's argument should be accepted, it would lead to exactly that which the courts have been astute to avoid. An administrator could say, "well, I believe you've committed fraud and therefore I revoke your licence. No matter how long you have been operating and all the repercussions or any of the other matters a court might consider. The impact of my decision to revoke is for you to sort out as you wish." So, self-help. The administrator determines if there was fraud. He will determine what matters and what does not matter. This would be the opposite of what the rule of law demands and what the courts wish to avoid, as lucidly summarised in paragraphs 50 to 58 of *Magnificent Mile* as quoted earlier in this judgment.

[194] When considering the impact of the outcome for which the Minister contends, I am mindful of the broad reach of administrative influence on the daily lives of citizens and other participants in the Namibian society and economy. I am mindful that more often than not, the administrator will enjoy a significant financial advantage, as an example, over the beneficiary. More often than not, the administrator would also be in position to use the inevitable information asymmetry to its advantage. Most beneficiaries of administrative

application was not argued on 23 May 2023. The applicant made it clear in its replying affidavit that the counter application was not yet before court. I do not recall that the Minister's counsel corrected this position in his written or oral argument prepared for and advanced on 23 May 2023.

decisions, and who may all be affected by a decision upholding the proposition for which the Minister contends, will not have the resources of a Xinfeng. How many of them might have the courage and resources to challenge a decision such this in the High Court? And how will the courts ensure that allegations of fraud regarding public resources see the light of day and are ventilated where they should be, in public and with the advantages of the institutional safeguards of courts?

[195] The concerns I express are not directed at the Minister or his good faith. Contrary to what Xinfeng asserts in its affidavits and heads of argument, I have not found evidence of bad faith on the part of the Minister. Instead, I am guided by the realities of the numerous court judgments in Namibia and South Africa, even just limited to the judgments concerning public procurement, from which it is clear that fraud and corruption are problems that ought to be ventilated publicly. Ventilating disputes about fraud in courts will align with the principles or values of finality and certainty. This approach will also align with the constitutional values of transparency and accountability.

[196] The benefits of resolving disputes on fraud in courts do not arise from the good faith or unique character of individual judges. The benefits, amongst others, arise from the constitutionally guaranteed independence of judges, from the easy public access to all court documents except in special circumstances, from the traditions and structures and rules of courts designed specifically for properly ventilating and resolving disputes of this kind, and from public access to court proceedings.

[197] The opposite approach may allow administrators to be judge, jury and executioner on fraud, without the correct support, and mostly without the public even knowing or having access to whatever hearings may be taking place. This approach will carry a real risk of unintended adverse consequences.

[198] Justice Cameron explained why, when considering the proper approach to cases such as this, one must be careful of focusing on the *bona fides* of the administrator or the *mala fides* of the beneficiary in front of court:⁹²

‘It does not assist the debate to point out that what happened in this case seems to have been highly unscrupulous and deplorable. This is because, in the next case, the official who seeks to ignore departmental action may not be acting with pure motives. Though the official here seems to have been on the side of the angels, the risk of vindicating the department's approach lies in other cases where the revoker may not be acting nobly.’

China State Engineering

[199] In *China State Engineering*,⁹³ the appellant received contracts to perform very valuable works for the respondent. Those contracts did not go through the required procurement channels and the members of the respondent's board of directors were not informed of all the relevant details of the contracts. Two high-ranking officials within the respondent were to blame. When a new board was appointed for the respondent, this board declined to honour the contracts. The new board eventually launched an application for self-review. The application succeeded in the High Court. On appeal, the only live issue was delay: whether the High Court ought to have found that the review had been launched unreasonably late and if so, whether the delay ought to be condoned.

[200] The Supreme Court introduced its discussion of the disputed issues as follows:⁹⁴

‘It is now firmly settled that administrative decision-making remains valid and binding, however flawed, unless set aside by a competent court. The consequence of that principle is that in a constitutional state governed by the rule of law and legality,

⁹² *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) par 104.

⁹³ *China State Engineering Construction Corporation v Namibia Airports Co Ltd* 2020 (2) NR 343 (SC).

⁹⁴ *Ibid* par 5.

where an administrative decision maker such as the NAC becomes aware that its decision-making is tainted by illegality (either arising from fraud by its officials, non-compliance with statutory prescripts or any other vitiating circumstance recognised in law), it is required, unless a prior challenge has been mounted by an aggrieved person with proper standing, to approach court to have the decision reviewed and set aside. Where there has been a prior challenge it may choose to go on record for the purpose of informing the court that it supports the review and make full disclosure of all the relevant evidence and documents under its control; and abide the decision of the court. What is clear is that it (and its officials entrusted with public responsibilities) must act in good faith and not become obstructive and be defensive against those seeking to have the decision-making corrected.'

[201] The parties did not refer me to this judgment. I shared the judgment with the parties on Friday morning, 23 June 2023 and sought their written submissions on its impact by the next morning. In its submissions, Xinfeng agreed that the judgment was decisive and that it aligned with paragraphs 94 and 95 of the *Xinfeng Investments v CEO of BIPA* judgment.

[202] The Minister's counsel maintained the argument that *Auas Diamond Company* and the overall principle that "fraud unravels all" were decisive. It would only be necessary to engage with *China State Construction* if the court disagreed with the primary arguments. I have already determined the primary arguments.

[203] Regarding *China State Construction*, the Minister argued that the dictum in paragraph 5 of the judgment was *obiter* in so far as fraud was concerned because fraud was not in issue in the case; instead, it was about non-compliance with the respondent's procurement policy and ultimately about condonation for the delay in delivering the application for self-review. As such, the only part of the judgment that is binding is the *ratio* concerning whether there had been an unreasonable delay (and whether it ought to be condoned).

[204] Counsel for the Minister also submitted that *China State Construction* 'had nothing to do with the validity or otherwise of an administrative decision, nor

with its cancellation by its author'. As such, on the authority of *Digashu*⁹⁵ the court was not bound by paragraph 5 of the Supreme Court's judgment. Counsel also pointed out, with due respect to the judges of the Supreme Court, that the court overstated the proposition more extensively than necessary, as the Constitutional Court had done in *Kirland* and *Merafong*. Counsel identified what he termed some of the 'the fault lines' in the quoted passage. The fault lines included the fact that paragraph 5 of the judgment does not leave any room for statutory powers of cancellation, when several statutes including the Mining Act contains such provisions. The passage also fails to account for the fact that administrative decisions may have specific life spans and may expire by effluxion of time.

[205] I am not convinced that the Supreme Court's dictum in paragraph 5 of its judgment is *obiter* as far as it lays out the duty of a state organ to seek a review of any administrative decision as soon as it notices that its decision-making is tainted by illegality, whether arising from fraud or any other vitiating defect. It seems to me that the considerations in paragraph 5 of the judgment, although not expressly stipulated in the discussion on condonation, did play a role in the outcome. A careful reading of the court's reasoning on condonation suggests that the court weighed up the objectionable conduct two high-ranking officials and the appellant, against the attempt by the members of the respondent's board of directors to eventually do what they were obliged to do under the proposition stipulated in paragraphs 5 of the judgment. But for that obligation, and its application specifically to the objectionable conduct by the respondent's own employees, the outcome may have been different.

[206] I agree with Minister's counsel that the dictum arguably overstates the principle in failing to stipulate that statutory powers of cancellation generally must be respected, and that the life span of an administrative decision may be specific and expire by effluxion of time. On the other hand, when viewed in its proper context, those issues were not before the Supreme Court and thus would

⁹⁵ *Digashu and Another v Government of the Republic of Namibia and others* Case No SA 7/2022 Supreme Court, decided on 16 May 2023 at pp25 to 35 paras [64] to [79].

not have raised any red flags and would not be binding on anyone that would wish to rely on a statutory cancellation clause or expiry date.

[207] Since there is doubt that this court is bound by the dictum in paragraph 5 of the judgment in *China State Construction*, and since the outcome of this case does not depend on whether or not the dictum is indeed binding, I assume it is not. However, what cannot be ignored is the fact that the remarks were made by the highest court, and that the remarks were emphatically in favour of the extended first *Oudekraal* principle.

Xinfeng Investments v CEO of BIPA

[208] These are the relevant facts of *Xinfeng Investments v CEO of BIPA*.⁹⁶ Mr Shifwaku owned the members' interest in Orange River Exploration Mining CC (Orange River). He applied for an exclusive prospecting licence (EPL8397) in respect of land close to Omaruru. Two years later, he agreed to a conditional sale of 85% of his members interest to Hineni Investments CC for N\$4,5 million. The condition was that the members' interest had to be transferred to Hineni within five days of Shifwaku accepting the terms of a notice from the Ministry of Mines of the Ministry's preparedness to issue EPL8397. The notice was issued and accepted on 29 April 2022. Shifwaku signed the documents transferring 85% of the interest in Orange River to Mr Smith, Hineni's nominee. Protocol, the company secretaries, filed an amended founding statement on 16 May 2022, in terms of which Hineni took transfer of the members' interest in Orange River. All that was missing was Hineni's payment of the first tranche of the N\$4,5 million to Shifwaku.

[209] After the exchange of several letters between Shifwaku, Smith and lawyers, commitments were made to transfer the funds. The transfers never happened. Shifwaku demanded payment by 7 June 2022, failing which he would regard the agreement with Hineni as cancelled. Shifwaku cancelled the agreement on 21 June 2022. The next day, Shifwaku contracted with Xinfeng

⁹⁶ *Xinfeng Investments (Pty) Ltd v Chief Executive Officer of Business and Intellectual Property Authority* (HC-MD-CIV-MOT-REV-2022/00330) [2020] NAHCMD 459 (2 September 2022).

Investments (Pty) Ltd and its shareholders and directors to sell 100% of the members' interest in Orange River to them for N\$50 million payable in three tranches: N\$6 million on signing the contract, N\$16 million on transfer of 10% members' interest, N\$16 million on transfer of the remaining 90%.

[210] Shifwaku complied with his contractual obligations by supplying his contracting partners with an amended founding statement confirming transfer to them of 100% interest in Orange River. Together with the other entities with an interest in the land covered by EPL8397, Shifwaku received N\$38 million.

[211] On 8 July 2022, the CEO of BIPA cancelled the amended founding statement. The members interest in Orange River reverted to Smith and Shifwaku.

[212] The court attempted to piece together what led to the CEO's decision. It appeared to the court that Hineni and Smith's lawyers had alerted the Chairperson of BIPA that Shifwaku was threatening to transfer Smith's members' interest and that there might be an attempt to change the ownership in Orange River. The Chairperson alerted the CEO, who signed out the original CC documents from the registry and kept it in her office. No-one could access the file without her permission. Still the threat materialised. A BIPA staff member simply created a duplicate file and amended the founding statement to register Xinfeng Investments and its shareholders as 100% members of Orange River.

[213] Once the CEO found out about the amendment of the documents she thought she'd kept in her office, she cancelled the newly amended founding statement. She offered three reasons: the amendment had been secured fraudulently; the amendment hadn't followed BIPA's procedures; and Smith's signature, necessary for the amendment to be registered, had been forged.

[214] Xinfeng Investments launched an urgent application to review the CEO's decision. It argued that: the CEO had unlawfully dispossessed Xinfeng Investments and its shareholders of property, contrary to Article 16 of the

Constitution; she ought to have given Xinfeng Investments and its shareholders notice of her decision and an opportunity to make representations under Article 18 of the Constitution, which she had not done; and she had become *functus officio* once her staff member had registered the first amendment giving the 100% interest to Xinfeng Investments and had no statutory authority to cancel the amended founding statement.

[215] The respondents resisted the application on numerous grounds. They took the point that the matter was not urgent, they pleaded that the registration in favour of Xinfeng and its shareholders was obviously contrary to the Close Corporations Act; they pleaded fraud in the form of Smith's forged signature and argued that (1) fraud unravelled all, (2) any act procured by fraud was a nullity, (3) fraud couldn't give rise to any rights and even if it could the court ought to refuse relief because the applicants had come to court to validate and illegality. The respondents also argued that only Shifwaku had a right to be heard as only he had been accused of fraud. He hadn't sought an audience with the CEO.

[216] The application succeeded. On the Supreme Court authority of *Pamo Trading*,⁹⁷ the court held that it did not matter that the applicants were not the alleged fraudsters: they still had the right under Article 18 to be heard.⁹⁸

[217] More relevant to the present dispute, the court also held⁹⁹ that the allegedly fraudulent registration of the amended founding statement in favour of Xinfeng Investments and its shareholders existed as matter of fact. It could not be ignored. It could not simply be cancelled or replaced by the CEO of BIPA, in the absence of a statutory power that authorised the CEO of BIPA to take such steps. All the CEO of BIPA had to do to correct the situation, was apply to court to have the allegedly fraudulent and non-compliant registration set aside. Although the court did not refer to *Kirland*, the court did rely on *Magnificent Mile*.

⁹⁷ *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others* 2019 (3) NR 834 (SC).

⁹⁸ *Xinfeng Investments (Pty) Ltd v Chief Executive Officer of Business and Intellectual Property Authority* (HC-MD-CIV-MOT-REV-2022/00330) [2020] NAHCMD 459 (2 September 2022) para [92].

⁹⁹ *Ibid* par 93 to 101.

And on *RDP*. The court rejected the respondent's reliance on the alleged fraud exception to the *functus officio* rule. The court applied the extended first *Oudekraal* principle.

[218] I have not found any grounds to distinguish this case from the judgment in *Xinfeng Investments v CEO of BIPA*. Thus, the court is bound by the ratio of the judgment unless I find it clearly wrong. In my view it is not clearly wrong. To the contrary.

Conclusion on prima facie right

[219] The Minister succeeded in proving fraud on a prima facie basis but did not have the power to revoke ML243 without approaching a court.

[220] The Minister argues that a finding of fraud alone is enough to find that Xinfeng did not make out a prima facie case for interim relief. He argues that Namibian administrative law cannot have evolved to the point where a court of law would maintain rights obtained through one's own fraudulent conduct, for so long as a decision or action on which such right is predicated is not set aside by a court of law. The Minister accepts that a finding that the Namibian administrative law has indeed evolved in this way, would mean that Xinfeng would have established a prima facie right. He submits that 'The unlawfulness of the Minister's conduct in revoking the licence will then become relevant and effective in the sense that it would effectively deny the applicant a right which it enjoys as a result of its own fraud against the Minister and in essence against the public. This would be a surprising result which is unprecedented in any legal system, and considering the age of our legal system, dearth of authority supporting such a proposition should speak for itself. The contrary view that fraud unravels everything is obviously well supported in law.'

[221] The Minister makes a compelling argument. However, it appears to be flawed since it remains premised on the argument that fraud always unravels all, even in Namibian administrative law in its current state of development. As the extension of the first *Oudekraal* principle in South Africa shows, and the

reception of the principle in Namibia shows, our courts have accepted that they may have to overlook even blatant corruption (and hopefully just for the time being, until the administrators get their ducks in a row and lodge the appropriate application) in the interests of preserving the rule of law. Consider the example in *China State Construction*. What would have happened if the Supreme Court had declined to condone the delay in lodging the self-review application, where the High Court's findings that the relevant decisions had to be reviewed and the contracts set aside hadn't even been contested in the Supreme Court, and the only issue was whether the challenge had been lodged in time? The obviously improperly secured contracts, for hundreds of millions of Namibian Dollars, would have been enforceable. Not nice, but necessary.

[222] I find that Xinfeng has made out at least a prima facie right to interim interdictory relief.

Does the balance of convenience favour granting the interim interdict?

[223] At this stage of the enquiry, a court must 'weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice the respondent will suffer if it is'.¹⁰⁰

[224] The prejudice Xinfeng will suffer is that it will have to stop all activities at the mining site, including all of the environmental protection obligations it has at the mining site. It will potentially have to dismiss all its employees and will have to remove all of its equipment. It claims to have invested N\$600 million in mining equipment and other necessary expenses.

[225] On my understanding of the papers, the main prejudice the Minister will suffer if the interdict is granted, is that he will not be able to make the mining claim available for new applications. The Minister's concern that informed the decision to revoke – that Xinfeng was extracting and exporting large quantities of unprocessed lithium ore contrary to the approved work program - is not a concern any longer. He directed Xinfeng to stop exporting unprocessed lithium

¹⁰⁰ LTC Harms *LAWSA* 2nd Ed LexisNexis 2008 Vol 11 par 406.

ore and to stay within the approved mining program. Xinfeng has stopped its activities under its proposed revised work programme, and has accepted that can only operate in terms of its proposed revised work programme once approved by the Minister. If the interim interdict is granted Xinfeng has at least the opportunity to try to convince the Minister to approve a work programme that may allow it to continue mining, while the urgent review is proceeding.

[226] I find that the balance of convenience favours Xinfeng.

Does Xinfeng have any adequate alternative remedies?

[227] Xinfeng argues that it has no adequate alternative remedy. If not granted the interim protection, it will have to stop all operations and leave the site. It will then be left only with a damages claim against the Minister. Even if it succeeds on an urgent review, there are no guarantees when the review will be finalised, even if it proceeds on an urgent basis. Xinfeng correctly argues that it will be very difficult to succeed with a damages claim, because it will have to show bad faith on the part of the Minister. Despite its assertion in its letters that preceded the litigation and its affidavits in the litigation that the Minister acted for an ulterior purpose, Xinfeng also argues that it has no concrete proof of bad faith on the Minister's part. I agree that there is no proof on the papers before me at this stage of bad faith. A damages claim is not an adequate alternative remedy.

[228] The Minister argues that Xinfeng's adequate alternative remedy is to run the review proceedings on an urgent basis and that the parties have agreed to do so. I disagree with this argument. An urgent review application, even with the best of intentions, can turn into a drawn out affair. The review application can end up taking much longer to finalise than anticipated. For example, the contents of the review record may be difficult to sort out, or the parties may need to examine and cross-examine witnesses. All this may leading to interlocutory applications and possibly even appeals.

[229] As such, I find that Xinfeng does not have an adequate alternative remedy.

Discretion

[230] Even if all of the requirements for an interim interdict have been satisfied, a court retains a discretion to refuse interim relief.

[231] The Minister argues that Xinfeng's fraud, even if proven on an interim basis only at this stage, ought to move the court to decline the relief. The Minister also argues that courts will not easily interdict the Executive from performing its statutory functions, out of respect for the doctrine of separation of powers. The Minister also argues that courts should not readily intervene in policy-laden decisions by the executive, and argues that the decision to revoke the licence was such a policy-laden decision.

[232] I do not agree that the decision to revoke is a policy-laden decision, comparable to, for example, the allocation of fishing rights as discussed in *Bato Star*.¹⁰¹ The Minister's case is that he found fraud, and that fraud unravels all. Both fall squarely within the domain of courts, unless a statute determines otherwise.

[233] This is not an application to stop the Minister from executing statutory powers, as had been the case in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,¹⁰² for example. The Minister does not have any power under the Minerals Act to revoke ML243 for the reasons he provided. Granting an interim interdict will not amount to undue interference by the Judiciary with the statutory functions of the Executive. It also will not undermine the authority of the legislature who passed the Minerals Act, or the member of the Executive who must administer the Minerals Act.

¹⁰¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

¹⁰² *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

[234] It is correct that turpitude is an established reason for denying an application for interim relief.¹⁰³ But it always depends on the facts. I am not convinced that it is necessary or appropriate to deny Xinfeng relief. The legal issues at stake, the rule of law considerations discussed earlier, and the balance of convenience that favours Xinfeng, inform my discretion to grant the interim interdict, despite the finding of fraud on a prima facie basis.

Order

[235] In the result, it is hereby ordered that;

1. Applicant's non-compliance with the Rules of Court relating to form, service, and the time periods for the exchange of pleadings is hereby condoned and the application under Part A is heard as one of urgency in terms of Rule 73.
2. Pending the final determination of Part B of this application, the respondents are interdicted and restrained from implementing in any manner the first respondent's decision taken on or about 28 April 2023 to revoke his decision to grant to the applicant mining licence ML243.
3. The first respondent is directed to pay the applicant's costs of suit in respect of Part A, including the costs of one instructing and two instructed legal practitioners.
4. The matter is postponed to **7 July 2023** at **10h00** for a status hearing on the way forward in respect of the review application.

R MAASDORP
Acting Judge

¹⁰³ CB Prest *The Law and Practice of Interdicts* 9th Impression Juta 2014 at 246.

APPEARANCES

APPLICANT: V Maleka SC (with him T Scott)
Instructed by: Nambili Mhata Legal Practitioner; Windhoek

RESPONDENTS: G Narib
Instructed by: Office of the Government Attorney