



REPORTABLE

CASE NO: SA 92/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GECKO SALT (PTY) LTD

Appellant

and

MINISTER OF MINES AND ENERGY

First Respondent

MINING COMMISSIONER

Second Respondent

WALTRUD GOSSOW NO

Third Respondent

ROLF GOSSOW HOLDINGS (PTY) LTD

Fourth Respondent

SALZ-GOSSOW (PTY) LTD

Fifth Respondent

MINISTER OF ENVIRONMENT AND TOURISM

Sixth Respondent

ENVIRONMENTAL COMMISSIONER

Seventh Respondent

DIRECTOR-GENERAL OF THE ANTI-CORRUPTION COMMISSION

Eighth Respondent

TY INVESTMENTS (PTY) LTD

Ninth Respondent

In the matter between:

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Appellant

and

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Coram: SHIVUTE CJ, DAMASEB DCJ, et MAKARAU AJA

Heard: 17 March 2025

Delivered: 20 June 2025

Summary: This appeal and cross-appeal stem from three interrelated review applications heard together by the High Court. All matters concern the interpretation and application of the Environmental Management Act 7 of 2007 (EMA 2007) and the Minerals (Prospecting and Mining) Act 33 of 1992 (MPMA 1992), and specifically the validity of Exclusive Prospecting Licence 4426 (EPL 4426), issued to Gecko Salt (Pty) Ltd (Gecko) by the Minister of Mines.

Gecko's review challenged the Minister of Mines' approval of the transfer of mining licences ML82D, ML82E and ML82F to Rolf Gossow Holdings (Pty) Ltd (RGH), asserting the transfer was fraudulent and unlawful, and that the Gossows conducted mining operations without the requisite Environmental Clearance Certificate (ECC), rendering the Minister's decision invalid under the EMA 2007. Gecko also alleged procedural and statutory violations, including non-compliance with sections of the MPMA 1992, and alleged irregularities in the Gossows' environmental practices and licensing.

Conversely, the Gossows initiated two reviews seeking to invalidate Gecko's EPL 4426 and its subsequent renewal. They argued that the licence was issued in violation of s 31 of the EMA 2007, and renewed without proper public consultation or ECC, and in breach of Art 18 of the Namibian Constitution. Alleged additional irregularities included improper authorisation of Gecko's renewal application and procedural defects in its submission.

Given the overlapping legal and factual issues, the High Court heard all three reviews jointly. A central issue across all applications was the validity of EPL 4426. The High Court found that, at the time of its purported issuance, Gecko did not possess an ECC as required under s 31 of the EMA 2007, rendering the licence invalid *ex lege*. The High Court found in favour of the Gossows in all three reviews and set aside EPL 4426 and referred the matter of renewal of EPL 4426 to the Minister of Mines for reconsideration.

On appeal, the central question was whether Gecko had *locus standi* in its own review and in opposing the Gossow reviews – ie, whether it held a valid mining licence conferring a direct and substantial interest in the subject matter of the applications. Gecko's standing was contingent upon the legality of EPL 4426, which in turn hinges on compliance with the MPMA 1992 and s 31 of the EMA 2007.

The following key issues arose for determination on appeal: (a) whether the High Court erred in its interpretation of s 31 of the EMA 2007, particularly in finding that the grant of EPL 4426 to Gecko without a pre-existing ECC was unlawful and therefore void; (b) whether Gecko substantially complied with s 31, as it contended, thereby rendering the licence valid in law; and (c) whether Gecko's failure to comply with s 31 renders the renewal of EPL 4426 equally invalid *ab initio*, with the consequence that there was no basis to remit the matter to the Minister of Mines for reconsideration.

Held that, Gecko's argument misstates the modern approach to interpretation as formulated and applied in Namibia and other common law jurisdictions. While interpretation should indeed consider context, purpose and values, it remains subject to the overarching objective of giving effect to Parliament's intention as expressed in the statutory scheme. Where that language is clear and unambiguous, the court is not at liberty to rewrite it under the guise of purposive construction.

Held further that, fidelity to the statutory text and scheme remains the starting point, even when broader contextual or purposive elements are considered.

Held that, against this jurisprudential backdrop, Gecko's reliance on substantial compliance as a substitute for strict compliance with s 31 of the EMA 2007 cannot be sustained. The section does not permit discretion or admit exceptions. It is framed in prohibitory terms and constitutes a jurisdictional fact for the lawful commencement of a listed activity. To hold, as suggested by Gecko, that informal

or *post hoc* measures could suffice would be to read into the provision a flexibility that Parliament has not provided.

Held further that, it would also undercut the object of the EMA 2007, which is to ensure environmental protection through a system of prior assessment, consultation, and approval – not retrospective regularisation.

Held that, s 27 of the EMA 2007 makes clear that no person may undertake a listed activity unless an ECC for the undertaking of the activity has been issued.

Held further that, the plain grammatical structure of the provision is unambiguous: it imposes a mandatory precondition to the lawful commencement of any listed activity – namely, the prior issuance of an ECC. There is no discretionary language allowing for deviation from that requirement, nor do the prescriptive provisions relating to the granting of an ECC lend themselves to a ‘substantial compliance’ interpretation.

Held that, the conditions imposed by the Minister of Mines when granting EPL 4426 do not dispense with the requirement imposed by s 31(1) of the EMA 2007, which provides in unequivocal terms that a competent authority may not issue an authorisation for a listed activity unless the applicant has obtained an ECC.

Held further that, the statutory scheme therefore makes possession of a pre-existing ECC a jurisdictional fact for the lawful issuance of an EPL in relation to a listed activity. The Minister of Mines’ conditions cannot and do not amount to a substitute for the ECC.

Held that, strict application of s 31 of the EMA 2007 does not result in an absurdity. On the contrary, it gives full effect to the legislative intent – namely, to ensure that the environmental consequences of listed activities are rigorously scrutinised before they are authorised. If s 31 is to be meaningful, it must be enforced as written.

Consequently, the main appeal was dismissed and the cross-appeal allowed.

APPEAL JUDGMENT

DAMASEB DCJ (SHIVUTE CJ and MAKARAU AJA concurring):

Background

[1] This appeal and cross-appeal concern the outcome of three review applications brought before the High Court, all of which relate to the interpretation, inter-relationship and application of certain provisions of the Environmental Management Act 7 of 2007 (EMA 2007) and the Minerals (Prospecting and Mining) Act 33 of 1992 (MPMA 1992).

[2] The first application was instituted by Gecko Salt (Pty) Ltd (Gecko), which sought to review and set aside a decision by the Minister of Mines and Energy (the Minister of Mines) approving the transfer of three mining licences¹ – ML82D, ML82E and ML82F – from the late Mr Rolf Wolfgang Gossow to Rolf Gossow Holdings (Pty) Ltd (RGH). This will be referred to as the Gecko Review.

[3] The second and third applications (Gossow Reviews 1 and 2) were brought by RGH and others (the Gossows), who sought to invalidate Exclusive Prospecting Licence 4426 (EPL 4426),² granted to Gecko by the Minister of Mines over an area overlapping with the Gossows' mining licences.

How EPL 4426 and the Gossows' mining licences intersect

¹ Mining licences are regulated under Part XII of the MPMA 1992.

² Exclusive prospecting licences are regulated under Part X of MPMA 1992.

[4] EPL 4426 pertains to Base and Rare Metals, Industrial Minerals and Precious Metals, and Gecko's prospecting rights are expressly limited to salt. Gecko contends that it was granted an unrestricted right to prospect for salt within the 'prospecting footprint', excluding three specified rectangular sections, over which the Gossows assert mineral rights by virtue of their mining licences.

[5] The Gossows concede that, despite some dispute regarding the precise location and extent of mining activities, mining licences ML82D, ML82E and ML82F fall within the boundaries of Gecko's EPL 4426.

[6] In the Gecko Review, the validity of the transfer of mining licences from the late Mr Rolf Wolfgang Gossow to RGH was contested, and allegations were made that the transfer was both fraudulent and unlawful. Central to Gecko's case is the claim that the Gossows conducted mining activities without obtaining an Environmental Clearance Certificate (ECC) as required by s 31 of the EMA 2007. Additionally, Gecko raised a concern regarding an alleged improper overlap between Gecko's EPL 4426 and the Gossows' mining licences over the same area.

[7] The Minister of Mines was also criticised for allegedly failing to consider (in granting the Gossows' mining licences) crucial information, including discrepancies in the transfer documents and ninth respondent's (TY's) involvement with the mining licences. Gecko also highlighted alleged non-compliance by the Gossows with environmental obligations, including unauthorised construction of accessory works. It also alleged violation of the

MPMA 1992, specifically ss 3(1)(b) and 47(1)(c), underscoring the allegedly improper granting of interests in the mining licences to TY and the alleged failure by the Minister of Mines in assessing RGH's financial and operational suitability for the grant of the mining licences.

[8] In the Gosrow 1 Review, the controversy centred around the invalidity of EPL 4426, which was issued by the Minister of Mines to Gecko in the absence of an ECC as required by s 31 of the EMA 2007.

[9] Gosrow 2 Review's further focus was the invalidity of the renewal of Gecko's EPL 4426 for the period 2019–2021. The premise here being that just as the original granting of that EPL without an ECC made it invalid, so was its extension, not least because the extension was done without *audi* being granted to the Gosrows who had an interest in the matter, contrary to Art 18 of the Namibian Constitution. Alleged procedural irregularities, including the late and defective lodging of the renewal application were also said to have compromised the validity of EPL 4426's renewal.

[10] In their challenge to Gecko's EPL 4426, the Gosrows also alleged violation of some provisions of the MPMA 1992, including alleged non-compliance with ss 47(1), 68(g), 72(2)(c) and 76(1)(e). Additionally, they alleged that the renewal application was defective because Gecko's Mr Krappmann had executed the renewal application without appropriate board authorisation. The Minister of Mines

and the Mining Commissioner's³ alleged failure to properly evaluate the application and adhere to procedural mandates were also highlighted.

Three reviews heard together

[11] Because of their interrelated nature, the three reviews were, although not formally consolidated, heard together by the High Court with the agreement of the parties.

[12] Central to the outcome of all three applications was the validity of EPL 4426. If it was unlawfully granted and therefore invalid:

(a) Gecko would have had no legal standing to challenge the Gossow mining licences which then would remain valid; and

(b) the Gossows' challenge against the Minister of Mines' renewal of EPL 4426 to Gecko had to succeed.

[13] The consequence of that is that it is unnecessary, except in so far as it is necessary to provide context, to go into much detail about the many factual disputes and legal controversies that engaged the attention of the court a quo.

Preliminary skirmishes in the High Court

[14] The court a quo dealt with several *in limine* points raised by the parties across the three review applications and disposed of these threshold issues

³ The Mining Commissioner is appointed in terms of s 4 of the MPMA 1992 and exercises extensive powers under that Act either by him or herself or under the direction of the Minister of Mines.

before it considered and determined the merits. I propose to refer to them only briefly.

[15] In the Gecko Review, the Gossows raised the issue of non-joinder of TY (ninth respondent) as a necessary party. The court a quo held that the defect was remedied by TY's eventual joinder. The Gossows also alleged that the deponent to Gecko's founding affidavit had not been duly authorised and that the application stood to be dismissed for that reason. I will return to this issue presently.

[16] In the Gossow 1 Review, Gecko raised a point *in limine* contending that the Gossows had unduly delayed launching their challenge against the EPL 4426. The court a quo rejected this contention and noted that the issue had already been canvassed in previous collateral proceedings and was not fatal to the application.

[17] In the Gossow 2 Review, the threshold issue of *locus standi* was raised by Gecko, challenging the Gossows' standing to seek review. The court dismissed this challenge, affirming that the Gossows had a direct and substantial interest in the outcome, owing to the competing rights in respect of the parties' overlapping rights over the area.

[18] Because all these issues now fall by the way side in view of what has now emerged on appeal as the central issue to be decided, I propose to deal only with the issue of unauthorised proceedings raised by the Gossows which the court a quo decided against Gecko.

[19] The High Court noted that the deponent to Gecko's founding affidavit, Mr Smit, did not state that he was authorised to launch the application on behalf of Gecko, a juristic person. More significantly, according to the learned judge a quo, when this point was squarely raised by the opposing parties in their answering affidavits, Gecko failed to reply or to provide any resolution from its Board of Directors authorising the litigation. Nor did it take any *ex post facto* steps to ratify the institution of the proceedings.

[20] The court a quo took the view that this omission was not a technicality but a defect of substance. It reasoned that where a company initiates legal action, it must show, particularly when challenged, that the proceedings were authorised – either through a board resolution or other appropriate corporate action. Without such authority, the company lacked *locus standi*. The court a quo held that Gecko's silence on the issue was fatal and concluded that the application fell to be dismissed on that ground alone.

[21] The learned judge a quo nevertheless proceeded to deal with the merits of Gecko's application. He explained that the issues raised in the application were of considerable public importance, particularly concerning the interpretation and application of s 31 of the EMA 2007. The learned judge concluded that it was necessary to pronounce on the issue for the benefit of clarity in the law, especially where the same parties were involved in parallel and related litigation. Thus, while the lack of authority warranted dismissal, the court found it prudent to determine

the merits of the dispute in what it considered the broader interest of justice and legal certainty.

[22] I cannot fault the approach adopted by the learned judge a quo.

Common ground

[23] As I previously pointed out, both in respect of its own application (Gecko Review) and its defence of Gossow Reviews 1 and 2, Gecko's *locus standi* hinges on the validity of EPL 4426. That issue falls to be determined on common cause or incontestable facts.

[24] EPL 4426 was granted to Gecko on 2 July 2014 by the Minister of Mines but an ECC in terms of s 31 of the EMA 2007 was only obtained on 12 October 2015, more than a year after the EPL was granted. Subsequently, the EPL was renewed for the period of 21 October 2019 to 20 October 2021.

[25] In so far as it is relevant to the outcome of the main appeal and the cross-appeal, EPL 4426 granted to Gecko was subject to the following conditions imposed by the Minister of Mines in terms of the MPMA 1992 and accepted by Gecko:

‘PART 3 – ENVIRONMENT

6. The holder of the exclusive prospecting licence shall observe any requirements, limitations or prohibitions on his or her prospecting operations as may in the interest of the environmental protection, be imposed by the Minister.

7. The holder of the exclusive prospecting licence shall undertake an Environmental Impact Assessment (EIA) over the area covered by the exclusive prospecting licence, formulate and forward to the Ministry of Environment and Tourism for approval an Environmental Management Plan Report (EMP) before any prospecting activity starts.

8. The holder of the exclusive prospecting licence shall enter into an Environmental Contract with the Ministry of Environment and Tourism and that of Mines and Energy within six (6) months, once the EIA and EMPR have been approved.'

Statutory backdrop

MPMA 1992

[26] An EPL is granted by the Minister of Mines under s 69(1)(a) of the MPMA 1992. Under subsec (2)(b) thereof, an EPL 'shall not' be granted if at the time of the application the applicant for an EPL is contravening any provision of that Act or 'any condition' imposed by the Minister of Mines. Once the Minister of Mines has granted an application for an EPL he or she 'shall . . . direct the [Mining] Commissioner to issue an [EPL] on such terms and conditions as may be agreed upon . . .'⁴

[27] When an existing EPL is sought to be extended, the extension granted may not exceed two years (s 71(1)(b)⁵ of the MPMA 1992). And it may be renewed by the Minister of Mines upon an application being made for renewal under s 72 of the MPMA 1992.

EMA 2007

[28] The objects of the EMA 2007 are as follows:

'The object of this Act is to prevent and mitigate, on the basis of the principles set out in section 3, the significant effects of activities on the environment by -

⁴ Section 70 (1) of the MPMA 1992.

⁵ Section 71(1)(b) provides that, when an EPL which was previously granted is sought to be extended, such extension is valid for no more than two years at a time.

- (a) ensuring that the significant effects of activities on the environment are considered in time and carefully;
- (b) ensuring that there are opportunities for timeous participation of interested and affected parties throughout the assessment process; and
- (c) ensuring that the findings of an assessment are taken into account before any decision is made in respect of activities.’⁶

[29] Under s 27 of the EMA 2007:

‘Listing of activities and prohibition in respect of listed activities

27. (1) The Minister, after following the consultative process referred to in section 44, may list, by notice in the *Gazette*, activities which may not be undertaken without an environmental clearance certificate.

(2) Activities listed, under subsection (1), may include activities in respect of any of the following areas –

- (a) land use and transformation;
- (b) water use and disposal;
- (c) resource removal, including natural living resources;
- (d) resource renewal;
- (e) agricultural processes;
- (f) industrial processes;
- (g) transportation;
- (h) energy generation and distribution;
- (i) waste and sewage disposal; chemical treatment;
- (j) recreation; and
- (k) any other area which the Minister considers necessary for the purpose of listing.

(3) Despite any other law to the contrary, a person may not undertake a listed activity, unless the person is a holder of an environmental clearance certificate in relation to that activity.

⁶ Section 2 of the EMA 2007.

(4) Any person who contravenes subsection (3) commits an offence and is on conviction liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.'

[30] In terms of s 28 of the EMA 2007, the Minister of Environment may, by notice under s 27, make provision for the granting of an exemption in respect of any activity that may not be carried out without an ECC.

[31] It is common ground that for purposes of s 27 of the EMA 2007, the Minister of Mines is a 'competent authority' as that phrase is defined in EMA 2007 and that the activity authorised by him under EPL 4426 is a 'listed activity' in respect of which there was no s 28 exemption.

Gossow applicants' contentions

[32] The Gossows impugned EPL 4426 on the ground that it was granted in the absence of an ECC under s 31 of the EMA 2007. They pointed out that s 31(1) prohibits authorisation of a listed activity without an ECC. They asserted that in terms of s 31(2) of the EMA 2007, the EPL issued to Gecko was invalid by operation of law and that, as a result, Gecko had neither the *locus standi* to challenge the Gossows' mining licences nor to resist the Gossows' challenge of the validity of EPL 4426.

[33] In similar vein, the Gossows maintained that the renewal of EPL 4426 was defective as the application was lodged late, and did not comply with ss 47(1), 68(g), 72(2)(c) and 76(1)(e) of the MPMA 1992. They also contended that the

renewal was for a period exceeding the permissible duration and lacked proper application of mind by the Minister of Mines. Further, they claimed that the Minister of Mines failed to give them a hearing before the renewal, despite their overlapping mining rights and direct interest(s) in the renewal.

[34] Gecko, for its part, did not dispute that an ECC had not been obtained prior to the grant and issuance of EPL 4426. However, it sought to justify the legality of the Minister of Mines' decision by pointing out that the EPL's grant was conditional upon compliance with the conditions attached to it – which required that an environmental impact assessment (EIA) be conducted and that an environmental management plan (EMP) be submitted and approved by the Minister of Environment before any prospecting activity could commence. Gecko also relied on the condition imposed by the Minister of Mines that an environmental contract be concluded with the Minister of Environment within six months of the EPL being granted. Gecko contended that these conditions ensured compliance with the environmental protection regime in due course, and that, for that reason, there was substantial, if not strict compliance with the requirements of the EMA 2007.

High Court's approach

[35] The High Court held:

‘[79] Read in its plain language, s 31 of the EMA prohibits the authorisation or issuance of a licence, permit or other like document in relation to a listed activity when an ECC has not been previously obtained. Furthermore, that provision renders any authorisation carried out in circumstances where there has been non-compliance with subsection (1) thereof, meaning an authorisation granted in the absence of an ECC is invalid.

...

[87] . . . It does therefor, appear to me that because of the fact that an authorisation was granted in this matter and in respect of a listed activity but in the absence of an ECC, the result is that the said authorisation is, by operation of the law invalid and the Parliament states so in clear and unambiguous terms.

...

[96] . . .

1. The granting of EPL 4426 granted by the Minister of Mines and Energy and issued by the Mining Commissioner to Gecko Salt (Pty) Ltd is declared to be invalid by operation of the provisions of section 31(2) of the Environmental Management Act, No. 7 of 2009.'

[36] The court held that the language of s 31 is peremptory, unambiguous and leaves no room for discretion or interpretive flexibility. It held that s 31 applies notwithstanding any other law to the contrary, and that it clearly prohibits the issuance of an authorisation for a listed activity without the proponent having obtained an ECC in advance. The court held that the definition of 'authorisation' in the MPMA 1992, which includes a licence or permit issued by a competent authority in respect of a listed activity, brought the granting of an EPL squarely within the ambit of the provision. Moreover, the Minister and the Mining Commissioner were properly characterised as 'competent authorities' for purposes of the MPMA 1992.

[37] The court observed that the supplementary conditions imposed by the Minister of Mines did not mention the ECC at all, but rather referred to the EIA and the EMP. While those are steps in the process leading to the possible issuance of

an ECC, they are not substitutes for the certificate itself, and the statutory regime does not permit these procedural steps to serve as proxies for the ECC. In any event, the critical requirement under s 31 is that the ECC must be obtained before the authorisation is granted. It is not sufficient that it be obtained at some later stage prior to commencement of operations.

[38] In rejecting Gecko's reliance on substantial compliance, the court held that the imperative language of s 31 admits of no gradations or degrees of compliance: a proponent either has an ECC at the time of authorisation, or it does not. If the ECC is absent, the authorisation is rendered invalid by operation of law, and no amount of administrative convenience or *ex post facto* compliance can cure that defect. The court held that, in such circumstances, it is not open to administrative decision-makers to craft conditions that dilute, postpone or undermine the statutory prerequisite, nor does the court have any discretion to relieve a party from the legal consequences of non-compliance.

[39] In respect of the Gossow 1 Review, the court held that EPL 4426 was invalid by operation of s 31 of the EMA 2007. The court stressed that the language of the provision was peremptory and invalidity automatic. The court found that it had no discretion to condone the illegality. The Minister of Mines' decision was thus set aside, with costs against Gecko.

[40] In the Gossow 2 Review, the court upheld the *audi alteram partem* contention, holding that the Gossows had not been afforded a hearing before the renewal of EPL 4426, despite their direct interest(s). The Minister of Mines had

invited representations only from Gecko and had unilaterally renewed the EPL. This conduct was held to violate Art 18 of the Constitution. The renewal decision was accordingly set aside and referred back to the Minister of Mines for reconsideration after hearing the Gossows.

[41] The Gossows' cross-appeal lies against the referral back to the Minister of Mines.

The appeals

Main appeal

[42] Gecko's appeal, insofar as it concerns the court a quo's interpretation of s 31, is founded on the following grounds:

' . . .

- a) The court a *quo* erred in holding that the appellant had no standing to seek the review relief sought by virtue of the operation of the provisions of section 31 of the Environmental Management Act No 7 of 2007 ("the EMA").
- b) In this regard, the court erred in applying a literal interpretation to section 31(1) of the EMA and not applying the modern approach to the interpretation of statutes which requires that the words utilised must be interpreted with regard to considerations of purpose and context and in a manner which avoids an insensible and unbusinesslike result.
- c) Insofar as purpose is concerned, the court a *quo* erred in disregarding the manifest purpose of section 31 which is that there is to be no prospecting without proper and appropriate protection of the environment evidenced in the form of an environmental clearance certificate first having being obtained.
- d) By applying section 31 literally and ignoring matters of purpose and the context within which the licence was issued, the interpretation arrived at by the court a

quo gives rise to an unbusinesslike and even absurd result that an environmental clearance certificate must first be obtained over what is as yet an unknown and unspecified area because no exclusive prospecting licence has been issued.

- e) The court a quo accordingly erred in not finding that, on a proper construction of section 31(1) of the EMA and the terms and conditions referred to, there had been compliance with the requirements of section 31(1), alternatively, there had been substantial compliance with its requirements.'

Cross-appeal

[43] The Gossows impugn the court a quo's order that 'the question of the renewal of EPL 4426 is remitted to the Minister of Mines for him to consider the said application afresh'. According to the Gossows, in light of the High Court's declaration in the Gossow 1 Review that 'EPL 4426 is invalid by operation of the law for want of compliance with the provisions of s 31 of the [EMA 2007]', the remittal to the Minister of Mines is 'incompetent in law, a misdirection and in any event moot'. They therefore seek a variation of the court a quo's order to the effect that the order of remittal be 'deleted'.

Issues in the appeal

[44] Just as it was in the court a quo, it remains common cause on appeal that both in respect of its own review application challenging the transfer of the mining licences to RGH, and its opposition to the Gossow reviews, Gecko had to prove that it had *locus standi*. In other words, that it had a valid EPL and therefore a direct and substantial interest in the subject matter of all three applications. Gecko would only have had such a direct and substantial interest if its EPL 4426 granted by the Minister of Mines complied with the relevant provisions of the MPMA 1992 and s 31 of the EMA 2007.

[45] The matter was decided by the High Court on the common cause fact that when the Minister of Mines purportedly granted EPL 4426 to Gecko, the latter did not have a pre-existing ECC in terms of s 31 of EMA 2007. It is also common cause in the appeal that:

- (a) the success of Gecko's appeal is dependent on this Court finding that the High Court's interpretation of s 31 of the EMA 2007 is wrong; and
- (b) if the appeal fails on that score, all other issues that arose in both Gecko's Review and Gosrow Reviews 1 and 2 fall by the way side and will not require this Court's decision.
- (c) Should Gecko's appeal fail, the ineluctable consequence is that the renewal by the Minister of Mines of EPL 4226 is equally void *ab initio* and there would be no need for the matter to be referred back to the Minister of Mines for reconsideration. In other words, that the cross-appeal should succeed.

[46] Gecko accepts that s 31 of the EMA 2007 applied to any valid grant of an EPL but contended both in the court a quo and on appeal that the provision was substantially complied with.

Parties' submissions

[47] Gecko contends that a purposive interpretation of s 31 of EMA 2007 leads to a different result than that arrived at by the High Court. It relies on the 'modern

approach to interpretation' adopted in *Total Namibia (Pty) Ltd v OBM Engineering & Petroleum Distributors*⁷ and subsequent cases for the proposition that the High Court improperly adopted a strictly literal meaning of s 31 and that had it adopted the modern approach to interpretation it would have come to a contrary result.

[48] According to Gecko, by adopting a narrow, literal interpretation of s 31, the court a quo neglected the provision's purpose and context, and reached an unreasonable, unbusinesslike and absurd conclusion. Gecko therefore contends that the court a quo's interpretation was erroneous and would negatively impact the mining industry and should not be allowed by this Court to stand.

[49] Gecko argues that the only reasonable, sensible and businesslike way in which the requirement for an ECC can be interpreted is that an application for an EPL should first be granted prior to an ECC. That would allow the holder physical occupation of the area, determine its contours and the work that needs to be done, including its possible impact on the environment and having done so to apply for an ECC with the knowledge that in terms of the conditions imposed by the Minister of Mines, no activity may actually commence until the Minister of Environment has granted the ECC and the holder has entered into an agreement with the Minister of Environment as prescribed by the conditions.

[50] Gecko submits that, although an ECC had not been issued at the time EPL 4426 was granted, the failure was not fatal to the legality of the licence. In their view, the legislative object of environmental oversight had nonetheless been

⁷ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC).

substantially achieved through the imposition by the Minister of Mines of conditions intended to serve the purpose of an ECC. To insist on literal compliance, they argue, would in the circumstances place form over substance.

[51] The Gossows on the other hand, maintain that s 31 is clear. They argue that s 31(1) applies 'despite any other law to the contrary', that is, it overrides any conflicting laws. They argue that Parliament clearly spelled out the consequence of issuing an 'authorisation' contrary to s 31(1) – which is the invalidity of the authorisation.

[52] According to the Gossows, the purpose of s 2 of the EMA 2007 is to 'prevent and mitigate' significant environmental impacts by ensuring that the findings of an assessment are considered prior to making any decisions regarding such activities. In support of this view, the Gossows also rely on s 27(3) of the EMA 2007, which explicitly provides that, notwithstanding any other law, a person may not undertake a listed activity unless they hold an ECC in relation to that activity.

[53] Similarly, TY contends that the court a quo's reasoning is unassailable. It argues that a plain-language approach must prevail over pragmatic considerations or speculative assumptions about the drafter's intent.

[54] TY contends that when statutory language is clear, it must be given its ordinary, literal and grammatical meaning unless such an interpretation results in manifest absurdity, inconsistency, hardship, or contradicts legislative intent. The

starting point, they contend, is always the language of the provision itself. According to TY, Gecko seeks to circumvent the plain meaning of the statute by advocating for alternative measures, such as imposing conditions, despite their inconsistency with the statutory language – an approach that is legally unsound and impermissible.

Determination of the appeal

[55] In *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*,⁸ this Court (per O'Regan AJA) set out the proper approach to the interpretation of a statute. Interpretation is 'essentially one unitary exercise' in which both text and context are relevant to construing an instrument such as a statute. The court engaged upon a statute's construction must assess the meaning, grammar and syntax of the words used; and the words used must be construed within their immediate textual context, as well as against the broader purpose and character of the statute. Consideration of the background and context is an important part of interpretation. Since context is an important determinant of meaning, when construing a statute, the knowledge that the legislator had when the law was passed is a relevant consideration.

[56] Context is considered by reading a provision or provisions under consideration in light of the statute as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the document in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the

⁸ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or one that undermines the apparent purpose of the document. The court must avoid the temptation to substitute what it regards as reasonable, sensible or unbusinesslike for the words actually used.

[57] With respect, Gecko's argument misstates the modern approach to interpretation as formulated and applied in Namibia and other common law jurisdictions. While interpretation should indeed consider context and purpose, it remains subject to the overarching objective of giving effect to Parliament's intention as expressed in the statute's text. Where that language is clear and unambiguous, the court is not at liberty to rewrite it under the guise of purposive construction.

[58] As Lord Scarman commented in *Stock v Frank Jones (Tipton) Ltd*:⁹

'If the words used by Parliament are plain, there is no room for the "anomalies" test, unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake.'

[59] Although the modern approach to statutory interpretation requires that the words of a statute be interpreted in their context and in light of the scheme of the legislation and its purpose, it is not a licence for a court to depart from the meaning conveyed by the language used, unless that meaning produces an

⁹ *Stock v Frank Jones (Tipton) Ltd* [1978] 1 ALL ER 955(G).

absurdity or an outcome Parliament could not have intended. In other words, purposive interpretation should not become an invitation to judicial innovation. Where the words are clear, and their ordinary meaning aligns with the apparent purpose of a statute, a court is not entitled to prefer a different meaning merely because it would better serve what the court perceives to be the purpose of the provision.

[60] That approach aligns with what was laid down in *Total Namibia*¹⁰ and *Namibian Competition Commission v Puma Energy Namibia (Pty) Ltd*¹¹ – that fidelity to the statutory text remains the starting point, even when broader contextual or purposive elements are considered. In *Total Namibia*, O'Regan JA quoted with approval Wallis JA's *dictum* in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹² that:

'[18] . . . Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used . . .'

[61] The principle that, where words used by Parliament are clear and do not produce an absurdity they should be given effect to, resonates with the position in the United Kingdom, as recently confirmed by the UK Supreme Court in *For Women Scotland Ltd v The Scottish Ministers*.¹³

¹⁰ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC).

¹¹ *Namibian Competition Commission v Puma Energy Namibia (Pty) Ltd* 2021 (1) NR 1 (SC).

¹² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

¹³ *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16.

[62] As per the unanimous court:

‘[9] The general approach to statutory interpretation in the United Kingdom is well-established . . . Most recently, this court set out the approach in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 in which Lord Hodge DPSC, giving the leading judgment, stated (paras 29–31):

“29. The courts in conducting statutory interpretation are ‘seeking the meaning of the words which Parliament used’: . . . More recently, Lord Nicholls of Birkenhead stated: ‘Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context’ (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: ‘Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.’

30. External aids to interpretation therefore must play a secondary role . . . But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. . . .

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered . . .”

[63] The court continued:

‘[11] The general approach of focussing on the words which Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation and by the expertise which the drafters of legislation bring to their task. But where there is sufficient doubt about the specific meaning of the words used which the court must resolve, the indicators of the legislature’s purpose outside the provision in question, including the external aids . . . must be given significant weight. . . .

[12] Lord Nicholls’ important constitutional insight in *Spath Holme*, that citizens with the help of their advisers should be able to understand statutes, points towards an interpretation that is clear and predictable. As Lord Hope DPSC stated in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153, at para 14:

“The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used.”

[64] Against this jurisprudential backdrop, Gecko’s reliance on substantial compliance as a substitute for strict compliance with s 31 of the EMA 2007 cannot be sustained. The section does not permit discretion or admit exceptions. It is framed in prohibitory terms and constitutes a jurisdictional fact for the lawful commencement of a listed activity. To hold, as suggested by Gecko, that informal or *post hoc* measures will suffice would be to read into the provision a flexibility that Parliament has not provided for.

[65] It would also undercut the object of the EMA 2007, which is to ensure environmental protection through a system of prior assessment, consultation and approval – not retrospective regularisation.

[66] It needs to be stated in very clear terms that the EMA 2007 was enacted after the MPMA 1992. It is trite that where there is a conflict in provisions of two statutes dealing with the same subject, the general rule is that the later statutory provision prevails.¹⁴ Besides, the modern approach to interpretation relied on by *Gecko* makes clear that what the Legislature intended must also be determined from the material that was known to the legislators when they enacted the EMA 2007.

[67] When the EMA 2007 was enacted, the legislators were aware that the Minister of Mines had the power to impose conditions under s 69 of the MPMA 1992. Therefore, it must be presumed, from the plain language of s 31 and the context in which it appears, that the Legislature intended that the conditions which the Minister of Mines might impose, cannot be the basis for excusing the requirement for an ECC. As far as context is concerned: s 27 of the EMA 2007 makes clear that no person may undertake a listed activity unless an ECC for the undertaking of the activity has been obtained; and the only exception allowed is, if under s 28, the listed activity is exempted by the Minister of Environment by notice in the *Gazette*.

[68] The plain grammatical structure of s 31 is unambiguous: it imposes a mandatory precondition to the lawful commencement of any listed activity –

¹⁴ *S v Festers* 1985 (4) SA 242 (C) at 247.

namely, the prior issuance of an ECC. There is no discretionary language which allows deviation from that requirement, nor do the prescriptive provisions relating to the granting of an ECC lend themselves to a 'substantial compliance' interpretation. The conditions imposed by the Minister of Mines when granting an EPL cannot dispense with the requirement imposed by s 31(1) of the EMA 2007 because (a) a competent authority may not issue an authorisation for a listed activity unless the applicant has obtained an ECC and (b) subsec (2) declares that any authorisation issued contrary to subsec (1) is invalid.

[69] I am satisfied that the Minister of Mines' conditions cannot and do not amount to a substitute for the ECC. Instead, they contemplate actions – such as conducting an EIA and entering into an environmental contract – to be taken after the ECC has already been issued. These forward-looking obligations may be suitable for post-issuance environmental compliance, but they cannot retroactively validate a grant made in breach of a peremptory statutory precondition.

[70] Further, in the present case, the Minister of Mines' conditions do not even mention the ECC as a prerequisite for the commencement of the authorised activity. As the court a quo correctly held, conducting an EIA and preparing an EMP are mere precursors to the possible grant of an ECC. They do not in themselves constitute compliance with s 31. The statutory sequence is clear: first, the proponent must obtain an ECC; only thereafter may a competent authority issue an authorisation, in this case the EPL. The process is deliberately front-loaded to ensure that environmental impacts are assessed before decisions are made – not addressed after the fact.

[71] Further, Gecko's approach opens the door to the undesirable case-by-case inquiry by courts whether the conditions imposed by the Minister of Mines under the MPMA 1992 amount to substantial compliance – thereby introducing discretion where the scheme of EMA 2007 permits none. Parliament expressly avoided such case by case inquiries by declaring in s 31(2) that authorisations granted without a prior ECC are invalid – not potentially valid if later cured. The EMA 2007 scheme tolerates no gradations of compliance; it insists upon actual environmental oversight, not its approximation.

[72] Moreover, the principle of legality – a cornerstone of our constitutional democracy – dictates that organs of state may act only in accordance with lawful authority. Granting an EPL in the absence of the required ECC is an irregularity and thus *ultra vires* the powers of the competent authority. The doctrine of substantial compliance cannot rescue an action that violates a peremptory statutory requirement, particularly where that requirement serves a public policy function – namely, environmental protection through prior screening.

[73] I am satisfied that a strict application of s 31 of the EMA 2007 does not result in an absurdity. On the contrary, it gives full effect to the legislative intent – namely, to ensure that the environmental consequences of listed activities are rigorously scrutinised before they are authorised. If s 31 is to be meaningful, it must be enforced as written.

[74] Section 31 of the EMA 2007 is not ambiguous. It sets a clear legal standard. Failure to meet it is fatal. Conditions imposed by the Minister of Mines cannot override the EMA 2007's statutory scheme.

Conclusion

[75] The primary contention advanced by Gecko on appeal is problematic for several reasons as I have demonstrated. Not only is s 31 of the EMA 2007 not subjected to any other law such as the MPMA 1992 but when this statute was passed, the Legislature was aware of the possibility that in granting an EPL the Minister of Mines can impose conditions under s 69 of the MPMA. There is no indication in ss 27 and 31 of the EMA 2007 or generally the scheme of the statute that it will not apply if a listed activity is authorised on condition that the authorised activity is carried on in a manner that does not harm the environment. The only exception allowed under the EMA 2007 is, if under s 28, the listed activity is exempted by the Minister of Environment by notice in the *Gazette*.

[76] It follows that whether or not s 31 of the EMA 2007 is peremptory as opposed to directory depends on its own terms and not by reference to conditions imposed in another statute for the authorisation of a listed activity.

[77] Accordingly, I find no fault with the approach taken by the court a quo. The reliance by Gecko on the conditions imposed by the Minister of Mines in granting EPL 4426 is misplaced, and their effect is legally incapable of reviving an

authorisation rendered invalid by statute. Once that premise collapses, so too does the entire basis for the main appeal. Accordingly, the main appeal must fail.

[78] As regards the cross-appeal, the Gossows' contention – that, in light of the court a quo's finding that EPL 4426 is invalid, the remittal to the Minister of Mines for reconsideration of its renewal is legally incompetent – cannot be faulted. The cross-appeal must therefore succeed.

Costs

[79] The parties were *ad idem* that costs must follow the result.

Order

1. The main appeal is dismissed with costs in favour of the respondents, including the costs of one instructing and two instructed legal practitioners in respect of Gossows and one instructing and one instructed legal practitioner in respect of the ninth respondent.
2. The cross-appeal is allowed and the High Court's order remitting Gecko's renewal application of EPL 4426 to the Minister of Mines is set aside, with costs, including the costs of one instructing and two instructed legal practitioners in respect of the Gossows.

SHIVUTE CJ

MAKARAU AJA

APPEARANCES

APPELLANT:	SC Rorke SC (with him G Dicks) Instructed by Ellis & Partners
FIRST TO THIRD RESPONDENTS:	R Tötemeyer (with him D Obbes) Instructed by Dr Weder Kauta & Hoveka Inc
NINTH RESPONDENT:	J Marais SC (with him JP Ravenscroft-Jones) Instructed by Fisher Quarmby & Pfeifer