REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 241/2014

In the matter between:

NAMSOV FISHING ENTERPRISES (PROPRIETARY) LIMITED	**1ST APPLICANT**
EMERITUS FISHING (PROPRIETARY) LIMITED	**2ND APPLICANT**
ATLANTIC HARVESTERS OF NAMIBIA (PROPRIETARY) LIMITED	**3RD APPLICANT**

And

MINISTER OF FISHERIES AND MARINE RESOURCES	**1ST RESPONDENT**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**2ND RESPONDENT**
NATIONAL FISHING CORPORATION OF NAMIBIA LIMITED	**3RD RESPONDENT**
NAMIBIAN LARGE PELAGIC & HAKE LONGLINING ASSOCIATION	**4TH RESPONDENT**
KATRINA SIKENI N.O. IN HER CAPACITY AS TRUSTEE OF THE NAMIBIA FISH CONSUMPTION PROMOTION TRUST	**5TH RESPONDENT**
JULIAN ENGELBRECHT N.O. IN HIS CAPACITY AS TRUSTEE OF THE NAMIBIAN FISH CONSUMPTION PROMOTION TRUST	**6TH RESPONDENT**
VICTOR PEA N.O. IN HIS CAPACITY AS TRUSTEE OF THE NAMIBIA FISH CONSUMPTION PROMOTION TRUST	**7TH RESPONDENT**
STEVEN AMBABI N.O. IN HIS CAPACITY AS TRUSTEE OF THE NAMIBIA FISH CONSUMPTION PROMOTION TRUST	**8TH RESPONDENT**
GIDEON THOMAS N.O. IN HIS CAPACITY AS TRUSTEE OF THE NAMIBIA FISH CONSUMPTION PROMOTION TRUST	**9TH RESPONDENT**
SUSAN NDJALEKA N.O. IN HER CAPACITY AS TRUSTEE OF THE NAMIBIA FISH CONSUMPTION PROMOTION TRUST	**10TH RESPONDENT**
BEIRAMAR FISHING (PROPRIETARY) LIMITED	**11TH RESPONDENT**
MARAZUL FISHING (PROPRIETARY) LIMITED	**12TH RESPONDENT**
GENDEV FISHING RESOURCES (PROPRIETARY) LIMITED	**13TH RESPONDENT**
KUISEB FISHING ENTERPRISES (PROPRIETARY) LIMITED	**14TH RESPONDENT**
NAMIBIA SEAWEED PROCESSING (PROPRIETARY) LIMITED	**15TH RESPONDENT**
THE SMALL PELAGIC FISHING ASSOCIATION OF NAMIBIA	**16TH RESPONDENT**

Neutral citation: Namsov Fishing Enterprises (Pty) Limited v Minister of Fisheries and Marine Resources (A 241-2014 [2015] NAHCMD 3 (20 January 2015)

Coram: UEITELE, J

Heard: 17 November 2014

Delivered: 03 December 2014

Handed Down 20 January 2015

Flynote: Review - Statute directing functions to be performed by Minister - Beyond competence of Minister to allocate quotas in excess of limit set by Statute - 'Agreement' purportedly made by Minister with parties to be regarded merely as a promise to exercise his discretion in a particular way - Minister must only take into account factors prescribed in the Marine Resource Act, 2000 when considering the allocation of quotas - No valid decision made by Minister to allocate quotas to applicants.

Review — Review in terms of rule 76 — High Court rules — Unreasonable delay — What constitutes — Rules not prescribing time limit — Question whether delay unreasonable within court's discretion - Court not satisfied that evidential basis laid for delay — Condonation of delay not justified under the circumstances.

Summary: Applicants approached this court on an urgent basis seeking amongst others the setting aside of the allocation of quotas to entities who do not hold rights under the Marine Resources Act, 2000 to harvest marine resources. Of the sixteen respondents only three opposed the applicants' application.

In their opposition the first respondent, the third respondent and the fourth to tenth respondents raised certain points *in limine.* The points raised *in limine* are that the application is not urgent and if it is urgent the urgency is self-created. Secondly the respondents allege that the applicants unduly delayed in bringing their application.

Held that in so far as the applicants are asking the court to review and set aside the first respondent's decision to allocate horse mackerel quotas from the 2014 reserve quotas to the non-right holders there is no urgency. The court further held that, it is prepared to accept that if the applicants are correct that they were allocated quotas on 18 and 21 July 2014 and those quotas were reduced on 22 July 2014, then their application is urgent and the court is prepared to condone the non-compliance with the rules of court and hear the application as an urgent one.

Held furthermore that, if the first respondent had on 18 and 21 July 2014, made a decision to allocate to the applicants 15 892 metric tons (from the reserve quota) in respect of the horse mackerel, that decision to allocate to the applicants 15 892 metric tons would be *ultra vires* the first respondent's power and is thus invalid.

Held furthermore that, the second reason why the first respondent's decision (to allocate to the applicants 15 892 metric tons from the reserve quota) would be invalid is that, if he had allocated the quotas on the basis of the grounds advanced by the applicants, the Minister would have allocated the quotas taking into account irrelevant considerations, because s (39) of the Act stipulates that the Minister must have regard to the matters set out in s 33(4) of the Act and to others that may be prescribed. Proportionate allocation of the quotas and the needs of an applicant are not amongst the matters

which the Minister must take into account when he considers applications for the allocation of quotas.

Held furthermore that, even if the Minister made an undertaking, to allocate quotas to applicants that undertaking is not binding. The court held that if the promise, had been given by an individual, it might well have been binding and enforceable. Given by the Minister it was no more than an undertaking to discharge his administrative duties in regard to allocating the quotas in a way which would satisfy the applicants' needs. The court does not regard the Minister's 'agreement' as anything more than a promise to meet their objection by exercising his discretionary administrative powers in a particular way. This promise cannot fetter his right, if circumstances connected with his administration require it, to exercise his discretion in some other way.

Held furthermore that whilst no time period is stipulated in Rule of Court 76 (or in common law practice) within which review proceedings have to be instituted, it is now well established that such proceedings must be instituted within a reasonable time of the decision or ruling sought to have reviewed.

Held furthermore that, Namsov should have applied for review of the decision by first respondent to allocate quotas to entities that do not hold rights to exploit the marine resources in question (i.e. horse mackerel) within a reasonable time after it became aware of Minister's decision. However, Namsov did not do that, it followed the route to negotiate and conclude agreements with some of the non-right holders (specifically the Trust, the eleventh and twelfth respondents) to utilize their quotas.

Held furthermore that, the applicants delayed in the institution of review proceedings and in the absence of cogent explanations for the delay in bringing the review applications, this court is not prepared to exercise its discretion in favour of the applicants for their unreasonable delay.

ORDER

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1. The allocation of quotas to the National Fishing Corporation of Namibia Limited, The Namibia Large Pelagic & Hake Longlining Association and The Small Pelagic Fishing Association of Namibia, is unlawful and irregular but is not set aside.

2. That applicants must, jointly and severally the one paying the other to be absolved, pay the costs of the 4th to 10th respondents, the costs to include the costs of one instructing and one instructed counsel.

3. No order as to costs in respect of the 1st to 3rd and 11th to 16th respondents.

JUDGMENT

UEITELE, J

[1] In this matter the applicants (there were initially three applicants, but at the hearing of the matter on 17 November 2014, the second applicant, Emeritus Fishing Proprietary Limited, had withdrawn its application, as a result only the first and third applicants' application remained for determination) approached this court on 3 September 2014 and on an urgent basis seeking the relief set out in their Notice of Motion. The Notice of Motion was, after the applicants received certain documents from the Ministry of Fisheries and Marine Resources, supplemented on 24 October 2014. I will in this judgment collectively refer to the remaining two applicants as the applicants

except where the context otherwise requires. Where the context so requires, I will refer to the first applicant as Namsov and to the third applicant as Atlantic Harvesters.

[2] There are sixteen respondents cited in this matter, but only three of the sixteen respondents opposed the applicants' application. The respondents who opposed the application are first respondent who is the Minister of Fisheries and Marine Resources (I will in this judgment refer to him as the Minister), the third respondent, who is the National Fishing Corporation of Namibia Limited (I will in this judgment refer to it as Fishcor and the fourth to tenth respondents in their respective capacities as the Trustees for the time being of the Namibia Fish Consumption Promotion Trust.

[3] In this judgment, I will set out the background to the applicants assertions that they are entitled to the relief that they are claiming. I will thereafter set out the grounds on which the respondents are opposing the applicants' claim and thereafter apply the applicable legal principle to the facts of this matter.

The background to the applicants' claim

[4] The harvesting of Namibia's marine resources for commercial purposes is governed by the Marine Resources Act, 2000[1]. Section 33 of the Act, in essence provides that the Minister may from time to time call for applications for the right to harvest Namibia's marine resources. The section sets out how the applications are to be made, and empower the Minister to grant to an applicant the right to harvest a specific marine resource but subject to the conditions set out in the right. The section furthermore sets out the factors, which the Minister must have regard to, when he considers an application for a right to harvest a marine resources in terms of the Act[2].

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[1] Act 27 of 2000. I will in this judgment refer to it as the Act.

[2] Section 33(4) reads as follows:
'(4) When considering, an application for a right, the Minister may have regard to-
(a) whether or not the applicant is a Namibian citizen;

[5] On 12 December 2001, Namsov was granted the right to exploit or harvest horse mackerel for a period of fifteen years. The right to so harvest the horse mackerel commenced on 01 January 2004 and would expire on 31 December 2018. Atlantic Harvesters' right to harvest/exploit horse mackerel was extended from 01 January 2005 to 31 December 2014.

[6] The right to harvest a marine resource is subject to other provisions of the Act. Two of the relevant sections are ss 38 and 39 of the Act. Section 38 empowers the Minister to set a total allowable catch in respect of a marine resource (which is the quantity of marine resources which may be harvested) over a given period. Section 39 empowers the Minister to subject the harvesting of any marine resource to such measures as he may consider necessary which may include quotas. The Minister has over a period of time set the total allowable catch over a period of 12 months. On 02 April 2014 the Minister, on the advice of the Marine Resources Advisory Council, set the quantity of the horse mackerel that may be harvested or exploited during the period commencing 01 January 2014 and ending 31 December 2014 at 350 000 metric tons.

[7] On 09 July 2013 the Minister acting in terms of s 39 of the Act addressed letters to the applicants and to other persons requesting them to submit their applications for the allocation of the horse mackerel quotas and licenses in respect of the 2014

(b) where the applicant is a company, the extent to which the beneficial control of the company vests in Namibian citizens;
(c) the beneficial ownership of any vessel which will be used by the applicant;
(d) the ability of the applicant to exercise the right in a satisfactory manner;
(e) the advancement of persons in Namibia who have been socially, economically or educationally disadvantaged by discriminatory laws or practices which were enacted or practised before the independence of Namibia;
(f) regional development within Namibia;
(g) co-operation with other countries, especially those in the Southern African Development Community;
(h) the conservation and economic development of marine resources;
(i) whether the applicant has successfully performed under an exploratory right in respect of the resource applied for;
(j) socio-economic concerns;
(k) the contribution of marine resources to food security; and
(l) any other matter that may be prescribed.

harvesting season. In response to the invitation of 09 July 2013, Namsov on 23 July 2013 submitted an application and applied for a quota of 100 000 metric tons in respect of the horse mackerel. From the record before me I could not establish the quota applied for by Atlantic Harvesters. On 20 December 2013 the Acting Permanent Secretary in the Ministry of Fisheries and Marine Resources addressed a letter to Namsov which amongst other things reads as follows: (I quote verbatim):

> 'It is my pleasure to inform your company that, the horse mackerel TAC for 2014 fishing seasons is set out at 350 000 mt.
>
> Therefore the Hon. Minister has approved the allocation of 31 469 mt to your company for the 2013 fishing season, commencing on 1 January 2014 expiring on 31 December 2014 subject to the quota allocation standard conditions.
>
> Kindly take note that the 2014 fishing season quota is allocated as follows:
>
> (a) 238 600 mt has been allocated to the right holders on a pro rata based.
> (b) 16 000 mt has been allocated to non-right holders.
>
> It is also important to note that after the above allocation only 102 200 mt remains and kept in reserve.'

A similar letter was also addressed to Atlantic Harvesters, in both the cases Namsov and Atlantic Harvesters accepted the quotas so allocated to them.

[8] As it appears from the letters of 20 December 2013 addressed to the applicants there was 102 200 metric tons of the TAC in respect of the horse mackerel kept in reserve. During July 2014, the Permanent Secretary in the Ministry of Fisheries and Marine Resources[3] addressed an Internal Memorandum to the Minister. In that memorandum the Permanent Secretary recommended to the Minister that 50 104

[3]Any reference to an official or officer in this judgment will be reference to an official or officer in the Ministry of Fisheries and Marine Resources, except where the context otherwise requires.

metric tons of the 102 200 metric tons which was kept in reserve be allocated to all the right holders and that 42 000 metric tons be allocated to the non-right holders. The Minister accepted the recommendation and awarded the 50 104 metric tons of the TAC to the right holders. From the record that was placed before me it appears that there was a total of 23 companies that had the right to harvest horse mackerel (I will in this judgment refer to these companies as the' right holders'). Of these 23 right holders, the right of one company namely Namibia Seaweed Processing, to harvest horse mackerel is being challenged and a total of 12 companies that did not have the right to harvest or exploit horse mackerel. I will in this judgment refer to the 12 companies as the 'non-right holders'.

[9] On 02 July 2014 the Permanent Secretary informed Namsov that the Minister has approved the allocation of an additional horse mackerel quota of 1259 metric tons to it. In the letter of 02 July 2014 Namsov was requested to indicate by no later than Friday 04 July 2014 whether it accepted the allocation and the conditions pertaining to the allocation. A similar letter was also addressed to Atlantic Harvesters, the only difference being that Atlantic Harvesters were allocated an additional horse mackerel quota of 236 metric tons of the total allowable catch. Both Namsov and Atlantic Harvesters on 03 July 2014 indicated to the Permanent Secretary that they will accept the quotas and the conditions attached to the quotas allocated to them, except that, in their letter of acceptance Namsov questioned why they were only allocated 1.23% of the total quota allocated, while they were allegedly allocated 12.7% of the initial allocation. They also raised the following questions:

'1. Is the entire reserve allocated? If so, on what basis are the allocations made? If not, when and how will the remainder be allocated?

2. How was the amount of 1,259 mt arrived at? What factors were taken into account and what criteria were applied when the additional quota was allocated?

3. Is an additional horse mackerel quota allocated to all the current quota holders? If so, kindly provide us with a list of the allocations made.'

[10] Pursuant to the letter of Namsov to the Minister, discussions ensued between the Minister and the representatives of Namsov. It appears that one of the discussions took place at a meeting requested by Mr. Mouton of Namsov. The meeting took place on 16 July 2014[4]. The minutes of that meeting (I pause to indicate that the applicants are disputing the accuracy of the minutes) indicate that:

- Mr. Mouton wanted to get clarification as to how the allocation from the quota was granted, and whether there was still something left;

- Mr. Mouton was informed that the allocation of the quota was not done on a pro rata basis and that of the 102 200 left in reserve 50 104 metric tons were allocated to right holders, 42 000 metric tons to non-right holders and that 10 096 metric tons were still left in reserve;

- Mr. Mouton indicated that Namsov has a shortfall and therefore needed the Minister to consider it for what was left in reserve;

- Mr. Mouton was informed that if any consideration needed to be made with respect to what is actually left in the reserve to Namsov, then the percentage of allocation to Namsov will be based on the total allocated to the right holders and not to the non-right holders.
- Mr. Mouton accepted the explanation given to him.

[11] On 18 July 2014[5] another meeting was convened with the legal representative of Namsov, Mr. Koep of Koep & Partners. The minutes of the meeting also indicate that:

[4]The meeting of 16 July 2014 was attended by, the Minister, Permanent Secretary, the Director of PPE , the Deputy Director of PPE and the Chief Executive Officer of Namsov.
[5]The meeting of 18 July 2014 was attended by, the Minister, Permanent Secretary, the Director of PPE and Mr. Koep of Koep & Partners.

- The purpose of Mr. Koep requesting the meeting was to obtain clarity as to how the quota was allocated;
- The Minister indicated to Mr Koep that the allocation was not based on a pro rata basis, but rather on the Ministry's request on value addition and employment creation; and that the Minister considered other aspects such as socio economic and bilateral relationships;

- The Minister indicated to Mr Koep that for many years now Namsov and Partners have been allocated a huge proportion of the quota that does not justify their involvement with respect to value addition, employment and investments and that the Minister had to exercise his discretion in allocating the quotas in reserve.

- The Minister concluded that he will revert back to Namsov.

[12] As I indicated above Namsov disputes the accuracy of the minutes. The deponent to the supporting affidavit of Namsov alleges that shortly after the meeting of 18 July 2014, the Minister allegedly contacted Mr Koep telephonically and informed him (i.e. Mr Koep) that he (the Minister) was prepared to grant (and hence decided to allocate) the additional quotas required by the applicants. Mr Koep allegedly replied as follows to the Minister:

> 'That's great news Minister. I have conveyed this to all board members. When will the announcement be made? Thank you for listening.'

This version of Namsov is denied by the Minister. The Minister alleges that he does not communicate his decisions through telephone or sms.

[13] On 21 July 2014[6] the Minister convened another meeting with Namsov and its legal representative, Mr Koep. The minutes of that meeting indicate that the Minister explained to everybody present what the purpose of that meeting was and he restated what was discussed at the meetings of 16 July 2014, and 18 July 2014. The minutes conclude by stating that after the meeting of 21 July 2014 the Minister directed that the reserve quota be released to Namsov on the basis that the quota was sufficient as agreed that it would be allocated based on the total allocation to the right holders. Namsov's version of what transpired at that meeting is however different. Mr Arnold who deposed to the supplementary supporting affidavit alleges that at the meeting of 21 July 2014, the Minister confirmed that there was sufficient quota available and that the portion of the 2014 Reserve Quota which the applicants requested and required was approved and this would be announced on the same or the following days.

[14] On 22 July 2014 the Permanent Secretary addressed letters to both Namsov and Atlantic Harvesters in which letters she informed them that the Minister has allocated an additional quota of 5908 mt in respect of Namsov and 1100 mt in respect of Atlantic Harvesters. On 23 July 2014 Namsov responded to the Permanent Secretary amongst others as follows:

> 'You will recall the meeting which we had in the board room of your Ministry on Monday July 21, 2014 where it was agreed by the Honourable Minister and accepted by Namsov that Namsov as well as the right holders of Trachurus would be allocated the quota as requested in the letter from Namsov to you dated 18 July 2014 and hand delivered to you by Mr Koep.
>
> This was also the assurance given by the Minister personally to Mr Koep and was conveyed to all the directors and shareholders of Namsov and Bidvest. This was also confirmed to some decision-makers that became involved in resolving this dispute. The Minister assured the meeting that there was sufficient quota in reserve to make up what

[6]The meeting of 21 July 2014 was attended by, the Minister, Permanent Secretary, the Director of PPE, the Chief Legal Advisor in the office of the Attorney General, two Chief legal Officers in the office of the Attorney General, a representative of Bidvest, Mr. Koep of Koep & Partners and the Chief Executive Officer of Namsov.

was requested in that letter. I have taken the liberty of confirming our request hereunder:

Namsov	13.1%
Kuiseb Fishing Enterprises (Pty) Ltd	4.3%
Gendev Fishing Resource (Pty) Ltd	2.6%
Emeritus Fishing (Pty) Ltd	2.2%
Atlantic Harvesters of Namibia (Pty) Ltd	2.5%

As this amount of 5908 mt is less than what we agreed was available and would be allocated to Namsov, we can only accept this as being partial fulfillment of the undertaking made to us. Any deviation from what was agreed upon would amount to breach of agreement and could carry consequences. In order to avoid further confrontation and in an attempt to accommodate the Minister we attach hereto a proposal as to how the current impasse can be addressed and resolved.

We would like to meet with you soonest in order to discuss the attached proposal and the allocation of the shortfall to Namsov.'

[15] The meeting requested did not take place and based on the above background the applicants allege that:

(a) On 18 & 21 July 2014 the Minister agreed to allocate 13 337 metric tons of the TAC of the reserve in respect of the horse mackerel for the 2014 Fishing season to Namsov and 2555 metric tons to Atlantic Harvesters Namibia (Pty) Ltd;

(b) By only allocating additional 5908 metric tons (to Namsov) and 1100 metric tons (to Atlantic Harvesters Namibia (Pty) Ltd), the Minister reduced the quotas allocated to the applicants without affording the applicants the opportunity to be heard.

(c) By allocating quotas from the 2014 reserve quota to the Trust, Third, Fourth, Eleventh and Twelfth respondents (and possibly the fifteenth and sixteenth respondents) the Minister acted unlawfully.

The applicants thus instituted these proceedings and specifically requested this court to:

- ✓ Review and set aside the Minister's decision reducing the horse mackerel quota allocated to the applicants from the 2014 Reserve Quota;

- ✓ Review and set aside the Minister's decision to convert the fifteenth respondent's seaweed harvesting right to a horse mackerel harvesting right;
- ✓ Review and set aside the Minister's decision to allocate horse mackerel quota from the 2014 reserve quota to the Namibia Fish Promotion Trust, Fishcor, Namibia Large Pelagic & Hake Longlining Association, Beiramar Fishing (Pty) Ltd, Marazul Fishing (Pty) Ltd, Namibia Sea Weed Processing (Pty) Ltd and The Small Pelagic Fishing Association of Namibia.

At the hearing of this application the applicants indicated that they will not persist with the remedy sought in prayer 4 of the Notice of Motion (i.e. that this court direct the Minister to delegate his decision making power to an officer from his office to reconsider the allocation of the quotas from the 2014 Reserve Quota).

[16] The Minister, Fishcor and the Trust opposed the applicants' application. The eleventh and twelfth respondents also opposed the application but simply for purposes of placing certain relevant facts before the court. In their opposition the Minister, Fishcor and the Trust raised certain points *in limine.* The points raised *in limine* are that the application is not urgent and if it is urgent the urgency is self-created. Secondly the respondents allege that the applicants unduly delayed in bringing their application. I will now turn to consider the points raised *in limine*.

Urgency

[17] The institution of an urgent application is governed by Rule 73 of the Rules of this Court, which amongst others provides as follows:

'**73.** (1) An urgent application is allocated to and must be heard by the duty judge at 09h00 on a court day, unless a legal practitioner certifies in a certificate of urgency that the matter on a court day, unless a legal practitioner certifies in a certificate of urgency that the matter is so urgent that it should be heard at any time or on any other day.

(2) The judge may, in addition to dismissing an application made under subrule (1) for lack of urgency, make a special order of costs against the applicant if the judge is satisfied the matter is not so urgent that it could not be heard on a court day.

(3) In an urgent application the court may dispense with the forms and service provided in these rules and may dispose of the application at such time and place and in such manner and in accordance with such procedure which must as far as practicable be in terms of these rules or as the court considers fair and appropriate.

(4) In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –

(a) the circumstances which he or she avers render the matter urgent; and

(b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.'

[18] The legal principles to be followed in urgent applications have been encapsulated by this Court many a times and are well documented. I will therefore not restate them in detail here. The crisp requirements of Rule 73, are that a party who approaches the court on an urgent basis must explain in sufficient detail why the matter is urgent; and must also state why he, or she will not be afforded substantial remedy at the hearing in due course.[7] This court has held that an applicant must not only pay lip service to these requirements, but must make out its case in the founding affidavit[8].

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[7] *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 (HC); *Clear Channel Independent Advertising Namibia (Pty) Ltd v Transnamib Holdings* Ltd 2006 (1) NR 121 (HC): *Katjivikua v The Magistrat; Magisterial District of Gobabis and Another* 2012 (1) NR 150 (HC).

[8] *Salt and Another v Smith* 1990 NR 87 (HC).

[19] In their founding affidavits the applicants state that the application is initiated as an urgent review application and that it is brought on a semi urgent basis. They set out the circumstances which allegedly renders the matter urgent to include the following:

(a) Quota allocations are made annually and are utilized during the year for which such allocation is made;

(b) If the application is initiated in the ordinary course the relief sought may ultimately prove futile and academic;

(c) The quotas will be exploited and the purpose of the application will be undermined.

(d) If effect is not given, on an urgent basis, to the ultimate quota allocation made by the Minister to the applicants, the applicants stand to suffer irreparable and substantial financial harm.

[20] In this matter, in so far as the applicants are asking this court to review and set aside the Minister's decision to allocate horse mackerel quotas from the 2014 reserve quotas to the non-right holders, I fail to recognize any urgency in the applicants' application. I say so for the following reason. The decision to allocate quotas to non-right holders was taken by the Minister as far back as May 2013 and the applicants were informed of that decision on 20 December 2013. By letter dated 20 December 2013 the applicants were informed that 16 000 metric tons of the TAC was allocated to non-right holders. On 16 July 2014 the applicants were informed that 42 000 metric tons of the reserve quota was allocated to non-right holders, yet their application to review and set aside the decision to allocate quotas to non-right holders was only initiated on 03 September 2014 that is more than *18 months* from the date that the decision to allocate quotas to non-right holders was taken).

[21] I now turn to the second basis on which the applicants are challenging the Minister's decision, namely that the Minister without giving the applicants an opportunity to be heard, reduced the quota, allegedly allocated to the applicants on 18 and 21 July 2014. I am prepared to accept that if the applicants are correct that they were allocated quotas on 18 and 21 July 2014 and the quotas were reduced on 22 July 2014, then their application is urgent and I am prepared to condone the non-compliance with the rules of court and hear the application as an urgent one. I will now turn to consider whether the applicants have discharged the *onus* resting on them entitling them to the remedy (namely that this Court must review and set aside the Minister's decision to reduce the quotas allocated to the applicants and also to allocate quotas from the reserve quota to non-right holders) they are seeking.

Did the Minister reduce the applicants' quotas?

[22] I have indicated above that for the 2014 fishing year the Minister set the total allowable catch for horse mackerel at 350 000 metric tons and that he initially allocated 247 800 metric tons to both right holders and non-right holders and kept in reserve 102 200 metric tons. From the 247 800 metric tons, which was initially allocated, Namsov received a quota of 31 469 metric tons and Atlantic Harvesters received 5911 metric tons. From the 102 200 metric tons kept in reserve the Minister initially allocated 92 104 metric tons and kept a further 10 096 metric tons in reserve. When the applicants were informed of the allocations made to them Namsov was not happy and engaged the Minister demanding that it be allocated a quota of 13 337 metric tons in respect of horse mackerel and that Atlantic Harvesters be allocated a quota of 2 555 metric tons in respect of horse mackerel. The applicants allege that the Minister, shortly after the meeting of 18 July 2014, contacted Mr Koep (of Koep & Partners the applicant's legal practitioner of record) telephonically and informed him that:

> 'He (i.e. the Minister) was prepared to grant (and hence decided to allocate) the additional quotas required by the applicants (i.e. 13 337 metric tons for Namsov and 2

555 metric tons for Atlantic Harvesters) and (the Minister) further informed Mr Koep that there was sufficient remaining quota in the 2014 Reserve Quota available in order to satisfy the demands made by applicants, and the requirements and needs of the applicants…'.

[23] Based on the above quoted alleged conversation between Mr. Koep and the Minister, the applicants argue that they were allocated 13 337 metric tons and 2555 respectively. They further argue that when the Permanent Secretary, on 22 July 2014 conveyed to them that they were allocated 5 908 metric tons (to Namsov) and 1110 metric tons (to Atlantic Harvesters) from the reserve quota (of 10 096 metric tons), the Minister unlawfully reduced their quotas. The Minister denies that he concluded an agreement with the applicants by telephone or through sms or at the meetings held at the Ministry on 18 and 21 July 2014 to allocate to applicants the quotas they required.

[24] Mr Töttemeyer who appeared for the applicants argued that the factual dispute between the applicants and the Minister as to whether the Minister did, on 18 and 21 July 2014, allocate quotas to the applicants must be resolved according to the general principles outline in the *Sternvalle* rule. The *Stellenvale* rule is of course based on the general rule stated by Van Wyk, J in the case of *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*[9]. He thus argued that the Minister's version is so far-fetched that I must on the papers reject it. For reasons that will become clear in the following paragraphs I do not consider it necessary to resolve that factual dispute between the applicants' allegations and the allegations by the Minister.

[25] There is no doubt that the allocation of quotas by the Minister amounts to the performance of an administrative act. It thus follows that the general legal principles applicable to determine whether a given decision or act of the Minister is a valid administrative act applies to the Minister's decision to allocate or not allocate quotas. The legal principles which are in my opinion relevant to the matter at hand are the principles that any decision taken by an administrative authority must comply with the

[9] 1957 (4) SA 234 (C).

relevant statutory requirements, that the administrative official must consider relevant considerations and disregard irrelevant considerations and the principle that a public authority cannot commit himself in advance against exercising the discretionary power to act for the public good.

[26] In the present matter the following facts are not in dispute:

(a) That the Minister, in terms of s 38 of the Act determined the total allowable catch in respect of the horse mackerel for the 2014 fishing year at 350 000 metric tons.

(b) By 02 July 2014, the Minister had already awarded and allocated 339 904 metric tons to both right holders and non-right holders leaving a balance of 10 096 metric tons.

(c) On 18 July 2014 the applicants demanded to be allocated a total of 15 892 metric tons.

(d) That the applicants demands to be allocated 15 892 metric tons were based on the facts that:

(i) The allocations made to them on 02 July 2014 is disproportionate to the ordinary quota allocation (i.e. that component of the TAC quota allocation not comprising part of the Reserve Quota) made to them;

(ii) The applicants had a reasonable expectation that based on recent allocation trends, the allocation of the 2014 Reserve Quota would be proportionate to that which was allocated to the applicants in respect of the main quota;

(iii) The quota allocated to them for the 2014 Reserve Quota was insufficient for the applicants' needs.

[27] I am of the opinion that, even if the Minister had on 18 and 21 July 2014, made a decision to allocate to the applicants 15 892 metric tons (from the reserve quota) in respect of the horse mackerel that decision to allocate to the applicants 15 892 metric tons would be *ultra vires* the Minister's power and is thus invalid. I say so for the following reasons. By 02 July 2014 only 10 096 metric tons (from the reserve quota) was still kept in reserve. So if the Minister was to grant 15 892 metric tons he would have exceeded the Total Allowable Catch determined in terms of s 33 of the Act whereas in terms of s 39(6)[10], he may not allocate more quotas to exceed the total allowable catch in respect of any marine resource. Mr. Tötemeyer who appeared for the applicants argued that this Court must ignore the quotas allocated to non-right holders. He said:

> '…the requirement that quotas allocated may not exceed the total allowable catch (i.e. the "TAC") set for a particular resource can - as a matter of law – only apply to quotas lawfully allocated…The point is thus that the illegal allocations (and catches of horse mackerel made by) the Trust and the third, fourth, fifteenth and sixteenth respondents may not be taken into account when considering the issue as to whether or not a sufficient quantity is left in order to grant the additional quota to applicants)'.

[28] I cannot agree with Mr. Tötemeyer on this score for the simple reason that when the Minister announced the allocation of quotas in respect of horse mackerel on 20 December 2013 and 02 July 2014 he performed an administrative act, and that act was valid until it was set aside by a court of law. This principle has been articulated as follows by Shivute, CJ:[11]

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[10]See s39 (6) of the Act which provides that. '(6) The aggregate of quotas allocated under subsection (3) in respect of any marine resource shall not exceed the total allowable catch set for that resource.'
[11]In the matter of Black Range Mining (Pty) Ltd v Minister of Mines and Energy and Others NNO 2014 (2) NR 320 (SC) at p 329 and also see Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others 2010 (2) NR 487 (SC) in para 23.

> 'The principle of legality is one of the incidents that flows from the rule of law. It follows then that, by virtue of the presumption of regularity, administrative acts — even those that may later be found to have been invalid — attract legal consequences until they are set aside or avoided.'

[29] The second reasons why the Minister's decision (to allocate to the applicants 15 892 metric tons from the reserve quota) would be invalid is that if he had allocated the quotas on the basis of the grounds advanced by the applicants, the Minister would have allocated the quotas taking into account irrelevant considerations, because s (39) of the Act stipulates that the Minister must have regard to the matters set out in s 33(4) of the Act and to others that may be prescribed. Proportionate allocation of the quotas and the needs of an applicant are not amongst the matters which the Minister must take into account when he considers applications for the allocation of quotas[12]. Thirdly even if the Minister made an undertaking, that undertaking is not binding[13]. In the case of *Waterfalls Town Management Board v Minister of Housing*[14] the High Court of the then Southern Rhodesia refused to enforce an agreement whereby a minister promised (both verbally and in writing) that his department would not erect certain buildings on a strip of crown land which was adjacent to a 'buffer strip' of land between an all-white township of Waterfalls and a black village. The government later ignored the undertaking and built houses on the 'buffer strip' the board then sought an order interdicting the government from continuing to building the houses on the 'buffer strip' and also an order to demolish the houses already build. The court held that the 'contract' bound neither the minister nor the government. Murray, CJ said:

> 'This promise, had it been given by an individual, might well have been binding and enforceable. Given by the Minister it was no more than an undertaking to discharge his administrative duties in regard to building in a way which would remove their grievances. I cannot regard the Minister's 'agreement' as anything more than a promise to meet their

[12] See the South African case of Agricultural Supply Association (Pty) Ltd v Ministry of Agriculture 1970 (4) SA 65 (T).

[13] See the English case of Rederiaktiebolaget 'Amphitrite' v King [1921] 3 KB 500.

[14] 1957 (1) SA 336 (SR).

> objection by exercising his discretionary administrative powers in a particular way. This promise cannot fetter his right, if circumstances connected with his administration require it, to exercise his discretion in some other way. If aggrieved the Board has a political, not a judicial remedy.'[15]

I associate myself with those remarks and I am satisfied that they find application in the case before me. I therefore find that the applicants have failed to discharge the onus resting on them, to show that the Minister validly and lawfully allocated 13 3337 and 2 555 metric tons to them. I thus reach the conclusion that the Minister did not reduce the quotas allocated to the applicants.

The allocation of quotas to non-right holders

[30] I will briefly return to the question of allocating quotas to non-right holders. One of the grounds on which the appellants are challenging the Minister's decision is the fact that the Minister allocated quotas to entities which do not hold rights to harvest the specific marine resource in question (i.e. horse mackerel).

[31] Since the allocation of quotas to exploit marine resources constitutes administrative action, of necessity the process must be conducted in a manner that promotes fair administrative-acts while satisfying the requirements of Article 18 of the Namibian Constitution. By awarding quotas to entities which do not hold rights to harvest the specific marine resource in question (i.e. horse mackerel) the Minister acted *ultra vires* s 39 of the Marine Resources Act, 2000. Consequently, the Minister's decision to allocate quotas to entities which do not hold rights to harvest the specific marine resource in question (i.e. horse mackerel) (with the exception of the Trust) is invalid, but is for reasons set out in the following paragraphs not reviewed and set aside.

[32] I have, however, indicated above that the respondents raised a preliminary objection that the review proceedings were not instituted within a reasonable time. The

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[15] At 342 E-G.

test (to determine whether the applicants delayed in challenging the Minister's decision) which the Court has to apply is of a dual nature, namely whether the proceedings were instituted after expiration of unreasonable time and if so, whether the unreasonable delay should be condoned.

[33] Whilst no time period is stipulated in Rule of Court 76 (or in common law practice) within which review proceedings have to be instituted, it is now well established that such proceedings must be instituted within a reasonable time of the decision or ruling sought to have reviewed[16]. There are two principal reasons for the rule that the Court should have the power to refuse to entertain a review at the instance of an aggrieved party who has been guilty of unreasonable delay. The first is that unreasonable delay may cause prejudice to other parties.[17]. The second reason is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions[18].

[34] What of course is a reasonable time depends on each case on its own particular facts and circumstances. This was articulated by Booysen, J in the South African case of *Radebe v Government of the Republic of South Africa and Others*[19], as follows:

> '… the Court has first to determine whether a reasonable time has elapsed prior to the institution of the proceedings, or to put it differently, whether there has been an unreasonable delay on the part of the applicant. *(Wolgroeiers Afslaers (Edms) Bpk v Municipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 42A; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A) at 86B-D). In deciding whether a reasonable time has elapsed, a Court does not exercise a discretion. The enquiry is a factual one, that is, whether the period which has elapsed

[16]Jeffery v South African Medical and Dental Council, President 1987 (1) SA 387 (C); Radebe v Government of the Republic of South Africa and Others 1995 (3) SA 787 (N).
[17]Harnaker v Minister of the Interior 1965 (1) SA 372 (C) at 380 D; Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41.
[18]Sampson v SA Railways and Harbours 1933 CPD 335 at 338; Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41; cf Kingsborough Town Council v Thirlwell and Another 1957 (4) SA 533 (N) at 538.
[19] 1995 (3) SA 787 (N) at 798G-799E.

was, *in the light of all the relevant circumstances*, reasonable or unreasonable. (Wolgroeiers Afslaers case, supra, at 42C-D; Setsokosane's case, supra, at 86E).

If the Court were to arrive at the conclusion that there has been an unreasonable delay, the Court exercises a discretion as to whether the unreasonable delay should be condoned. What a reasonable time is, is of course dependent upon the circumstances of each case. . . .When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings.'

[35] The above excerpt was referred to with approval by the Supreme Court in the case of *Kruger v Transnamib Ltd (Air Namibia) and Others*[20]. In the unreported judgment of *Ebson Keya v Chief of the Defence Force & 3 Others*[21] and also the findings of this court, as made in the *Purity Manganese (Pty) Ltd v Minister of Mines & Energy*[22] and the *Namibia Grape Growers and Exporters v Minister of Mines & Energy* [23] and *Ogbokor v The Immigration Selection Board*[24] decisions, in which cases a delay of some seven and eight months for the bringing of the review application was held as having constituted an unreasonable delay. In the matter of *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*[25] Damaseb, JP said:

'In *Ebson Keya v Chief of Defence Forces and Three Others* the court had occasion to revisit the authorities on unreasonable delay and to extract from them the legal principles applied by the courts when the issue of unreasonable delay is raised in administrative law review cases. The following principles are discernable from the authorities examined:

(i) The review remedy is in the discretion of the court and it can be denied if there has been an unreasonable delay in seeking it: There is no prescribed time limit

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[20] 1996 NR 168 (SC).
[21] Unreported judgment in High Court case A 29/2007 delivered on 20 February 2009.
[22] 2009 NR (1) 277 (HC).
[23] 2002 NR 328 (HC).
[24] Unreported judgment of the High Court of Namibia case A (A 223/2011) [2012] NAHCMD 33 (17 October 2012).
[25] 2011 (2) NR 437 (HC).

and each case will be determined on its facts. The discretion is necessary to ensure finality to administrative decisions to avoid prejudice and promote the public interest in certainty. The first issue to consider is whether on the facts of the case the applicant's inaction was unreasonable: That is a question of law.

(ii) If the delay was unreasonable, the court has discretion to condone it.

(iii) There must be some evidential basis for the exercise of the discretion: The court does not exercise the discretion on the basis of an abstract notion of equity and the need to do justice between the parties.

(iv) An applicant seeking review is not expected to rush to court upon the cause of action arising: She is entitled to first ascertain the terms and effect of the decision sought to be impugned; to receive the reasons for the decision if not self-evident; to obtain the relevant documents and to seek legal and other expert advice where necessary; to endeavour to reach an amicable solution if that is possible; to consult with persons who may depose to affidavits in support of the relief.

(v) The list of preparatory steps in (iv) is not exhaustive but in each case where they are undertaken they should be shown to have been necessary and reasonable.

(vi) In some cases it may be necessary for the applicant, as part of the preparatory steps, to identify the potential respondent(s) and to warn them that a review application is contemplated. In certain cases the failure to warn a potential respondent could lead to an inference of unreasonable delay.'

[36] In the matter *Keya*[26] Damaseb, JP said:

'…In exercising the discretion whether or not to condone unreasonable delay, the Court may have regard to the conduct of a respondent in so far as it may have contributed to the delay. The Court may also, at this stage of the inquiry, consider the extent of the prejudice suffered by a respondent and whether it may have been averted by the

[26] Supra footnote 21 at paragraph 19.

applicant simply warning the respondent of the intended review. The reason for this is obvious as recognized by the Supreme Court in *Kruger supra* at 172 A, where the Court said:

> "Where a respondent in review proceedings is given notice that a decision is about to be taken on review such respondent knows it is at risk and can arrange its affairs so as to be the least detrimental."

[37] In the present matter the decision to allocate quotas to non-right holders was taken as far back as May 2013 and implemented during December 2013 and July 2014. In response to the respondents' objections that the review proceedings were not instituted within a reasonable time the applicants simply deny that they delayed in instituting the review proceedings, they contend that the objection based on unreasonable delay is baseless. They submitted that they are only challenging the allocations made under the 2014 reserve quota. I do not agree with the applicants that the point of reference is 22 July 2014 when the Minister allocated the quota that remained in reserve. In my view what the applicants are challenging is the decision to allocate quotas to non-right holders and that decision was taken in May 2013 (that is more than 18 months ago) communicated to the applicants on 20 December 2013 and implemented for the first time on 20 December 2013 and for the second time on 02 July 2014. I am thus of the opinion that the applicants delayed in instituting the review proceedings.

[38] Having made the factual finding that the applicants delayed in instituting the review proceedings, what remains for me to determine is whether or not a satisfactory explanation has been offered by the applicant to account for the delay. Because of the misconception that their cause of action only arose on 22 July 2014 the applicants did not, in their respective founding affidavits, offer any explanation as to why they did not initiate the challenge on the decision to allocate quotas to non-right holders earlier than September 2014. Mr. Tötemeyer who appeared for the applicant argued that if the applicants had challenged that decision earlier it would have been a challenge in

vacuum. I do not agree with Mr. Tötemeyer, for the simple reason that they already knew in May 2013 the decision to allocate quotas to non-right holders was taken and communicated to the applicants and implemented in December 2013 for the first time and implemented for the second time during July 2014. On both the occasions (that is during December 2013 and July 2014) when it was implemented it impacted on the applicants in that it reduced the metric tons that were available for allocation to the applicants by 16 000 metric tons and 42 000 metric tons respectively. The failure to explain the delay in instituting review proceedings within a reasonable time is fatal to the applicants' case. See the case of *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others*[27] where Muller, J with approval quoted the following from the case of *Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union and Others*[28]:

> '[32] Failing an explanation for the delay in mounting an attack on the validity of the application I consider the delay was unreasonable in the circumstances and that no basis for condoning it has been advanced. It follows that the appellant lost its right to complain of the alleged invalidity of the application which was in a sense validated thereby; cf *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 381A - C.'

[39] Namsov should have applied for review of the decision by Minister to allocate quotas to entities that do not hold rights to exploit the marine resources in question (i.e. horse mackerel) within a reasonable time after it became aware of Minister's decision. However, Namsov did not do that it followed the route of negotiating and concluding agreements with some of the non-right holders (specifically the Trust, the eleventh and twelfth respondents) to utilize their quotas. In the circumstances and in the absence of cogent explanations for the delay in bringing the review applications, I am not prepared to exercise my discretion in favour of the applicants for their unreasonable delay as set out earlier herein.

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[27] 2009 (1) NR 277 (HC).

[28] 2001 (4) SA 149 (SCA).

[40] I have above, indicated that the Minister's decision to allocate quotas to entities which do not hold rights to harvest the specific marine resource in question (i.e. horse mackerel) (with the exception of the Trust) is invalid. The reason why I have excluded the Trust from that finding is the fact that I do agree with the submission by Mr. Namandje that the Trust does not harvest the marine resources for commercial purposes and therefore does not require a right to harvest those resources. In respect of the 15th respondent there was insufficient information and documentation placed before me for me to make a finding on whether or not the Minister validly converted the respondent's right from seaweed harvesting right to a horse mackerel harvesting right. In the light of what I said in this judgment I make the following order.

1. The allocation of quotas to the National Fishing Corporation of Namibia Limited, The Namibia Large Pelagic & Hake Longlining Association and The Small Pelagic Fishing Association of Namibia, is unlawful and irregular but is not set aside.

2. That applicants must, jointly and severally the one paying the other to be absolved, pay the costs of the 4th to 10th respondents, the costs to include the costs of one instructing and one instructed counsel.

3. No order as to costs in respect of the 1st to 3rd and 11th to 16th respondents.

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Judge

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APPEARANCE

For the applicants:	R Tötemeyer SC assisted by D Obbes Instructed by Koep & Partners
For the First & Second Respondents	S Akweenda Instructed by Government Attorneys
For the Third Respondents	R Maasdorp Instructed by Engling Stritter & Partners
For the Fourth to Tenth Respondents	S Namandje Of Sisa Namandje Inc
For the Eleventh to Sixteenth Respondents	No Appearance