

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING: LEAVE TO EXECUTE

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

In the matter between:

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

1ST APPLICANT

KAOKOLAND MINING EXPLORATION CC

2ND APPLICANT

and

**OTNIEL KOUJO
MINISTER OF MINES AND ENERGY
MINING COMMISSIONER**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

Neutral Citation: *Luxury Investments One Hundred and Ninety Two (Pty) v Koujo* (HC-MD-CIV-MOT-REV-2017/00411) [2018] NAHCMD 390 (28 November 2018)

CORAM: PRINSLOO J

Heard: 07 November 2018

Delivered: 28 November 2018

Reasons: 29 November 2018

Flynote: Practice – Judgments and orders – Application for stay of execution of judgment pending appeal to Supreme Court – Court having jurisdiction to determine matter in terms of its inherent jurisdiction where dictates of real and substantial justice required it.

Summary: The first respondent filed a notice of appeal to the Supreme Court against the orders and judgment of this court dated 20 August 2018 wherein the court granted the applicant's conditional counter-application. Shortly after the filing of the appeal by the first respondent, the applicants thereafter launched an application for leave to be granted to put the order dated 20 August 2018 into operation pending the appeal process.

In support of the application, a detailed founding affidavit deposed to by Mr. van der Plas was filed together with a number of supporting affidavits. The application was duly opposed by the first respondent and an answering affidavit of Mr. Koujo was filed in support of this opposition.

The crisp question for determination in the matter *in casu* is thus whether on the facts at hand, a proper case is made out to grant leave to put the order to execute the judgment into operation pending the appeal process.

This rule was premised on a principle of the common law to the effect that the noting of an application for leave to appeal, suspended the 'execution' of the order. Applications for leave to execute judgments of this court pending appeal, are governed by the provisions of Rule 121 (2). Rule 121(2) of the Rules of the High Court.

Mr. Heathcote argued on behalf of the applicants that the first respondent did not put up any case for potential of irreparable harm or prejudice and leave to execute should be granted. He pointed out that the first respondent, apart from a sweeping statement by

the first respondent that he will suffer 'massive and irreparable harm', he failed to advance a single primary fact for such a statement.

Mr. Heathcote submitted that in contrast with the first respondent, the applicants made out a clear case for 'massive and irreparable harm' or prejudice should leave to execute be refused. He submitted that this was factually demonstrated in the founding affidavit of Mr. van der Plas.

Mr. Namandje contended that the applicants' case is based on the wrong assumption that the judgment of this court in August 2018 resulted in a restoration of the first and second applicants mining claims. He argued that the applicants are defending this court's acceptance of the irregular affidavit filed after close of pleadings and in which affidavit the third respondent stated under oath that the first applicant's application for mining claims were still under consideration. However, he argued that whether or not the mining claims were granted, the fact remains that the cancellation of the first respondent's claims was reviewed and set aside and the order on the counter application did not put any life in the alleged claims of the first applicant as the matter was simply referred back to the decision-maker.

It was argued that the majority of the allegations made on behalf of the applicants relates to the prejudice or irreparable harm to be suffered by the second applicant but that the second applicant as already alluded to did not apply for mining claim not does it have any. The allegations of prejudice and irreparable harm are therefore irrelevant and thus inadmissible.

It was further argued that the first respondent duly applied for mining claims and was granted such mining claims. Third parties were contractually recruited to undertake mining activities and it would suffer irreparable harm and prejudice if the first respondent were dislodged from the mining area, while awaiting the outcome of the appeal to the Supreme Court. Mr. Namandje submitted that it would be against all notions of justice if

the first respondent were to be denied the right to undertake its mining activities when he has filed an appeal as the appeal enjoys excellent prospect of success.

Held – From the onset, there is very little contained in the answering affidavit of the first respondent in opposition to the application. In the answering affidavit of the first respondent, he indicated that he will suffer irreparable harm if the application is granted in favor of the applicants. The first respondent did not elaborate on the nature of or the potentiality of irreparable harm or prejudice.

Held – No documentation was presented to this court as to the nature of the potential prejudice or harm that the first respondent will suffer.

Held further – It not apparent how and why the respondent will be severely prejudiced should execution be granted. If the *Wightman* case is applied to the facts of this matter, there is clearly no real, genuine and bona fide dispute of fact that exists as the first respondent who raised the dispute in his answering affidavit did not address the facts said to be disputed.

Held – A court dealing with an application for leave to execute must caution itself against the temptation to deal with the application as if it was the appeal court, for this would have the undesirable effect of pre-judging the outcome of the appeal.

Held further – In my view, counsel for the first respondent remained unable during the hearing to demonstrate that there are prospects of success on appeal on the grounds raised. I do not believe that another court might come to a different conclusion on the grounds raised.

ORDER

1. The court condones the applicants' non-compliance with the rules of court relating to service and time periods for exchanging pleadings and further grants condonation for having to hear the matter on an urgent basis as contemplated in terms of High Court Rule 73.
2. Pending the finalization of the first respondent's appeal noted on 5 September 2018 in case **HC-MD-CIV-MOT-REV-2017/00411** to the Supreme Court of Namibia:
 - a. Paragraphs 2 (a) of this court's order dated 20 August 2018 is operative with immediate effect, and
 - b. The first respondent and all those holding through him, shall vacate the area of the first applicant's affected claim as described in the further supplementary answering affidavit to the main application dated 17 April 2018, as depicted in annexure "WvP 11" annexed to the founding affidavit in this urgent application, specifically the borders identified by reference point 13.1 ("the applicants' mining area");
 - c. Should the first respondent or any of the persons present on the applicants' mining area refuse to vacate the applicant's mining area upon service of the order by the Deputy Sheriff for the Kunene Region, then the Station Commander (or acting Station Commander) of Opuwo is directed to make sufficient members of the Police Force available, to assist the Deputy Sheriff to execute this order.'
3. Cost to be cost in the appeal.

JUDGMENT

PRINSLOO J:

Introduction

[1] The application before me was brought on Notice of Motion by the first and second applicants, who were the third and fourth respondents in the matter of *Koujo vs Minister of Mines and Energy*.¹ In the aforementioned, this court delivered judgment on 20 August 2018 wherein the court granted the applicant's conditional counter-application. In the relevant matter, the court made an order that the decision of the second respondent to grant mining claims 70056 and 70057 to Otniel Koujo is set aside with costs and the matter was referred to the second respondent to consider and comply with the principles of natural justice. The reasons in this matter were released on 24 August 2018.

[2] On 05 September 2018 the first respondent filed a notice of appeal to the Supreme Court against the orders and judgment in case *Koujo vs Minister of Mines and Energy* HC-MD-CIV-MOT-REV-2017/00411) NAHCMD 260 (17 August 2018), on the counterclaim.

[3] Subsequent to the filing of the appeal by the first respondent, the applicants launched the application before me for leave to be granted to put the order dated 20 August 2018 into operation pending the appeal process. This application was launched on 22 October 2018 after due compliance with Rule 32 (9) and (10). The applicants launched their application in compliance with Rule 65 of the Rules of court. The applicants prayed for the following relief in its notice of motion:

'1. Condoning the applicants' non-compliance with the rules of court relating to service and time periods for exchanging pleadings and further seeking condonation for having the matter heard on an urgent basis as contemplated in terms of High Court Rule 73.

¹ (HC-MD-CIV-MOT-REV-2017/00411) NAHCMD 260 (17 August 2018).

2. Directing that the order granted by this Honorable Court on 20 August 2018 in the matter between the parties is implemented pending the outcome of the appeal noted by the first respondent.
3. Further and /or alternative relief.
4. Cost of suit.’

[4] At this juncture, it would be apposite to point out that Mr. Heathcote, acting on behalf of the applicants, moved for an amendment to the notice of motion from the bar as set out in the applicants’ heads of arguments,² for an order in the following terms:

1. Condoning the applicants’ non-compliance with the rules of court relating to service and time periods for exchanging pleadings and further seeking condonation for having the matter heard on an urgent basis as contemplated in terms of High Court Rule 73.
2. Pending the finalization of the first respondent’s appeal noted on 5 September 2018 in case HC-MD-CIV-MOT-REV-2017/00411 to the Supreme Court of Namibia:
 - a. Paragraphs 2 (a) of this court’s order dated 23 August 2018 is operative with immediate effect, and
 - b. The first respondent and all those holding through him, shall vacate the area of the first applicant’s affected claim as described in the further supplementary answering affidavit to the main application dated 17 April 2018, as depicted in annexure “WvP 11” annexed to the founding affidavit in this urgent application, specifically the borders identified by reference point 13.1 (“the applicants’ mining area”);
 - c. Should the first respondent or any of the persons present on the applicants’ mining area refuse to vacate the applicant’s mining area upon service of the order by the Deputy Sheriff for the Kunene Region, then the Station Commander (or acting Station Commander) of Opuwo is directed to make sufficient members of the Police Force available, to assist the Deputy Sheriff to execute this order.’

² Paragraph 20.1-20.3 of Applicants’ Heads of Argument at page 11-12.

[5] The amendment to the prayers in the notice of motion was not opposed.

[6] In support of the application, a detailed founding affidavit deposed to by Mr. van der Plas was filed together with a number of supporting affidavits. These affidavits will be visited later during this ruling. The application was duly opposed by the first respondent and an answering affidavit of Mr. Koujo was filed in support of this opposition. No papers were filed on behalf of the second or third respondents.

[7] The crisp question for determination in the matter *in casu* is thus whether on the facts at hand, a proper case is made out to grant leave to put the order to execute the judgment into operation pending the appeal process.

[8] The rule applicable was premised on a principle of the common law to the effect that the noting of an application for leave to appeal, suspended the 'execution' of the order. Applications for leave to execute judgments of this court pending appeal are governed by the provisions of Rule 121 (2) which reads as follows:

'121 Civil appeal to Supreme Court

(1)

(2) Where an appeal to the Supreme Court has been noted the operation and execution of the order in question is suspended pending the decision of such appeal, unless the court which gave the order on the application of a party directs otherwise.

(3) (my emphasizes)'

Background:

[9] The background of this matter that preceded this application was set out in detail in the judgment delivered on 20 August 2018 and I do not deem it necessary to deal

with the ruling in the main application by chapter and verse and will for convenience restate the summary of the facts and findings by quoting from the main application.³ The 'main application' was a review which had its origin in an urgent application in which the applicant prayed for the certain relief in its notice of motion:⁴

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

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

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

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

³ *Koujo vs Minister of Mines and Energy* (HC-MD-CIV-MOT-REV-2017/00411) NAHCMD 260 (17 August 2018).

⁴ '1. Condoning the applicant's non-compliance with the Rules of Court relating to service and time periods for exchanging pleadings and further seeking condonation for having the matter being heard over the weekend and hear the matter as one of urgency as contemplated in terms of Rule 73 of the Rules of the High Court.

2. Ordering the first respondent not to further implement his decision embodied in his letter dated 9 November 2017 addressed to the applicant.

3. Ordering the respondents not to, in any way, take any action purportedly on the basis that the applicant's mining claims no.: 70056 and 70057 have been cancelled.

4. Ordering that the orders under paragraphs 2 and 3 hereof serve as interim interdicts with immediate effect pending the finalisation of Part B.'

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

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

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

This court held as follows:

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

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

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

9.10 The proper functionary must be afforded the opportunity to make its determination on the matter at hand, being the mining commissioner and upon consideration of s 44 and s 55

together, the intention of the legislature is that it must be the mining commissioner who should make the determination in cancellation of mining claims and not the Minister.

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

[10] When the main application was adjudicated, the dispute between the parties were decided in two parts, i.e. the first part, which was the main application for review, in which the first respondent was successful in setting aside the Minister's decision to cancel his claims; and the second part, in which the applicants succeeded with their conditional counterclaim to have the grant of the claims to the first respondent reviewed and set aside. The granting of the first applicant's six mining claims was not challenged in any way.

The appeal

[11] As the first respondent was dissatisfied with the outcome of the review, he noted an appeal on five pertinent grounds in his Notice of Appeal dated 05 September 2018, which I will summarize for purposes of this ruling:

1st Ground: The first respondent took issue with this court's reliance on the explanatory affidavit of Erastus Shivolo and its refusal to strike same out of the court record. It is maintained that the court failed to take into account the rights of the appellant (first respondent) to a fair trial in terms of Article 12 of the Namibian Constitution and as such the first respondent was substantially prejudiced when the court regarded the said affidavit as 'utmost important' in deciding the third and fourth respondents (the current applicants) conditional counterclaim.

2nd Ground: The first respondent took issue with this court's finding that the coordinates forming mining claims 69776-69781 are in fact the same as mining claims 66988-66993 and that such was confirmed by the expert Mr. Christo Pieterse;

3rd Ground: The first respondent objected to the finding of this court that both Mr. Christo Pieterse and second respondent (ministerial respondent) confirmed that the applicant's (first respondent) mining claims number 7056 and 70057 overlaps the third respondent's claim (first applicant);

4th Ground: The grounds for objecting to the said finding is based on the fact that this court was not entitled to rely on the affidavit of the second respondent and further that the available evidence did not proof overlapping as claimed by the respondents. Alternately, should the Supreme Court find that there was overlapping as alleged by the respondents, the first respondent objects to this court's finding that the overlapping on its own particularity in respect of different minerals is unlawful and statutory impermissible;

5th Ground: The first respondent objects to this court's finding that the contravention of s. 125 of the Minerals Act leads to invalidation of a granting of mining claims in respect of an application received after another one.

The application:

Founding affidavit:

[12] The founding affidavit was deposed to by Mr. Willem Arrie van der Plas, who is the sole director of the first applicant of mining claims 69776-69781 and the sole member of the second applicant that had been conducting the first applicant's mining activities on the affected mining claim, for a period of approximately ten years prior to the current dispute.

[13] Mr. van der Plas submitted that the essence of the main application relates to the applicants' mining claims applied for on 24 February 2016. The mining claims number 69776 -69781 were allocated by the Ministerial respondents over the exact same area as that of the first applicant's earlier mining claims 66988-66993. Specifically, original mining claim 66990 was renumbered to mining claim 69778 and the two mining claims had the same coordinates. This is also the mining claim that was granted by the Ministry on 18 October 2017 to the first applicant, which is the subject matter of this current application (and the preceding review proceedings) and is referred to as the 'affected claim'.

[14] In his founding affidavit, Mr. van der Plas made the following submissions setting out what happened from the time of the delivery of judgment (which is summarized for sake of brevity):

(a) According to the deponent, the first respondent frustrated the applicants' access from as far back as 14 December 2017 when the interim order was made. From that time the first respondent was allowed by the applicants for a short opportunity during or about January 2018 and February 2018 to remove their processed ore from the mining area, where after it was fully fenced in. He states that at the affected mining area, there are millions of dollars' worth of mining equipment and vast volumes of dislodged copper ore stockpiled in the fenced mining area. The applicants were denied any form of access to these items with a combined asset value in the excess of NAD 8 500 000.⁵ The vehicles and equipment with combined asset value in excess of NAD 17 000 000 are under the applicants' direct control and stored in the applicants' mining camp, three kilometres away from the main gate of the fenced area.

(b) Operational rates of the Plant & Equipment are derived from guidelines produced and published by the Construction Plant Hire Association of SA ('CPHA'). The 'standing time' losses are projected at 70% of the normal operation rates, which is the recommended idle factor proposed by CPHA. The approximated daily standing time

⁵ List of items as per annexure "WVP 02" at page 63 of the Court Bundle.

losses incurred by the applicants relevant to their inability to use any of the plant and/or perform any mining activities amount to NAD 75 584.00 per calendar day, calculated at NAD 2 267 518.00 per month.

(c) On 18 October 2017, the applicants mining claims were granted. On 09 November 2017, the first respondent's mining claims were cancelled by the ministerial respondents. During February 2018, the first respondent's Chinese business partners started to perform extensive mining operations in the disputed mining area. They acted with the permission of the first respondent as they had no independent rights to the mining area. The first respondent appears to have leased and/or assigned certain undisclosed mining rights to his Chinese partners, which the applicants believe have not been disclosed to the second and third respondents.

(d) Since February 2018, the mining operations within the fenced mining area were not in accordance with the mining claims obtained by the first respondent as the mining claims had been specifically limited to semi-precious stones, however, the first respondent and his business partners engaged in high velocity blasting activities within the 40m deep open case mining pit, which the first and second applicants excavated into the bedrock over the last 8 years.

(e) The majority of semi-precious stones found in the vicinity of the disputed mining area where the first respondent and his business partners are conducting their mining activities is of a sensitive crystallite and high velocity blasting activities shatter and destroy any crystal-like composition and would render the finding of and/or preservation of semi-precious stones an impossibility. The high velocity blasting proves that the first respondent is engaging in blasting for copper. Mr. van der Plas stated that this belief is reinforced by the fact that the first respondent applied for multiple export permits for 1000 tonnes of copper material and single export permit for 10 kg of copper material on 11 June 2018.

(f) Inspection of the applicants mining equipment located in the fenced off area reflects substantial damage caused to a number of the pieces of equipment. Conveyer belts of the heavy duty crushers at the processing plant were cut up, partly removed and destroyed. Replacement costs of conveyer belts imply losses of hundreds of thousands of Namibian Dollars.

(g) In the period of 20 August 2018, when judgment was delivered by court to 05 September 2018 when the appeal was filed, the court order was breached continuously by high velocity blasting activity followed by excavation work where after the fully loaded trucks registered to African Huaxia Mining (Pty) Ltd would depart from the mining area. Said registration was verified with the NATIS system.

(h) As a result of the ongoing activities and in apparent violation of the court order, the legal representative of the applicants addressed urgent correspondence to the offices of the first respondent's legal practitioner demanding that the applicants be afforded immediate and unrestricted access to the affected mining claim and that the first respondent and his business partners terminate all mining activities at the said mining claims. No acceptable response was received.

(i) The entire open cast pit and the equipment and crushers are located in the centre on the first applicant's affected claim. The entire area that falls within the fenced area that encloses the first respondent's two former claims. The exact equipment and open cast pit was previously described by the first respondent as 'virgin land'. Mr. van der Plas states that at the bottom of the open cast excavation, a number of bornite pipe which contains very high copper content was found in 2015. This is the area where the first respondent is currently focusing his mining activities.

(j) Mr. van der Plas submitted that the balance of convenience in the matter under adjudication, inclusive of the pending appeal proceedings, favours the first and second applicants for the following reasons:

- (i) The first applicant's application for the due allocation of the particular mining claim was in full compliance with the requirements of the Act;
- (ii) The first applicant's application for the due allocation of the particular mining claim was filed on 24 February 2016, which is seven months prior to the filing of the first respondent's application for the two overlapping mining claims during October 2016;
- (iii) The first respondent's application, which stated that the area comprising his two mining claims, was 'virgin land'. This misrepresentation by the first respondent caused the Ministry not to properly investigate the matter prior to the official making a recommendation to the approving authorities.
- (iv) For as long as the applicants are not allowed to mine on their allocated mining claim, they are on a continuous basis suffering irreparable monetary harm and prejudice, with losses that will continue to accumulate for as long as the appeal process is pending.
- (v) If the applicants are required to await the finalization of the appeal process prior to them being afforded access to their mine and equipment and be allowed to resume their mining activity, they stand to suffer irreparable monetary harm and damages which has been quantified at NAD 75 584.00 per calendar day and thus NAD 2 267 518 per calendar month. Further losses are quantified as follows:
 - a. When mining at full capacity at three shifts per day, the mine produces and the plant procures 250 to 300 tonnes of ore per month.

- b. The general yield of the ore extracted from the open cast pit contains 23% pure copper per ton while each ton of extracted ore contains 700 grams of pure silver;
- c. The current commodity price index confirms that copper currently sells at USD 6 161.91 per ton, while silver sells at USD 14.31 per fine ounce.
- d. Based on these calculations each month's 250 tons extracted ore yields 57.5 tons of pure copper, which after reduced by smelting costs, results in gross sales amounting to USD 341 909.00 per month.
- e. Based on these calculation each months 250 tons extracted ore yields 5 468.75 fine ounces of pure silver, which after reduced by smelting costs, resulting in gross sales amounting to USD 71 972 per month.
- f. At official BON exchange rate as on Friday, 21 September 2018 the combined sum of USD 413 881.00 equates to NAD 5 943 334 per month in turn over, which is being lost.
- g. After deduction of the basic plan equipment and wage costs, the gross monthly profit amounts to NAD 2 832 594 which in turn amounts to a gross profit loss of NAD 101 164 per calendar day of in-operation.
- h. Calculations of the accumulated losses suffered by the applicants since April 017 when the first respondent secured the halting of the applicant's ongoing mining operations, calculated over a 518 day period a total loss at NAD 47 895 463.

(vi) That is unlikely that the first and second applicants will be able to recover these losses from any of the respondents.

(vii) That the counter-application in the main proceedings succeeded and that the first respondent's appeal is without merit.

Supporting affidavits

[15] In support of the applicants' application, the following supporting affidavits were filed:

(a) Mr. Christo Pieterse, a Land Surveyor, confirmed he did the surveying of the applicable mining claim beacon coordinates of the original mining claims and also studied the coordinates of the mining claims of the first applicant and that of first respondent's mining claims. He plotted the data on an electronic or digital mapping or geographic information systems and confirmed that applicants' mining claims and that of the first respondent are overlapping.

(b) Mr. Stephanus Johannes Visser, the in-house estimator in the employment of Premier Construction CC, confirmed he compiled the calculations as set out in the spreadsheets annexed to the founding affidavit of Mr. van der Plas;

(c) Mr. Daniel Kotze, a legal practitioner practicing under the name and style of Danie Kotze and Associates in Swakopmund, confirmed he took the photographs attachments as annexed to the founding affidavit of Mr. van der Plas. Mr Kotze also made the NATIS enquiries regarding the motor vehicles (trucks) used at the disputed mining area.

(d) Mr. Izak Jacobus Schoonbee, who is employed by the second applicant and has been involved in the ongoing mining activities of the applicants for the past five years.

He confirmed what was deposed to by Mr. van der Plas regarding the activities of the first respondent and his business partners on the mining area for the past nine months.

The first respondent's reply to the application

[16] In his answering affidavit, the first respondent (Otniel Koujo) avers that in reading the affidavit of Willem Arie Van Der Plas in support of the purported enforcement application, there are several problems against the applicant. Primarily, the first respondent submits that the applicant has misled the Minister of Mines and Energy, the Mining Commissioner and this court in that it has kept everyone in these proceedings under the wrong and false impression that somehow it had mining claims or that it existed in law, specifically referring to Luxury Investment 192 (Pty) Ltd.

[17] The first respondent continues to submit that he has personally obtained various documents from the Registrar of Companies, which he purports to be factual and authentic. On this score, the first respondent submits that the court made a decision based on distorted information on the background of the applicant's involvement in the present matter, i.e. its *locus standi* and its existence in law. The first respondent lays down the following timeline of events in respect of Luxury Investment 192 (Pty) Ltd.'s history:

- a) On 8 July 2013, the name of Otvani Copper, was approved by the Registrar of Companies was to be valid between 8 July 2013 to 7 September 2013. Prior to that, a notice to shareholders of a general meeting was issued on 14 June 2013 by Luxury Investment 192 (Pty) Ltd, informing them that the name Luxury Investment 192 (Pty) Ltd will be changed to Otvani Copper (Pty) Ltd and that the main business and objective of that company will change and will henceforth be for copper resource development, mining claims and so forth. ("Annexure A" and "Annexure B")

- b) Following that, on 19 July 2013, the existing name Luxury Investment 192 (Pty) Ltd was formally changed by the Registrar of Companies to Otvani Copper (Pty) Ltd. (Annexure C1,C2 and C3)
- c) From 8 July 2013 in particular, there did not exist a company by the name of Luxury Investment 192 (Pty) Ltd and refer to an annual return dated 13 September 2013 clearly indicating that Otvani Copper (Pty) Ltd with registration number 2013/0252 existed, and not Luxury Investment 192 (Pty) Ltd. (Annexure D)
- d) Further, the application for reservation of name approved by the Registrar of Companies dated 8 July 2013 and the application for change of name from Luxury Investment 192 (Pty) Ltd to Otvani Copper (Pty) Ltd dated 11 July 2013, are attached as Annexures E1 and E2.

[18] The first respondent continues that he carried out this investigation when he tried to obtain documents from the Ministry of Mines and Energy on whether Kaokoland Mining exploration or Luxury Investment 192 (Pty) Ltd ever lawfully owned any mining claims. The first respondent further states that he came across this after this court's judgment in September 2018. The first respondent indicates that he made the following findings with the Registrar of Companies and the Business and Intellectual Property Authority (BIPA):

- a) A certain company called Argyrosomus Fishing (Pty) Ltd, as per certificate to commence business and articles of association (Annexure F1 and F2), were changed this to Luxury Investment 192 (Pty) Ltd with registration number 2018/0964 (Annexure F3).
- b) The applicant indicated in the main application that certain claims were transferred to it on 30 July 2013 (Annexure G). The first respondent states that

had the applicant been truthful with the Mining Commissioner or Minister of Mines and Energy, such transfer was going to be possible, as Luxury Investment 192 (Pty) Ltd ceased to exist already by 19 July 2013.

- c) The first respondent submits that what this proves is that at the time of the purported application for mining claims by the applicant herein, and at the institution of these proceedings, there did not exist a company called Luxury Investment 192 (Pty) Ltd. In the result, it also did not as a matter of law and fact, own any mining claims.

Replying affidavit

[19] In his replying affidavit, Mr. van der Plas dealt extensively with the averment by the first respondent that the entity by the name of Luxury Investments 192 (Pty) Ltd does not exist in law and therefore has no *locus standi*.

[20] Mr. van der Plas denied the averment and suggests that the first respondent's suggestion that the applicants has no *locus standi* is without merit. He explained the chronological order which was followed in the registration of the company and maintained that the registration number of the company remained unchanged since the date of registration in 2013. He denies any intention to mislead the court or anyone else for that matter.

[21] In respect of the second applicant whom the first respondent alleges is not a party to the proceedings, Mr. van der Plas referred the court to the court order dated 27 February 2018 wherein the parties agreed that the second applicant shall be joined as a party to the proceedings. He therefore maintains that this averment by the first respondent is also without merit.

[22] On the supposition of the first respondent that first applicant's mining claims are under consideration, Mr. van der Plas states that such assumption is incorrect as the

first applicant's mining claims were awarded on 18 October 2017 and remained as such to date of this hearing. These rights of the first applicant are not subject to any legal challenge.

[23] On the issue of irreparable harm, Mr. van der Plas submitted that other than making the bald statement, the first respondent did not advance any figures to substantiate his statement, in contrast with the applicants. He reiterated that he denies that the first respondent would suffer any harm.

Argument advanced on behalf of the Applicants

[24] Mr Heathcote structured his argument according to the factors to be considered by court as set out in the matter of *Minister of Land and Resettlement v Dirk Johannes Weidts & Another*⁶ by Masuku J in confirmation of the *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*⁷ which finds application in this jurisdiction.

[25] Mr. Heathcote argued on behalf of the applicants that the first respondent did not put up any case for potential of irreparable harm or prejudice and leave to execute should be granted. He pointed out that the first respondent, apart from a sweeping statement by the first respondent that he will suffer 'massive and irreparable harm', he failed to advance a single primary fact for such a statement.

[26] In this regard, the court was referred to *Mega Power Centre CC t/a Talisman Plant and Tool Hire v Talisman Franchise Operations (Pty) Ltd and Others*⁸ in which matter the court found that the a deponent cannot simply make an allegation which do not amount to factual evidence or make such a conclusion of facts without providing the primary evidence on which the secondary facts are based.

⁶ (I 1852/2007) [2016] NAHCMD 7 (22 January 2016).

⁷ 1977 (3) SA 534 (AD).

⁸ 2016 (4) NR 1174 (HC).

[27] Mr. Heathcote submitted that in contrast with the first respondent, the applicants made out a clear case for 'massive and irreparable harm' or prejudice should leave to execute be refused. He submitted that this was factually demonstrated in the founding affidavit of Mr. van der Plas.

[28] On the statement by the first respondent that the applicants' averments on damages are aggravated, irrelevant and false, Mr. Heathcote argued that the first respondent has no factual basis on which to dispute the applicants' claims of the nature and quantum of their monetary damage.

[29] He argued that on the various statements made by the applicants, the first respondent advanced unsubstantiated denials and thus do not create any bona fide dispute of fact. It was submitted that as such, the applicants' averments, which are inherently probable and supported by cogent evidence, should be accepted as accurate by this court.

[30] Mr. Heathcote stated that the only 'defence' supported by facts is the alleged non-existence of the first applicant in law. He however argued that this defence does not avail the first respondent since it has been negated by the facts put up in answer thereto in the applicants' replying affidavit.

[31] On the issue of prospects on appeal, it was submitted that the first respondent has no prospects of success. Mr. Heathcote submitted that the first respondent appeal has no merit. He also dealt with the grounds of appeal as follows:

On ground 1: Mr. Heathcote submitted that the first ground of appeal is aimed at the unsuccessful striking out application of the explanation by the Mining Commissioner. Since the striking out application was interlocutory in nature, the appeal against the refusal could only be pursued with this court's leave. In this instance, leave was never sought nor granted, however, submitted that there is no prospect of success in this regard.

On the remaining grounds: Mr. Heathcote submitted that the appeal has no merits as it is impermissibly aimed at the court's reasons. The first respondent's reliance on the import of s.125 of the Minerals (Prospecting and Mining) Act 33 of 1992 is also argued to be unmeritorious as the significance of the section has been emphasized by our apex court.

[32] It was further submitted that the first respondent effectively hijacked the mine claims of the applicants as he abused the errors in the Ministry's Flexi Cadastre digital mapping system. He submitted that the first respondent persists with his contention that it is his good fortune that the 'virgin land' for which he applied for semi-precious stone mining claim happens to have a fully - fledged copper mining in the middle of it. The first respondent is focusing his mining activities at the massive open cast pit for which the first respondent did not show any proof of expenditure in respect of any basic mining or preparation activities. Mr. Heathcote argued that it is no coincidence that after the first respondent applied for a permit to transport and export 1000 tons of copper was refused, he partnered with a copper mining company with a mining site close to Rehoboth with foreign shareholders whose trucks have been transporting material out to the 'virgin land' immediately after high velocity blasting.

[33] Mr. Heathcote in conclusion submitted that the need of balance of convenience does not arise since the first respondent has refused to advance primary facts to allow the court to assess any harm he may suffer or to compare any such harm against the substantial and irreparable harm. The applicants have shown that they will suffer and since the first respondent's appeal has no reasonable prospects of success. In the event that if this court should find that a balance exercise is necessary, the balance of hardship overwhelmingly favours the implementation of this court's order pending the appeal.

Argument advanced on behalf of the First Respondent

[34] Mr. Namandje argued contrary to the submissions made on behalf of the applicants that no case was made out for the orders sought in the Notice of Motion.

[35] Mr. Namandje was in agreement that the main and controlling principles applicable to the determination of this application were refined in the *South Cape Corporation* case⁹ which was adopted and applied in the matter of *Walmart Stores Inc. v Chairperson of Namibia Competition Commission and Three Others*¹⁰ and he accordingly also argued this matter along the guidelines as set out in the aforementioned cases.

[36] It was submitted that the second applicant has made out a case as to why it is an applicant in the proceedings *in casu* as it did not apply for mining claims, nor does it have any mining claims and has not put up any facts on the basis of which it should be an applicant.

[37] Mr. Namandje submitted that the controlling and established principles in relation to this kind of application make it clear that the determination of the present application is based on the overall exercise of the court's discretionary powers to determine what is just and equitable and in doing so, the court should have regard to the factors as set out in the *South Cape Corporation* matter. It was pointed out that it is for the applicants to establish that leave to execute should be granted and thus bears the onus to establish a special case for leave to execute pending an appeal.

[38] Mr. Namandje contended that the applicants' case is based on the wrong assumption that the judgment of this court in August 2018 resulted in a restoration of the first and second applicants mining claims. He argued that the applicants are defending this court's acceptance of the irregular affidavit filed after close of pleadings and in which affidavit the third respondent stated under oath that the first applicant's application for mining claims were still under consideration. However, he argued that whether or not the mining claims were granted, the fact remains that the cancellation of

⁹ Supra at footnote 5.

¹⁰ 2012 (1) NR 69 (SC).

the first respondent's claims was reviewed and set aside and the order on the counter application did not put any life in the alleged claims of the first applicant as the matter was simply referred back to the decision-maker.

[39] It was argued that the majority of the allegations made on behalf of the applicants relates to the prejudice or irreparable harm to be suffered by the second applicant but that the second applicant as already alluded to did not apply for mining claim not does it have any. The allegations of prejudice and irreparable harm **are** therefore irrelevant and thus inadmissible.

[40] It was further argued that the first respondent duly applied for mining claims and was granted such mining claims. Third parties were contractually recruited to undertake mining activities and it would suffer irreparable harm and prejudice if the first respondent were dislodged from the mining area, while awaiting the outcome of the appeal to the Supreme Court. Mr. Namandje submitted that it would be against all notions of justice if the first respondent were to be denied the right to undertake its mining activities when he has filed an appeal as the appeal enjoys excellent prospect of success.

[41] Mr. Namandje is of the opinion that even if there were merits in the applicant's submissions relating to the provisions of s. 125 of the Act, it is unlikely that the apex court would find that non-compliance would lead to invalidity. In this regard the court was referred to the matter of *Torbitt v International University of Management*.¹¹

¹¹ 2017 (2) NR 323 (SC) at par 36-37:

[36] Where a statutory duty is imposed on a public body or public officers —

'and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescription may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirement were essential or imperative'.

[37] In Maxwell Interpretation of Statutes, regarding the performance of a public duty the following was said:

'On the other hand, where the prescriptions of a statute relate to the performance of a public duty, and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, yet not promote the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them. It has often been held, for instance, when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, that the Act was directory only

[42] It was submitted that both in respect of the irreparable harm or balance of convenience, the applicants failed to make out a proper case to be granted leave to have the judgment of this court put into operation.

[43] On behalf of the first respondent, it is submitted that the first respondent has excellent prospects to succeed on appeal. It was submitted that in view of the further evidence produced by the first respondent, which evidence is to be introduced at appeal, will cause the applicants case to become even weaker and fragile. Mr. Namandje contended that the court made an order on wrong facts as the change in company name is not a non-consequential matter and has consequences with reference to s. 55 and 56 of the Companies Act.

[44] Accordingly, Mr. Namandje therefore prayed that the court dismisses the application with costs.

The Law Applicable

[45] Leave to execute an order of court pending the outcome of an appeal is at the discretion of the court that is called upon to deal with the matter. The discretion has been described as “general” and “wide”.¹² The purpose is to ameliorate or prevent further hardship that may be occasioned to a party who has judgment in his favour, by delay in execution of the order.

[46] This exercise requires striking a balance between the conflicting interests of the applicant and those of the respondent, in a manner that advances justice and equity.¹³

[47] To this end, principles have been laid down for the guidance of the court in the exercise of its discretion.

and might be complied with after the prescribed time.'

¹² *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 at page 545 para C.

¹³ *South Cape Corp*, supra, page 545 para D.

[48] Appealing against judgments and orders is a very important part of our justice system, obviously up to a certain point because matters must finally be concluded. The right of appeal must not lightly be hampered, and the granting of leave to execute a judgment pending appeal has a good potential to do so.

[49] In *Walmart Stores Inc. v Chairperson of Namibia Competition Commission and Three Others*,¹⁴ Smuts J (as he then was) discussed the principles applicable to an application of this nature as follows:

[40] The principles applicable to an application of this nature were, with respect, succinctly summarised by then Appellate Division in South Africa in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*⁴ as follows:

“The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; *Ruby’s Cash Store (Pty.) Ltd. V Estate Marks and Another*, supra at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. *Fismer v Thornton*, 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;

(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;

¹⁴ 2012 (1) NR 69 (SC)

(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and

(4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

[41] I accept that these principles also reflect the state of the law in Namibia, having been stated at a time when the then Appellate Division of South Africa was the highest court of appeal in respect of Namibia. ”

[50] In *Minister of Land and Resettlement v Dirk Johannes Weidts & Another*,¹⁵ Masuku J revisited applications for leave to execute a judgment pending appeal and stated as follows:

[13] To my understanding, the following can be gleaned from the nomenclature employed in the subrule in question. First, if this court has, in a civil matter granted an order and an appeal has been noted against the said order to the Supreme Court, the noting of the appeal ordinarily stays the operation and execution of the order in question. This, in my view makes sense for the reason that if it were otherwise, by the time an order is made by the Supreme Court in favour of the appellant, it may in some cases be difficult and at times impossible to give effect to the Supreme Court’s judgment or order as the case may be. This may serve to hamper the logical and orderly conduct of litigation through all the rungs of the court structure to the apex court. In a sense therefore, the noting of an appeal freezes or maintains the status *quo* until the Supreme Court, being the court with the last word, has determined the matter in a final fashion in favour of one or the other party.

¹⁵ (I 1852/2007) [2016] NAHCMD 7 (22 January 2016).

[14] It would also appear to me that the general rule is to have the noting of an appeal stay execution of the judgment automatically. For that reason, it is my view that the filing of an application for leave to execute must therefore be regarded as the exception to the general rule and one, it would further seem to me, that the court should not grant lightly or merely for the asking as it may have the potential to interfere, as pointed out above, with the dissatisfied party's ordinary constitutional and legal right of recourse to a higher court and in this case, for final for redress.

[15] Second, if a party to the case wishes to have this court's order or the judgment rendered operational and executable immediately without waiting for the final word from the Supreme Court, then the onus is upon that party, being the successful one, to approach this court to direct otherwise, namely, that the judgment be executed notwithstanding a pending appeal.¹⁶

Application of the law to the facts

[51] From the onset, I must point out that there is very little contained in the answering affidavit of the first respondent in opposition to the application before me. This will become apparent from my discussion of the factors hereunder.

The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted

[52] In the answering affidavit of the first respondent, he indicated that he will suffer irreparable harm if the application is granted in favor of the applicants. The first respondent did not elaborate on the nature of or the potentiality of irreparable harm or prejudice.

¹⁶ Cf *Southern Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD) at 546 C-H.

[53] No documentation was presented to this court as to the nature of the potential prejudice or harm that the first respondent will suffer. It is not clear what the contractual agreement between the first respondent and his business partners are.

[54] It is submitted that both the first respondent and third persons will suffer massive irreparable harm. It is not sufficient just to make the statement. In some instance, a bare denial meets the requirements, however, this is not that case.

[55] It not apparent how and why the respondent will be severely prejudiced should execution be granted.

The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused:

[56] The judgment of this court dated 20 August 2018 in respect of the main application was of such a nature that it restored the *status quo ante*. It was correctly pointed out that the ministerial respondents have to apply their minds and reconsider their earlier decision regarding the withdrawal of the first respondent's mining claims. The mining claims granted in favor of the first applicant were never cancelled. Therefore once the *status quo ante* was restored, the first and second applicants were entitled to proceed with their mining operation. The result of the judgment would therefore have been a physical restoration of the action mining site and not a 'restoration of "*the First and Second Applicants' mining claim, which entitles the Applicants to control and possession of the mining claim and the underlying mining area*"' as submitted in the first respondent's heads of arguments.

[57] In his answering affidavit, the first respondent states that the Mining Commissioner may grant the claim again to him or may make any other decision. He further stated that it is not a given that the applicant will be given mining claims. This is a moot point in light of the fact that the first applicant has granted the relevant mining claim and that is not the subject matter of the review application.

[58] The first respondent is currently mining at the open cast pit of the applicants, which is evident from the founding affidavit of Mr. van der Plas and which was not disputed by the first respondent. The first respondent did not advance anything factual to rebut the averments set out in the founding affidavit of Mr. van der Plas. This includes the averments that: a) the first respondent is currently making use of high velocity blasting to mine copper, contrary to the permit granted to him for mining of semi-precious stones, and that this blast material are removed by the trucks of third parties; b) the alleged illegal mining and high velocity blasting from the date of judgment on 20 August 2018 in the main application to date of the noting of the appeal on 05 September 2018; c) the damage to the equipment of the applicants, d) the losses suffered by the applicants on a daily and monthly basis.

[59] The first respondent denies that the applicants were frustrated from accessing the mining area. He submitted that the applicants have reasons to aggravate the allegations in respect of the alleged irreparable harm as it is done to sway this court and in addition thereto the allegations are false. The first respondent does not expand on this averment.

[60] The answering affidavit of the first respondent contains bare denials in respect of the allegations of damage to the equipment of the applicants and illegality on his part. In turn the first respondent stated that as the applicants mining claims expired in June 2015, it is the applicants that were mining illegally.

[61] The first respondent does not present any factual basis on which he disputes the applicants' claim either in nature or in quantum and the court must accept the calculations of the applicants as correct.

[62] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*,¹⁷ Heher JA stated as follows:

¹⁷ 2008 (3) SA 371 (SCA).

'[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.'

[63] If the *Wightman* case is applied to the facts of this matter, there is clearly no real, genuine and *bona fide* dispute of fact that exists as the first respondent who raised the dispute in his answering affidavit did not address the facts said to be disputed.

[64] Based on the calculations of the applicants, the financial harm and prejudice that the applicants stand to suffer if the execution of the court order is not enforced, will run into millions of Namibian Dollars on a monthly basis.

[65] One last issue to address in this regard is the issue of the *locus standi* of the second applicant. In this application, the question by the first respondent appears to be without merit as the court order dated 27 February 2018 specifically joined the second applicant as a party to the proceedings.¹⁸

[66] It was argued on behalf of the first respondent that the majority of the allegations related to the prejudice or irreparable harm would be suffered by the second applicant but the second applicant did not apply for any mining claim, nor does it have any and

¹⁸ **Court order dated: 27 February 2018:**

2. The parties and Kaokoland Mining Exploration Close Corporation have agreed that Kaokoland Mining Exploration Close Corporation shall be joined as the fourth respondent in this application and that Kaokoland Mining Exploration need not be served afresh with any of the process already delivered in this application as it has notice thereof through its instructed legal practitioner, Danie Kotze and his correspondent firm, Koep & Partners, that will accept all further process in this application on behalf of Kaokoland Mining Exploration Close Corporation.

therefore, the allegations of prejudice and irreparable harm on the part of the second applicant is irrelevant and thus inadmissible. This issue was not addressed in the answering affidavit of the first respondent and applicants had no opportunity to reply to same. I will therefore give no further consideration of this point raised in argument.

The prospects of success on appeal:

[67] A court dealing with an application for leave to execute must caution itself against the temptation to deal with the application as if it was the appeal court, for this would have the undesirable effect of pre-judging the outcome of the appeal. However, it is a factor to be considered in considering whether real and substantial justice requires a stay in execution pending the appeal.

[68] An issue that was pertinently raised by the first respondent is the non-existence of the first applicant. This was not raised as a ground for appeal but the first respondent intend to introduce this new evidence on appeal and submits that will even further weaken the case for the applicants.

[69] With regards to the admission of new evidence at the appeal stage, I was referred to the matter of *JCL Civils Namibia (Pty) Ltd v Steenkamp*¹⁹ where AJA Strydom discussed the issue as follows:

[27] Although, by s 19 (a) of Act 15 of 1990, this court is granted wide powers to receive evidence on appeal a reading of the cases has shown that this is a power which the court would exercise sparingly and only where certain prerequisites are complied with. These are firstly that a reasonable and acceptable explanation must be given why the evidence was not tendered at the trial. Secondly the evidence must be essential for the case on hand; and thirdly it must be of such a nature that it may probably have the effect of influencing the result of the case. (See *Staatspresident en 'n Ander v Lefuo* 1990 (2) SA 679 (A) at 691C - 692C.)

¹⁹ 2007 (1) NR 1 (SC).

[70] The question is clear in that if this issue is raised, it would have the effect of influencing the case. Having regard to the comprehensive replying affidavit filed by Mr. van der Plas in answer to the averments of the first respondent, I am doubtful if the new evidence that the first respondent wish to present during the appeal would affect the outcome of the appeal.

[70] The majority of the grounds of appeal, apart from this court's interpretation and application of s. 125, turns on the affidavit of Mr. Shivolo that was relied on and the reasons advanced by court in support of her findings.

[71] The failure to strike out is interlocutory in nature and not subject to appeal as of right. The remainder of the grounds of appeal appears to be aimed at the reasons advance for my ruling and not on the application of law to the facts before court.

[72] In respect of the ground of appeal that addresses s. 125 of the Act, I can only remark that the law is clear in this regard as set out by the Supreme Court in *Black Range Mining (Pty) Ltd v Minister of Mines and Energy and Others NNO*²⁰.

[73] In my view, counsel for the first respondent remained unable during the hearing to demonstrate that there are prospects of success on appeal on the grounds raised. I do not believe that another court might come to a different conclusion on the grounds raised.

In conclusion

[74] On the totality of the issues before me, I am of the considered view that it is unnecessary to consider the last element set out in the *South Corporation* namely, the balance of hardship, as the first respondent failed to advance any primary fact to allow this court to assess any harm he may suffer or to compare any such harm against the substantial and irreparable harm the applicants have shown that they will suffer.

²⁰ 2014 (2) NR 320 (SC) at 338 A-B.

[75] For the reasons discussed above, I am satisfied that the applicants have discharged the onus placed on them to show that the order dated 20 August 2018 should be implemented pending the outcome of the appeal.

[76] In the premises, I issue the following order:

1. The court condones the applicants' non-compliance with the rules of court relating to service and time periods for exchanging pleadings and further grants condonation for having to hear the matter on an urgent basis as contemplated in terms of High Court Rule 73.
2. Pending the finalization of the first respondent's appeal noted on 5 September 2018 in case **HC-MD-CIV-MOT-REV-2017/00411** to the Supreme Court of Namibia:
 - a. Paragraphs 2(a) of this court's order dated 20 August 2018 is operative with immediate effect, and
 - b. The first respondent and all those holding through him, shall vacate the area of the first applicant's affected claim as described in the further supplementary answering affidavit to the main application dated 17 April 2018, as depicted in annexure "WvP 11" annexed to the founding affidavit in this urgent application, specifically the borders identified by reference point 13.1 ("the applicants' mining area");
 - c. Should the first respondent or any of the persons present on the applicants' mining area refuse to vacate the applicant's mining area upon service of the order by the Deputy Sheriff for the Kunene Region, then the Station Commander (or acting Station Commander) of Opuwo is directed to make

sufficient members of the Police Force available, to assist the Deputy Sheriff to execute this order.'

3. Cost to be cost in the appeal.

J S Prinsloo

Judge

APPEARANCES

FOR THE APPLICANTS: R Heathcote (with R Maasdorp)
instructed by Koep & Partners, Windhoek

FOR THE RESPONDENT: S Namandje
of Sisa Namandje & Co. Inc., Windhoek