



**REPORTABLE**

CASE NO: SA 48/2018

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**OTNIEL KOUJO**

**Appellant**

and

**MINISTER OF MINES AND ENERGY**

**First Respondent**

**MINING COMMISSIONER**

**Second Respondent**

**LUXURY INVESTMENTS ONE HUNDRED AND**

**NINETY TWO (PTY) LTD**

**Third Respondent**

**KAOKOLAND MINING EXPLORATION CC**

**Fourth Respondent**

**Coram:** DAMASEB DCJ, SMUTS JA and FRANK AJA

**Heard:** 8 July 2020

**Delivered:** 30 July 2020

**Summary:** The appellant launched a review application in the court *a quo* seeking to review the Minister of Mines and Energy's (the Minister) decision under section 44 of the Minerals (Prospecting and Mining) Act 33 of 1992 (the Act) cancelling mining claims (number 70056 and 70057) registered in his name on 7 February 2017. The Minister had issued an exclusive prospecting licence (EPL) 6334 to the appellant on 26 September 2016. Prior to this, the Minister, on 10 February 2016 alerted the third respondent that its mining claims (number 66988

and 66993) had expired - the third respondent's mining activities in respect of those claims were at the time being conducted by the fourth respondent. This was soon followed by the Minister issuing an EPL 6738 to the third respondent, which on 24 February 2016 applied for the registration of the mining claims it had held before. The third respondent addressed the Mining Commissioner that the 'erroneous' plotting of coordinates by the Ministry on its system had caused an overlap between the appellant's registered claims and one of the claim areas applied for (and previously held) by the third respondent. Appellant was informed to desist from mining activities pending advice from the Attorney-General. On 31 August 2017, the Minister gave the appellant a notice of his intention to cancel the appellant's mining claims under s 44 of the Act – he afforded the appellant the opportunity to make representations on the issue. On 18 October 2017, the Minister approved the third respondent's mining claim number (69776 to 69781) – and notified the appellant of the cancellation of his claims.

The appellant's case was that the Minister did not have the power under s 44 of the Act to cancel his mining claims. He alleged that the power to cancel vests in the Mining Commissioner. The respondents filed a counter application premised upon s 125 of the Act (in that, the granting of the claims to the appellant was in conflict with s 125). This counter application was conditional upon the appellant succeeding with his review application. Appellant argued that the term 'shall' in s 125 should not have a peremptory meaning, he also contended that s 125, properly interpreted, does not prohibit the overlapping of claims, particularly where they relate to different minerals. He further contended that the respondents are precluded from relying upon a ground not cited by the Minister as a basis for the cancellation of the appellant's claims.

The court *a quo* found and set aside the cancellation on the grounds that the power to cancel in s 44 is vested in the Mining Commissioner. This issue was not appealed against by the respondents.

To be determined by this court is whether the court *a quo* erred in granting the counter application relying on s 125 and in an explanatory affidavit filed by the Mining Commissioner irregularly.

Explanatory affidavit - After respondents filed a counter application, the matter proceeded to case management - the court *a quo* made an order directing a number of prehearing steps to be conducted by specific dates. The Minister and Mining Commissioner were directed to file the record of decision making by 2 March 2018 and deliver their answering affidavits by 6 April 2018 – they did not file an answering affidavit within the prescribed time – rather, they filed an affidavit explaining the decision making process and how errors were made in the capturing of coordinates in the system (the explanatory affidavit). This affidavit was filed two and a half weeks before the hearing and after all affidavits were exchanged. Exercising its discretion, the court *a quo* received the explanatory affidavit of the Mining Commissioner and declined appellant's application to have the explanatory affidavit struck from the record on grounds of being in conflict with the court order and the provisions of rule 54 of the High Court Rules.

*Held*, by exercising its discretion, the court *a quo* correctly found that the explanatory affidavit was of importance in clarifying the issues before it.

*Held that*, the court retains a discretion to exercise its inherent powers to regulate proceedings before it, especially with reference to receiving evidence provided that it does not give rise to unfair and unjust results.

*Held*, the power of a court on appeal to interfere with the exercise of a discretion in an instance where a court exercises its discretion to exercise its powers to regulate its own procedures is strictly circumscribed.

*Held*, this is an exercise of a discretion in a 'strict or narrow sense' where a court of appeal will only interfere if the court below 'exercised its discretion capriciously or upon a wrong principle or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons or materially misdirected itself.'

*Held that*, public interest is served by the receipt of the affidavit so that the real issues can be determined with reference to the full factual position. Had the appellant sought leave to deal with the explanatory affidavit after its receipt by the

court below, and that had been refused, the position would be entirely different. But the failure of any attempt to seek to address the affidavit particularly after its receipt renders the claim of prejudice on appeal as contrived and lacking in any real substance.

Section 125: Interpretation - The issue concerning s 125 is whether it precluded the granting of the appellant's claims given the fact that the third respondent applied for mining claims before the appellant had done so. Section 125 requires the consideration of applications in their sequence.

*Held*, the ordinary meaning of the terms employed by the legislature in the statutory scheme of s 125 meant that 'shall' is to have a mandatory meaning.

*Held*, the intention of s 125 is to place a clear statutory obligation upon the respective repositories of the powers to consider applications in the sequence they are made and received. The use of the term 'all' with reference to those applications in s 125 reinforces this approach.

*Held*, not only does the use of the term 'shall' ordinarily signify an intention to make the obligation embodied in s 125 mandatory, but the context and purpose of the provision reinforces this.

*Held*, the purpose of this provision within the context of the Act is to provide for transparency and certainty in the manner in which and the wide and far reaching powers vested in the Minister and Mining Commissioner are to be exercised in allocating rights to Namibia's natural resources.

*Held that*, the use of the term 'shall' in s 125 takes its ordinary peremptory meaning, given the statutory context and legislative intention for the provision. It further follows that conduct in conflict with it (by not following the sequence in considering applications) will result in invalidity. The conclusion reached by the High Court in this regard is beyond reproach.

Appeal is dismissed with costs.

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## APPEAL JUDGMENT

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SMUTS JA (DAMASEB DCJ and FRANK AJA concurring):

[1] This appeal concerns a dispute about mining claims and primarily centres on the interpretation to be given to s 125 of the Minerals (Prospecting and Mining) Act 33 of 1992 (the Act).

### Factual background

[2] This dispute arose in the following way. On 10 February 2016, the Minister of Mines and Energy (the Minister) alerted the third respondent that its mining claims (numbers 66988 and 66993) had expired. (The third respondent's mining activities in respect of those claims were at the time being conducted by the fourth respondent). This was soon followed by the Ministry of Mines and Energy (the Ministry) issuing an exclusive prospecting licence (EPL) 6738 to the third respondent which on 24 February 2016 applied for the registration of the mining claims it had held before.

[3] During March 2016, the appellant was in the same area (in the vicinity of the village Otvani in a remote part of the Kunene Region) in search of mining opportunities. He identified an area and supplied the coordinates to the Ministry and was informed that the area was subject to an EPL but that the mining claims of the fourth respondent over the area had expired and that there were no current mining claims over the area. On 26 September 2016, the Ministry issued an EPL 6334 to the appellant who on 25 October 2016 applied for registration of mining

claims 70056 and 70057 in that area which were granted and registered by the Ministry on 7 February 2017.

[4] On 20 April 2017, the appellant informed the fourth respondent in writing of the registration of these mining claims and noted that the fourth respondent was 'undergoing (its) current mining operations' at these claims and called upon it to desist with those mining activities and to remove its machinery from the claim area within 14 days.

[5] On 6 June 2017, the third respondent (as erstwhile holder of mining claims over the area) addressed the Mining Commissioner on the issue, referring to its pending application for registration of mining claims over the same area as before. It pointed out that 'erroneous' plotting of coordinates by the Ministry on its system had caused an overlap between the appellant's registered claims and one of the claim areas applied for (and previously held) by the third respondent. The third respondent also pointed out that the appellant had only installed beacons on 17 or 18 May 2017 and sought the Minister's intervention to resolve the issue amicably.

[6] The Mining Commissioner on 9 August 2017 informed the appellant to desist from mining activities pending advice from the Attorney-General. This was subsequently followed by the Minister giving notice to the appellant on 31 August 2017 of his intention to cancel the appellant's mining claims under s 44 of the Act and affording the appellant the opportunity to make representations on the issue. The appellant's response came from his legal practitioner on 18 September 2017 denying that there were any grounds to cancel the claims.

[7] On 18 October 2017, the Ministry approved the registration of the third respondent's mining claim numbers 69776 to 69781. The appellant's legal practitioner thereafter on 8 November 2017 demanded that the fourth respondent remove its mining equipment from the appellant's mining area. On the following day the Minister notified the appellant of the cancellation of his claims.

[8] The appellant, on 17 November 2017 launched a review application in the High Court seeking to review the Minister's decision to cancel his claims and applying for interim relief pending the determination of the review in the main application. The principal ground in support of the review was that the Minister did not have the power to cancel the appellant's mining claims under s 44 of the Act. That section vests the power to do so in the Mining Commissioner. Other review grounds were also raised but are not relevant for present purposes.

[9] The Minister and Mining Commissioner were both cited as respondents. Although filing a notice to oppose, they did not further oppose the application. The third respondent was cited and the fourth respondent was later joined to the application. The proceedings were protracted, given the application for interim relief which was granted and a conditional counter application brought by the third and fourth respondents – jointly referred to in this context as the respondents.

[10] The respondents' counterclaim was conditional upon the appellant succeeding with his review of the cancellation of his mining claims (by the Minister) and, in that event, sought to set those (the appellant's) claims aside (70056 and 70057) because the third respondent's application for mining claims

predated the appellant's. The purpose was thus to restore the position prior to the granting of the claims to the appellant.

[11] The counter application was premised upon s 125 of the Act which requires that applications are to be considered by the Ministry in the order they were received by the Ministry.

[12] In support of the conditional counter application, a detailed affidavit was filed by a land surveyor, Mr Pieterse (the expert), who unequivocally stated with reference to the coordinates duly plotted, that the appellant's claims overlapped the third respondent's pending (and prior) claim. It was also stated by the respondents, with reference to photographic evidence, that the appellant's claim was within an active mining operation (of the fourth respondent) which had been carried on for some ten years. It was contended by the respondents that the appellant would have been aware of the existing mining on the claim area, yet he stated in his application for the mining claim that the area was 'virgin' territory.

[13] In response to the counterclaim, the appellant denied an overlap but provided no evidence in support of that denial and did not properly deal with Mr Pieterse's affidavit save for a bare denial and to label it with unsupported pejorative terms.

[14] After the counter application was filed, the matter proceeded to case management and the High Court made an order postponing the matter to a date of hearing being 18 May 2018 and directed that a number of prehearing steps be



conducted on specific dates. The Minister and Commissioner were directed to provide the record of decision making by 2 March 2018. The appellant and third respondent were afforded a week to supplement their respective founding affidavits in support of the main application and the counter application for review. The cited respondents were directed to deliver answering affidavits by 6 April 2018 and the appellant was required to reply to the answering affidavits and to answer to the counter application by 13 April 2018. The respondents were directed to reply to the answering affidavit to the counter application a week later on 20 April 2018. The appellant's heads were due on 27 April 2018 and the respondents' on 8 May 2018.

[15] The Minister and Mining Commissioner did not file answering affidavits in the required time frame. Nor did they file a notice of opposition to the counter application. But shortly before the date of hearing, the Mining Commissioner, Mr Shivolo, on 30 April 2018 filed an affidavit to explain the decision making process relating to the disputed claims. In this belatedly filed affidavit, Mr Shivolo confirmed that the Minister and he did not oppose either the application or conditional counter application but rather sought to explain what had occurred within the Ministry concerning the competing claims. He explained that the Ministry had migrated to a new operating system. In the process, errors occurred in entering coordinates of the third respondent's mining claims.

[16] When the appellant applied for claims 70056 and 70057, Mr Shivolo stated that the system incorrectly indicated that the area was vacant because the coordinates of the third respondent's claims were plotted to the west of their actual position. Mr Shivolo stated that the appellant, when applying for his claims 'knew

that the area was already taken up because on the ground there was equipment and indications that the area was already occupied'. After the claims were registered in favour of the appellant and the third respondent objected to them, Mr Shivolo stated that the Ministry 'became aware of the overlap in mining claims between the appellant and the third respondent'. The Minister, acting upon the advice of the Attorney-General, proceeded to give notice to the appellant of an intention to cancel the appellant's claims as a consequence and thereafter purported to do so.

[17] Despite the period of two and a half weeks between the filing of this affidavit and the date of hearing, the appellant did not seek leave to apply to adduce a further affidavit to deal with Mr Shivolo's affidavit. Nor did the appellant seek a postponement of the hearing for that purpose. Instead, he applied for the affidavit to be struck from the record as it had not been filed in accordance with the court order in case management setting out the dates for the filing of affidavits by the applicant and respondents (opposing the application).

#### The approach of the High Court

[18] The court found that the cancellation of the appellant's claims by the Minister was outside his powers and unlawful. The court correctly found that the power to cancel in s 44 is vested in the Mining Commissioner and set aside the Minister's decision to do so. The respondents understandably did not cross appeal that finding and ruling.

[19] In the exercise of its discretion, the court received the affidavit of Mr Shivolo and declined the appellant's invitation to strike it from the record.

[20] Turning to the conditional counter application, the court found that the respondents had established that the claims overlapped, taking into account the evidence of the expert witness, Mr Pieterse, and the Mining Commissioner. The court held that s 125 found application and that the application to the Ministry received first – namely the third respondent’s – should have been considered first and set aside the granting and registration of appellant’s claims over the same area and referred the matter back to the Ministry for further action.

[21] The appellant appeals against that decision. Whilst the respondents oppose the appeal, they do not take issue with the setting aside of the Minister’s cancellation of the appellant’s claims.

#### The parties’ submissions

[22] Counsel for the appellant contended that the court below erred in refusing to strike Mr Shivolo’s affidavit and by taking its contents into account. Counsel argued that this was in breach of the appellant’s constitutional rights to a fair trial.<sup>1</sup> It was further contended that the Mining Commissioner was a party to the proceedings and had not sought condonation ‘for the late filing’ of this affidavit as is required by rule 54(3) of the High Court Rules and that the Minister and Mining Commissioner were barred as a consequence. Counsel pointed out in oral argument that the Mining Commissioner was represented in court at the case management hearing when the dates for the filing of affidavits were provided. Counsel submitted that the appellant was prejudiced by the filing of Mr Shivolo’s affidavit as he had already filed his replying affidavit.

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<sup>1</sup> Protected under Art 12 of the Namibian Constitution.

[23] The appellant also took issue with the court's finding that the coordinates of the third respondent's claims matched that of its later claims applied for and objected to the finding of an overlap of those claim areas with the appellant's claims 70056 and 70057. It was argued that the court was not entitled to rely on Mr Shivolo's statement to this effect and that the respondents' expert's evidence (of Mr Pieterse) did not establish this.

[24] Finally, counsel for the appellant took issue with the court's finding that a contravention of s 125 would lead to the invalidity of mining claims granted out of sequence.

[25] It was contended that the legislature did not intend invalidity would follow upon non-compliance with s 125, especially where applications were not in respect of the same minerals, relying upon *Torbitt and others v International University of Management*.<sup>2</sup>

[26] Counsel for the respondents argued that the material facts properly approached demonstrated that the claims were considered contrary to the priority established by s 125 and that the appellant's claims were correctly set aside as a consequence. It was also contended that, the appellant had dishonestly sought to exploit errors in the Ministry's system.

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<sup>2</sup> *Torbitt and others v International University of Management* 2017 (2) NR 323 (SC) paras 36 and 37.

[27] Respondents' counsel further argued that the system of priority established by s 125 meant that conduct in conflict with the peremptory wording of that provision rendered it a nullity. It was submitted that the facts established an overlap beyond reasonable dispute and that the appellant had failed to raise a valid defence to the counter application.

[28] Counsel for the respondents also argued that Mr Shivolo's affidavit was not an answering affidavit filed in opposition to the application, but was provided to explain the decision making out of a duty on the part of the decision maker to do so. It was an irregular proceeding because of its lateness but would not result in parties being barred. If the appellant had sought to set aside the filing of the affidavit as an irregular proceeding under rule 61, he would need to establish prejudice which had not been done.

The High Court's decision to receive the Mining Commissioner's affidavit

[29] Although notices to oppose were initially filed on behalf of the Minister and Mining Commissioner after service of the appellant's application, they did not file answering affidavits and interim relief was granted by the High Court on 14 December 2017 while the main review application thereafter proceeded. The Minister and Mining Commissioner were required to file the review record pursuant to the joint case management report which was made an order of court. The respondents were required by this order to file answering affidavits by 6 April 2018 and the appellant was required to provide his replying affidavit by 13 April 2018, with the matter set down for hearing on 18 May 2018.

[30] The Minister and Mining Commissioner did not present any answering affidavits within the required time frame or at all as they no longer opposed the application and had not filed a notice to oppose the counter application.

[31] The Mining Commissioner instead filed what was correctly termed an explanatory affidavit which sought to explain the decision making process and how errors had occurred in the capturing of coordinates in the new system utilised by the Ministry to plot and depict the areas in respect of mining claims and other licences. But he did so at a very late stage and after all the affidavits between the protagonists had been exchanged. There was no accompanying application seeking to receive the affidavit out of sequence. The proper time to file it was at the stage of filing the record to afford the parties the opportunity to supplement their papers with regard to what is contained in it (as it after all explained the record of the decision making).

[32] The appellant's response to it was to apply to strike the affidavit from the record. Despite a more than adequate period (between 30 April and 18 May 2018), the appellant did not seek to apply to adduce a further affidavit to deal with it. There is no explanation as to why this was not or could not be attempted. Nor did the appellant seek a postponement of the hearing to do so, particularly after it was received. The appellant would have been entitled to do so at the Mining Commissioner's costs (which the High Court would in fairness have granted in the absence of an adequate explanation for its late filing), had such an application been made. In absence of doing so, the protestation of prejudice on the part of the appellant has a distinctly hollow ring. As are the complaints of breaching the appellant's fair trial rights when there was this and a prior opportunity before the

hearing to address the unfairness of a belatedly filed affidavit by seeking to address its contents at the cost of the government respondents.

[33] The High Court correctly considered that the affidavit was of importance in clarifying the issues before it, especially the explanation concerning the system errors which resulted in the decision making and the challenges to it. The presiding judge proceeded to exercise her discretion not to strike the affidavit and to receive it.

[34] The primary challenge to its receipt is that it is in conflict with the court order and that rule 54 of the High Court Rules requires compliance with the rule, practice direction or court order and in particular rule 54 (3) which visits the failure to deliver a pleading in accordance with a case plan order by barring the offending party.

[35] The delivery of this affidavit was however, in my view, not strictly speaking in conflict with the court order concerning answering affidavits as it was not an answering affidavit and the debarring would not in my view arise as the appropriate sanction as the Minister and Mining Commissioner, even though cited respondents, were no longer opposing the proceedings. It was correctly termed an explanatory affidavit by a decision maker in his duty to account for his conduct and thereby to assist the court in the administration of justice. Although not provided for in the order, it should have been filed with the record so that the protagonists would have had an adequate opportunity to deal with it. The absence of an adequate and acceptable explanation for filing it so late and an application to receive it, meant that the filing of the affidavit was an irregular step or proceeding,

liable to be set aside under rule 61 of the High Court Rules, as was contended on behalf of the respondents. The appellant did not apply to set it aside as an irregular step or proceeding but instead sought to strike it. The court however plainly had a discretion to receive it. In determining whether to set aside this irregular proceeding, the court has a discretion whether or not to overlook the irregularity. In exercising its discretion to do so or not would take into account the question of prejudice.<sup>3</sup> In the absence of real prejudice, a court would be unlikely to exercise its discretion to set it aside as an irregular proceeding which would then stand.

[36] The court furthermore and in any event retains a discretion exercising its inherent powers to regulate proceedings before it, especially with reference to receiving evidence provided that it does not give rise to unfair and unjust results. In appropriate cases, a court can draw upon its inherent powers to receive evidence in the interest of fairness and justice.<sup>4</sup> This would eminently be such a case with fairness requiring that parties are afforded time to deal with it should they so wish and with an appropriate cost order in their favour.

[37] The power of a court on appeal to interfere with the exercise of a discretion in an instance where a court exercises its discretion to exercise its powers to regulate its own procedures is strictly circumscribed.<sup>5</sup> It is an exercise of a discretion in a 'strict or narrow sense' where a court of appeal will only interfere if the court below 'exercised its discretion capriciously or upon a wrong principle or

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<sup>3</sup> *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) paras 110-111.

<sup>4</sup> *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC) para 41 (RDP1).

<sup>5</sup> *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC) para 106 (RDP2).



has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons or materially misdirected itself.’<sup>6</sup>

[38] Appellant’s counsel did not challenge the exercise of the court’s discretion on any of these bases but persisted with his contention that rule 54(3) meant that the Minister and Mining Commissioner were barred and were required to apply for and receive condonation before the affidavit would be received. As I have pointed out this affidavit was not an answering affidavit in the strict sense contemplated by the court order and thus by s 54(3) which would result in barring if filed late. But, the other forms of sanction were indeed warranted because of its lateness, such as severe censure coupled with an appropriate costs order to afford parties the opportunity to deal with it if they sought to do so.

[39] Having carefully considered the reasoning and approach of the court below, no basis has been established to interfere with the exercise of the court’s discretion. On the contrary, it would seem that the public interest is served by the receipt of the affidavit to facilitate the real issues being determined with reference to the full factual position. Had the appellant sought leave to deal with the affidavit after its receipt by the court below, and that had been refused, the position would be entirely different. But, the failure of any attempt to seek to address the affidavit particularly after its receipt renders the claim of prejudice on appeal as contrived and lacking in any real substance.

[40] The receipt of this late affidavit should not by any means be understood as undermining the effect of rule 54(3) and its importance to the due administration of

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<sup>6</sup> RDP2 para 106 and the authorities collected in footnote 104.

justice, court managed proceedings and the imperative that parties strictly adhere to rule 54 and the time limits provided in court orders, the rules and practice directives. The affidavit in question is exceptional – where a decision maker in furtherance of a duty to account explains the decision making process impugned in review proceedings. But, the duty to file such an affidavit would have arisen when filing the record and its lateness, entirely unexplained, was deserving of severe censure and if it had caused any postponement, an appropriate cost order – even punitive - would be warranted, given the disruptive effect of such conduct on the efficient functioning of court controlled case management.

#### Overlap

[41] In answer to the conditional counter application, the appellant denies any overlap between his mining claims and those of the third respondent. But the denials of the evidence of the expert, a duly qualified and practising land surveyor who actually surveyed the area in question at an earlier juncture, amount to mere bare denials which the appellant sought to strengthen by derogatory reference to that evidence. A bare denial remains precisely that, even when accompanied by vehemence or derogatory terms when referring to the evidence in question.

[42] The expert's evidence is supported by the statement by the Mining Commissioner to the same effect. It is also supported by graphical depiction of the area and photographic evidence. And there was no satisfactory explanation given as to why the appellant sought the removal of the fourth respondent's mining equipment from the area in the absence of an overlap.

[43] The denial of an overlap is one which may be categorised as one of contention without factual substratum. The court below was correct in its finding on the papers of an overlap

#### Section 125 of the Act

[44] Section 125 of the Act, under the heading 'Order in which applications made in terms of this Act are to be considered', provides:

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

[45] Counsel for the appellant argued that the term 'shall' should not have a peremptory meaning and also contended that s 125, properly interpreted, does not prohibit the overlapping of claims, particularly where they relate to different minerals. Counsel pointed out that the appellant's claims are in respect of 'semi-precious stones', whereas the minerals covered by the third respondent's claims are 'base and rare metals'.

[46] In their written argument, appellant's counsel also contended that the respondents are precluded from relying upon a ground not cited by the Minister as a basis for the cancellation of the appellant's claims. This contention confuses the decision making process and is devoid of merit. The respondents' conditional counter application for review is in respect of the granting of the appellant's claims and not their cancellation by the Minister purportedly under s 44 of the Act. The Minister's act of cancellation was rightly set aside by the court below. The

respondents' challenge to the granting of the claims to the appellant was on the ground that this was in conflict with s 125. This is a separate issue to their purported cancellation – on the basis that the third respondent's application for claims over the same area predated the appellant's. The authorities with reference to reasons given by decision makers relied upon by the appellant simply find no application and are not necessary to consider for the purpose of this judgment.

[47] The question is rather whether s 125 precluded the granting of the appellant's claims, given the fact that the third respondent applied for mining claims before the appellant had done so - on the basis that s 125 requires the consideration of applications in their sequence. The reasons given by the Minister in his flawed exercise of cancellation powers are irrelevant to this question.

[48] After a thorough survey of the approach to the construction of text in England and South Africa, this court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*<sup>7</sup> concluded that the approach to interpretation of text would entail assessing the meaning of the words used within their statutory context, as well as against the broader purpose of the Act.<sup>8</sup>

[49] The statutory context is both Art 100 of the Constitution and the Act and its purpose. As is provided for in Art 100 of the Constitution, natural resources above and below the surface of the land (and at sea) belong to the State, if they are not otherwise lawfully owned. The Act is premised on this principle which is reaffirmed and repeated in s 2 of the Act. Any rights in relation to prospecting for minerals

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<sup>7</sup> *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC) paras 18-19.

<sup>8</sup> *Namibian Association of Medical Aid Funds & others v Namibia Competition Commission & others* 2017 (3) NR 853 (SC) para 41.

and their mining vest in the State, as does the control over the sale and disposal of minerals.

[50] The Act proceeds to provide for an elaborate system of licencing and approvals for persons or entities to carry on those activities and to expressly prohibit those activities from taking place save with a licence or approval granted by the Minister or Mining Commissioner in terms of the Act. The Act is made up of several parts. Several of these separately deal with specific types of licences or mining claims. Section 125 is to be found in Part XVII entitled 'General Provisions' applying to all the different types of licences and claims.

[51] It is within this context that the meaning of s 125 is to be considered. The ordinary meaning of the terms employed by the legislature is clear. Not only does the use of the term 'shall' ordinarily signify an intention to make the obligation embodied in s 125 mandatory, but the context and purpose of the provision reinforces this. Plainly the use of the term 'all' together with 'shall' were intended by the legislature to make it mandatory for the repository of the power to consider the applications in their sequence. The statutory scheme certainly supports such an interpretation. The intention of s 125 is to place a clear statutory obligation upon the respective repositories of the powers to consider applications in the sequence they are made and received. The use of the term 'all' with reference to those applications in s 125 reinforces this approach.

[52] Section 125 furthermore does not restrict its application with reference to the type of applications or with reference to the type of minerals. On the contrary, the use of the term 'all' with reference to applications and 'any' (regarding their

nature) has the opposite effect. This disposes of counsel for the appellant's argument that the provision is confined to applications for the same type of mineral as mining operations for the repository of the power to consider in the statutory sequence, even if the mining of different types of minerals may not necessarily be incompatible. If that were the case, that would be an aspect for a repository of the power to consider in the statutory sequence, even though this consideration may not arise on the facts of this case where the appellant almost immediately sought the removal of the fourth respondent after being granted the claims, indicating that the mining for different minerals may not be compatible.

[53] The purpose of this provision within the context of the Act is to provide for transparency and certainty in the manner in which the wide and far reaching powers vested in the Minister and Mining Commissioner are to be exercised in allocating rights to Namibia's natural resources. As was contended by respondents' counsel, this court accepted that the system of priority in respect of applications set by s 125 is of importance to the mining industry.<sup>9</sup> It is after all conducive to accountability and public interest in the context of the Act and the constitutional dispensation with regard to minerals (and other natural resources such as those in the sea) that the statutorily set procedures for applications for their allocation are strictly adhered to.<sup>10</sup>

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<sup>9</sup> *Black Range Mining (Pty) Ltd v Minister of Mines and Energy & others* NNO 2014 (2) NR 320 (SC) para 45.

<sup>10</sup> *President of the Republic of Namibia & others v Anhui Foreign Exchange Construction Group Corporation Ltd & another* 2017 (2) NR 340 (SC) para 69. See generally the sentiments expressed with regard to the need for transparency and accountability raised in the context of procurement which apply with equal if not greater force in the allocation of rights to natural resources. *Pamo Trading Enterprises CC & another v Chairperson of the Tender Board & others* 2019 (3) NR 834 (SC) paras 29-32. See also *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (4) SA 179 (CC) para 71.

[54] A directory meaning contended for by the appellant would render this important provision toothless and nugatory and undermine its statutory purpose.

[55] Reliance by counsel for the appellant upon the approach of this court in *Torbitt* is misplaced. That matter concerned a statutory injunction contained in the Labour Act<sup>11</sup> which requires<sup>12</sup> that an arbitrator 'must issue an award' within 30 days of the conclusion of arbitration proceedings under that Act. The High Court in that matter held that the wording was peremptory and that an award given more than 30 days after the conclusion of proceedings resulted in a nullity. This court made it clear that the use of the term 'must' meant that it was peremptory as far as the arbitrator was concerned.<sup>13</sup> It compelled an arbitrator to make an award within that period. That was after all what the legislature obviously intended. But it did not intend invalidity of an award given a day or two later, having regard for the purpose and context of the provision. It meant that the term 'must' retained its ordinary mandatory meaning but the consequence of non-compliance with it by an arbitrator was not visited with invalidity of an award delivered late. The mandatory meaning would mean that an arbitrator could be compelled by a party to make an award if he or she had not done so within 30 days. That would be the consequence of non-compliance with that provision in the form of a remedy. But this consequence did not result in the meaning given to 'must' was directory. This court found that it was mandatory upon an arbitrator but that its breach did not result in invalidity, because this would result in an absurdity and unjust consequences. In short, the statutory purpose and context is to be considered in

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<sup>11</sup> 11 of 2007.

<sup>12</sup> In s 86(18).

<sup>13</sup> *Id* para 40.

determining the consequences of non-compliance with a mandatory statutory duty.<sup>14</sup>

[56] If applications were not considered in their sequence and the meaning of 'shall' is to be directory, there would then be no recourse and it would be a toothless provision. This could certainly not have been the intention of the legislature in the context of the compelling public interest for the Minister and Mining Commissioner to act with transparency on behalf of the State in according the valuable rights to minerals.

[57] It would also not avail an aggrieved applicant for a mining licence (or the public interest) to seek a *mandamus* against the repository of the power if an application had been granted out of sequence.

[58] It follows that the use of the term 'shall' in s 125 takes its ordinary peremptory meaning, given the statutory context and legislative intention behind the provision. It further follows that conduct in conflict with it (by not following the consequence in considering applications) will result in invalidity. The conclusion reached by the High Court in this regard is beyond reproach.

### Conclusion

[59] It follows that the appeal is without merit and is to be dismissed. The respondents sought the costs of two instructed counsel in the appeal. The ambit of this appeal in my view justifies such an order.

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<sup>14</sup> See generally *Claud Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd* 2018 (1) NR 155 (SC) at para 36 *et seq.*



Order

[60] The following order is made:

The appeal is dismissed with costs, to include the costs of one instructing and two instructed legal practitioners.

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**SMUTS JA**

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**DAMASEB DCJ**

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**FRANK AJA**

## APPEARANCES

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