

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: HC-MD-CIV-MOT-REV-2022/00608

AFRICA BIG LION MINING (PTY) LTD ('ABLM')

APPLICANT

and

THE COMMISSIONER FOR CUSTOMS AND EXCISE

FIRST RESPONDENT

NAMIBIA REVENUE AGENCY

SECOND RESPONDENT

THE MINISTER OF FINANCE

THIRD RESPONDENT

THE MINISTER OF MINES & ENERGY

FOURTH RESPONDENT

Neutral citation: *Africa Big Lion Mining (Pty) Ltd ('ABLM') v The Commissioner for Customs and Excise* (HC-MD-CIV-MOT-REV-2022/00608) [2023] NAHCMD 735 (15 November 2023)

Coram: PARKER AJ

Heard: 6 September 2023

Delivered: 15 November 2023

Flynote: Statute – Interpretation – What assistance can be drawn from Acts prior to the date of the Act which one has to interpret – Prior Act being the Minerals (Prospecting and Mining) Act 33 of 1992 that was passed before the Export Levy Act 2 of 2016 which the court was to interpret.

Summary: Statute. Interpretation. The court was faced with the interpretation of the word 'dolomite' under the Export Levy Act 2 of 2016. The words 'dimension stone group' have been defined in s 1 of the Minerals (Prospecting and Mining) Act 33 of 1992. The court applied the definition in the prior Act to arrive at the interpretation of the word 'dolomite' under the subsequent Act.

Held, Where there are different statutes *in para materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory to each other.

Held, further, if two statutes are *in pari materia*, it is assumed that uniformity of language and meaning was intended.

ORDER

1. The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.
2. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ:

[1] The applicant, represented by Ms van der Westhuizen, is a mining enterprise. It has presently two active mining licences in Namibia, as well as 15 active Exclusive Prospecting Licenses. The applicant extracts and exports dolomite from Namibia, and the applicant does so in the firm belief that such export should not attract export levies under the Export Levy Act 2 of 2016. ('the ELA')

[2] Thus, the applicant wishes *to continue* exporting dolomite, a Namibian natural resource, within the meaning of article 100 of the Namibian Constitution, without paying to the fiscus even one solitary and paltry Namibia cent. I use 'to continue' advisedly. That is what this application is all about, if the founding papers and the applicant's counsel's oral submissions are bereft of legal jargons and legal platitudes. Put simply, the applicant wishes to continue to deplete Namibia's soil of dolomite and export the mineral to the benefit of the applicant without the applicant paying an export levy in terms of the ELA that would have benefited Namibia, as Ms Angula, counsel for the respondents submitted. The respondents have moved to reject the application.

[3] Ms van der Westhuizen found Ms Angula's submission to be emotional statements. That may be so, but they are not empty and frivolous statements. Granted, the applicant may be employing Namibians and may be paying other governmental fees and charges, as Ms van der Westhuizen submitted. That, this court does not know. What this court sees in the applicant's papers is that it has not been paying export levy for exporting dolomite, and it wants that sweet arrangement to continue unabated, and it has approached the court to allow the arrangement to continue unceasingly. That is the pith and marrow of the applicant's case.

[4] What good grounds has the applicant placed before the court to review the decision complained of, that is, the decision that stopped the largesse the applicant has been enjoying.

[5] The level of the enquiry is, therefore, to determine whether the applicant has shown that good grounds existed to review the decision of 14 July 2022 ('the dolomite decision'). The kernel of the applicant's challenge by judicial review is that the first and/or the second respondent having included dolomite as a dimension stone in terms of the ELA acted *ultra vires* the ELA, among other grounds.

[6] I proceed to consider the applicant's grounds of review, remembering that the respondents bear no onus to justify their decision.¹ It suffices if they have given reasons for their decision, and they have given reasons.

¹ *Christian v Metropolitan Life Namibia Retirement Authority Fund and Others* 2008 (2) NR 753 (SC) para 15.

[7] The primary plank in the applicant's grounds to review the decision is set out neatly and concisely in the founding affidavit thus:

'62.2 The Act does not provide for the imposition of an export levy for Dolomite and doing so despite thereof is unlawful and ultra vires.'

[8] The Act is the ELA. The founding papers deal also with complaints about how dolomite should not be placed in the same basket as marble, for instance, and exact the same amount of levy in respect of marble and dolomite. The applicant's primary grounds of review is that in coming to the dolomite decision, the respondents acted ultra vires the ELA. The following charges are also laid at the feet of the respondents, namely, that there was a lack of *audi alteram partem* ('audi' for short) of rules of natural justice, as well as a charge that the first respondent did not apply his mind in the decision making exercise. The applicant relies on legitimate expectation, too.

[9] Thus, the next level of the enquiry is to consider whether the dolomite decision is ultra vires the ELA. The applicant says that export levy for minerals, gas and crude oil is prescribed in Schedule 1 to the ELA, and no reference to dolomite is found in the Commodity Code for Dimension Stones; ergo, the applicant should be allowed to continue exporting such of Namibia's natural resources for free, without paying any export levy.

[10] In all this, I did not hear the applicant to say that: (a) dolomite is a valueless commodity in monetary terms; and (b) dolomite is not a dimension stone. If the applicant accepts that the levying of export levy on dimension stones is intra vires the ELA, I fail to see any good reason why the exacting of export levy on dolomite, a dimension stone, has suddenly become ultra vires the ELA.

[11] Dolomite is part of the dimension stone group; and dimension stone group has been defined in s 1(1)(b) of the Minerals (Prospecting and Mining) Act 33 of 1992 ('the MPMA'). It is this very Act that governs the prospecting and mining of dolomite by the applicant, as Ms Angula submitted.

[12] I find it cynical and self-serving for the applicant to disown the definition of dimension stone group in the MPMA as inapplicable to the ELA. I cannot find any good reason why one can argue that the court is not entitled to apply the said statutory definition in the instant proceeding. Mind you, we are talking about a legal system where courts are entitled to resort to even the dictionary meaning of words when interpreting words not statutorily defined, as an aid to statutory interpretation.²

[13] If it is permissible to consult any reputable English dictionary as a guide to meaning of a word or phrase in a statute, I cannot see any good reason why it is not permissible to consult another statute dealing with a comparable or identical subject matter where the court is faced with interpreting a word or phrase not defined in the statute concerned but is defined in such other statute. In my view the ELA and MPMA are *in pari materia*.³

[14] In his authoritative book *Interpretation of Statutes*, Devenish states:

‘What assistance can one draw from Acts prior to the date of the Act which one has to interpret? Before a prior Act can serve as a guide in the interpretation of a later Act, the two Acts must be kindred legislation, which requires that they must deal with the identical subject-matter, not merely give effect to a single policy or, to use the Latin expression, they must be *in pari materia* (*pari* here does not mean similar or like, but identical)’.⁴

[15] The general principle in regard to the interpretation of statutes *in para materia* was explained by Lord Manfield thus:

‘Where there are different statues *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory to each other’⁵

[16] ‘Thus, if two statutes are *in pari materia*, it is assumed that uniformity of language and meaning was intended.’⁶

² *International Underwater Sampling Ltd v MEP Systems (Pty) Ltd* 2010 (2) NR 468 (HC).

³ GE Devenish *Interpretation of Statutes* (1996) at 133-136 passim.

⁴ *Ibid* at 133.

⁵ *R v Loxdale* (1758) 1 Burr 445 at 447.

⁶ Francis AR Bennion *Statutory Interpretation* (1984) at 516.

[17] On the foregoing authorities, I find that dolomite is a dimension stone, within the meaning of the ELA, and ought to be treated as such for the purposes of Schedule 1 to the ELA.

[18] On Annexure AB4, which is a Customs Declaration Form, the applicant took it upon itself to classify dolomite under international commodity code 25181000, knowing that that code is not provided in Schedule 1 at all. Schedule 1 contains the code 251512 for dimension stones. I dare say, the applicant did that for the sole purpose of escaping paying export levy.

[19] In the exercise of his or her power under s 10(1) of the ELA, the first respondent *qua* customs authority conducted an assessment to determine whether the goods, viz dolomite, indicated in the applicant's customs declaration form are subject to export levy. If he or she was not satisfied with such initial assessment, he or she is entitled under s 12 to conduct a reassessment exercise.

[20] The point should be emphasised that in carrying out the aforementioned exercise under the provisions of the ELA, the first respondent is not precluded from consulting with other public authorities that administer statutes that are *in pari materia* with the ELA.⁷ In doing so, the first respondent would not be delegating his or her powers under the ELA. In that regard, the first respondent consulted, that is, compared notes (to use a pedestrian language) with authorities in the Ministry of Mines and Energy, ie the Ministry that, under the responsible Minister (the fourth respondent), administers the MPMA, and authorities in Namibia Revenue Agency (the second respondent).

[21] I find that the consultative exercise enabled the first respondent to decide that upon the correct interpretation of the relevant provisions of the ELA, dolomite is a dimension stone and therefore subject to export levy under the ELA. There is nothing unfair, unreasonable, lack of *audi*, and ultra vires about the aforesaid consultative exercise and the decision (ie the dolomite decision). Indeed, the consultative exercise establishes undeniably that the first respondent applied his or her mind to the question before him in compliance with the common law rule that the repository of discretionary power must apply his or her mind to the question before him or her.⁸

⁷ See paras 13-17 above.

⁸ Etienne Mureinik (1986) 'Administrative Law in South Africa' SALJ Vol 103 at 615-645.

[22] The charge of lack of the *audi* doctrine of the rules of natural justice is met with the following response. It should be remembered, natural justice is a flexible doctrine: Its content may vary according to the nature of the power or discretion exercised and the circumstances of the case at hand.⁹ What a hearing entails and how a hearing may be afforded to an interested person depends, barring statutory prescriptions, largely on the facts and circumstances of the particular matter. Thus, an applicant need not always be given an oral hearing, but may be given an opportunity to deal with the matter in writing.¹⁰

[23] In the instant matter, the applicant was not entitled to be heard before the respondents interpreted the ELA. They interpreted the ELA that dolomite falls under dimension stone and therefore subject to the export levy prescribed in respect of dimension stone in Schedule 1 to the ELA, as Ms Angula submitted, within the meaning of the ELA.' And I have not faulted such interpretation. And it cannot be said that the dolomite decision and the assessment of levy is unreasonable.

[24] In that regard, it should be remembered-

[31] What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.¹¹

[25] From the analysis of the law and the facts and the conclusion set out above, I am satisfied that the dolomite decision and the decision on the assessment of levy

⁹ *New Era Investment (Pty) Ltd v Roads Authority and Others* 2014 (2) NR 596 (HC).

¹⁰ *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) 174 H, per Strydom CJ.

¹¹ *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

are reasonable, within the meaning of article 18 of the Namibian Constitution. In light of careful analysis of the context of the conduct of the respondents, which I have undertaken previously, I conclude that it is the conduct of a reasonable decision maker.¹²

[26] Furthermore, the power to do assessment and reassessment to determine whether the goods concerned are liable to an export levy and the amount of export levy payable on export levy of the goods is vested in the first respondent by the Namibia Revenue Agency Act 12 of 2017, the ELA, and the Customs Excise Act 20 of 1998. Therefore, the first respondent's power to assess and reassess goods as such did not offend the law.¹³ In sum, the first respondent did act *intra vires* the applicable legislation and kindred legislation¹⁴ in compliance with article 18 of the Namibian Constitution.

[27] I fail to see upon what legal imagination the applicant claims the allowance of legitimate expectation. The expectation of the applicant that he would continue to export dolomite without paying a cent in export levy and that he would be heard before the respondents interpreted the law and applied the law as interpreted in the exercise of their statutory power is not legitimate: It is not a reasonable expectation that the court ought to protect.¹⁵ It is a self-created expectation, based on the applicant's own perception of the law.¹⁶

[28] Based on these reasons, I find that the applicant has not made out a case for the relief sought. In the result, I order as follows:

1. The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.
2. The matter is finalised and removed from the roll.

¹² *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC) para 49.

¹³ *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* loc cit.

¹⁴ Francis AR Bennion *Statutory Interpretation* (1984) at 516 footnote 6 loc cit.

¹⁵ *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC).

¹⁶ See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 80.

C PARKER
Acting Judge

APPEARANCES:

APPLICANT:

C van der Westhuizen

Instructed by Shikongo Law Chambers,
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RESPONDENTS:

M Angula

Instructed by Office of the Government
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