REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2022/00289

In the matter between:

NCUMCARA COMMUNITY FOREST MANAGEMENT COMMITTEE	**1ST APPLICANT**
MUDUVA NYANGANA COMMUNAL CONSERVANCY MANAGEMENT COMMITTEE	**2ND APPLICANT**
KATOPE EAST COMMUNITY FOREST MANAGEMENT COMMITTEE	**3RD APPLICANT**
KAVANGO EAST AND WEST REGIONAL CONSERVANCY AND COMMUNITY FOREST ASSOCIATION	**4TH APPLICANT**

and

THE ENVIRONMENTAL COMMISSIONER	**1ST RESPONDENT**
DEPUTY ENVORINMENTAL COMMISSIONER	**2ND RESPONDENT**
MINISTER OF MINES AND ENERGY	**3RD RESPONDENT**
COMMISSIONER FOR PETROLEUM AFFAIRS	**4TH RESPONDENT**
ATTORNEY-GENERAL FOR THE REPUBLIC OF NAMIBIA	**5TH RESPONDENT**
RECONNAISSANCE ENERGY NAMIBIA (PTY) LTD	**6TH RESPONDENT**
NATIONAL PETROLEUM CORPORATION OF	

NAMIBIA **7TH RESPONDENT**

Neutral Citation: *Ncumcara Community Forest Management Association v The Environmental Commissioner* (HC-MD-CIV-MOT-GEN-2022/00289) [2022] NAHCMD 380 (29 July 2022)

CORAM: MASUKU J
Heard: **13 July 2022**
Delivered: **29 July 2022**

Flynote: Legislation – Environmental Management Act No. 7 of 2007 ('the Act') – appeal against decision of Environmental Commissioner – power of Minister of Mines and Energy to grant interim relief in terms of s 50(6) of the Act – Civil Procedure – urgency in terms of rule 73(4) discussed – service of process - jurisdiction of the High Court in matters provided for in terms of s50 of the Act.

Summary: The applicants approached the court on an urgent basis, seeking the staying of an implementation of a decision by the Environmental Commissioner issued in favour of the seventh respondent. In terms of that decision, the seventh respondent was granted an application amending the wells, which the seventh respondent could drill. The applicants cried foul because they had not received any notice of the proposed amendment. They alleged that they had filed an appeal against the decision in question and had further applied to the Minister, in terms of s 50(6) of the Act to stay the implementation of the decision but the Minister had not, despite being put to terms made a decision in that regard. It was on that basis that the court was approached to grant an interim interdict pending a determination of their appeal by the Minister.

Held: that the failure to serve process at a party's designated address does not avail that party if it can be shown by objective evidence that that party was in any event served and became aware of the process issued against him or her.

Held that: a party, who claims that a matter is urgent, must comply with the mandatory provisions of rule 73 of the High Court Rules. In this connection, that party must explicitly allege circumstances on oath which render the matter urgent and why that

party claims it cannot be afforded substantial redress in due course. Failure to do this results in the matter being struck from the roll for want of urgency.

Held further that: the requirements of urgency should not be conflated with the requirements for the granting of an interim interdict as these are separate and distinct legal concepts, with different requirements.

Held: that in alleging that a matter is urgent, an applicant must ensure that the respondent's procedural rights to receive proper service, give full instructions to counsel and to file an opposition are not compromised.

Held that: the court does have jurisdiction to entertain matters that emanate from the provisions of s 50(6) of the Act and that the fact that the Minister is given the first port of call to deal with interim interdicts does not deprive the court of jurisdiction in the wide sense.

Held further that: should the Minister not make a decision in terms of s 50(6) of the Act, the court has power to issue a *mandamus* if so approached. Furthermore, if the Minister should refuse to grant a stay in terms of s 50(6) of the Act, an aggrieved party has a right to approach the court to obtain the necessary relief.

Held: that the applicants were not at large, whilst the appeal was pending, to abandon the application in terms of s 50(6) of the Act and approach the court for the relief otherwise available in terms of the said provisions. The relief in s 50(6) is in the nature of domestic remedies that a party should exhaust before approaching the court for relief.

Held that: the court does not lightly resort to its inherent jurisdiction except where a need to hold the scales of justice evenly arises and where there is no specific law providing for that particular situation.

Held further that: the period of time afforded to the Minister by the applicants, to make a decision on the s 50(6) application, namely five days, was in all the circumstances unreasonable.

Held: that though the matter could be struck for lack of urgency, it was however appropriate to dismiss the application on the grounds that the court did not have jurisdiction in the narrower sense, to entertain the application for stay when the Minister has power in terms of the law to grant the relief sought.

The application was thus dismissed with costs.___

ORDER

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1. The application is dismissed.
2. The applicants are ordered to pay the costs of the respondents who opposed the application jointly and severally, the one paying and the other being absolved, with the costs being consequent upon the employment of one instructing legal practitioner and one instructed legal practitioner, where so employed.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Presently serving for the court's determination is an application brought on an urgent basis by the applicants. In essence, the applicants seek an order granting an interim interdict in favour of the applicants in respect of the staying of the implementation of a decision made by the 1st respondent, the Environmental Commissioner on 15 June 2022.

[2] The applicants further seek an order that the interim interdict obtains pending the determination of an appeal allegedly filed by the applicants to the Minister of Energy

and Mines in terms of the provisions of the Environmental Management Act, No. 7 of 2007.

[3] It is fair to say that the application is vigorously opposed by all the respondents. In this connection, they spared no effort in throwing all manner of legal points in opposition at their disposal. In this regard, the respondents, who are differently represented, raised various points of law *in limine*, which are the subject of this judgment, as agreed by the parties.

The parties

[4] The applicants are entities who are based in the Okavango East and West Regions of the Republic of Namibia. The 1st applicant is described as Ncumcara Community Forest Management Committee. It is alleged to be a duly constituted Management Authority and established as a *universitas ad personorarum* in respect of a Community Forest. Its place of business is situate at Ncumcara Community Forest, Kavango West, Rundu.

[5] The 2nd applicant is Muduva Nyangana Communal Conservancy Management Committee, which is alleged to be duly constituted and established as a *universitas ad personorarum,* with a written constitution, in terms of the Nature Conservation Ordinance Section 24A of Ordinance 4 of 1975. Its place of business is said to be in the Kavango East Region of this Republic.

[6] The 3rd applicant is Katope Community Forest Management Committee, a Management Authority in respect of a Community Forest. It is alleged to be established as a *universitas ad personorarum*, by virtue of an agreement and declaration issued by the Minister of Environment and Tourism and Forestry. Its principal place of business is situate at Katope Community Forest, halfway between Rundu and Nkurenkuru, Kavango West of this Republic.

[7] The 4th applicant is Kavango East and West Regional Conservancy and Community Forest Association. It is described as a voluntary association duly established in terms by its members as a *universitas ad personorarum*. In this

connection, it is alleged to have a written constitution. Its principal place of business is situate at Joseph Mbambangandu Community Campsite located in the Joseph Mbambangandu Conservancy located 40 km from Rundu, in Kavango East Region of this Republic.

[8] The 1st respondent is the Environmental Commissioner, duly appointed in terms of s 16(1)(*a*) of the Environmental Management Act. He is cited in his official capacity in this application. The 2nd respondent is the Deputy Environmental Commissioner, an official appointed in terms of s 16(1)(*b*) of the same Act.

[9] The 3rd respondent is the Minister of Environment, Forestry and Tourism, duly appointed in terms of Art 32 of the Constitution. His address of service like all the other Government respondents, s c/o the office of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek. The 4th respondent is the Minister of Mines and Energy, also appointed in terms of Art 32 of the Constitution. He shares the same address with the 3rd respondent.

[10] The 5th respondent is the Commissioner for Petroleum Affairs under the Ministry of Mines and Energy. This official is appointed in terms of s 3(1) of the Petroleum (Exploration and Production) Act No 2 of 1991. The 5th respondent is cited in his official capacity, with the same address as the other Governmental respondents. The 6th respondent is the Attorney-General of this Republic, who is appointed in terms of the Constitution.

[11] The 6th respondent is Reconnaissance Energy Namibia (Pty) Ltd, a private company with limited liability. It is incorporated and registered in terms the company laws of this Republic, with its registered place of business situate at 129 Hosea Kutako Drive, Windhoek. It also has an alternative address which is not necessary to mention in this judgment. The 7th respondent is the National Petroleum Corporation of Namibia, a State owned enterprise duly established in terms of the company laws of this Republic. Its place of business is located at 1 Aviation Road, Windhoek.

[12] The applicants will be referred to collectively as ‘the applicants’. Where a need arises to identify the particular applicant, it will be separately identified. The

Environmental Commissioner will be referred to as 'the EC'. His deputy, the 2nd respondent, will be referred to as 'the DEC'. The Minister of Environment, Forestry and Tourism will be referred to as 'the 3rd respondent'. The Minister of Mines and Energy, whose legislative responsibilities appear central to this application, will be referred to as 'the Minister'.

[13] The Commissioner for Petroleum Affairs will be simply referred to as 'the C.P.A.' The Attorney-General, where need to refer to him or his offices arises, will be referred to as 'the A-G'. Reconnaissance Energy Namibia (Pty) Ltd, the 7th respondent, will be referred to as 'REN'. Last but by no means least, the National Petroleum Corporation of Namibia, will be referred to as 'Namcor.'

Acronyms

[14] It is perhaps convenient at this juncture, to also refer to certain acronyms that may need to be employed in this judgment. These are in addition to some of those already mentioned in the immediately preceding paragraphs. 'EMA' will refer to the Environmental Management Act. 'EIA' will refer to the Environmental Impact Assessment. 'EMP' will refer to the Environmental Management Plan. 'ECC' will refer to the Environmental Compliance Certificate. 'PEL', on the other hand will refer to the Petroleum Exploration Licence.

Representation

[15] It is necessary, at this juncture, to mention the legal practitioners who represented the parties mentioned above. Ms. C. Van Wyk represented the applicants. All the Government respondents were represented by Mr. S. Namandje on instructions of the Government Attorney. REN was represented by Mr. Khama on the instructions of Nyambe Legal Practitioners, whereas Namcor was represented by Mr. Narib, also instructed by Nyambe Legal Practitioners.

[16] The court appreciates the assistance and contribution made by all the legal teams in the determination of this matter. The collegial spirit and the respect accorded to the court and to each other by the respective legal teams is highly commended and

worth emulating. In football parlance, the legal practitioners played the ball and not the man or woman, as the case may well be.

The relief sought

[17] Although the relief sought by the applicants is intimated in the opening paragraphs of this judgment, it is, however, imperative that I set out the relief sought in full. This is to conduce to a fuller and better understanding of the judgment, and perhaps more importantly, to an enhanced appreciation of the reasoning of the court at the end of the day.

[18] I quote the notice of motion verbatim below. In it, the applicants seek the following relief:

'1. Condoning the Applicants non-compliance with the ordinary rules of this Court in the normal course;

2. Dispensing with the forms and service provided for in the Rules and also to dispose of the application at such time and place and in such manner and in accordance with such procedures which must be, as far as possible, in terms of the Rules of this Honourable Court or as the Court considered fair and equitable;

3. To hear this matter on an urgent basis; and further

4. To grant an interim interdict to restrain the seventh respondent (REN) from putting further into effect the decision of the ECC (Environmental Clearance Certificate) of 15 June 2022 or continuing any oil and gas exploration activities which have been purportedly authorised by the First Respondent (the Environmental Commissioner) by way of its amendment; and

5. That pending the final determination of the relief sought in an appeal and/or otherwise, which is for the Minister to direct the Seventh Respondent (REN) to apply for a new ECC in terms of Section 31(1), by complying with the procedures in the Environmental Management Act and its Regulations, inter alia, to provide proper notice and carry out consultations with all potentially interested and affected parties, including the Applicants, and to conduct an adequate environmental impact assessment of each proposed drilling site and assess cumulative and other impacts – the First Respondent be interdicted from implementing such decision; and

6. Such further and/or alternative relief as the Honourable Court may deem necessary.'

[19] The application is accompanied by and based on the founding affidavit deposed to by Mr. Paulus Kampanza, who describes himself as the chairperson of the 1st applicant. The other applicants contented themselves with filing confirmatory affidavits, in large measure confirming the contents of the founding affidavit of Mr. Kampanza.

Background

[20] The facts giving rise and constituting the cradle for the present application are for the most part, not the subject to much disputation. This is particularly so in relation to the current application. The facts may be summarised in the fashion that follows below.

[21] REN applied for and was granted a PEL licence on 26 August 2019. This licence authorised REN to undertake 'Proposed Petroleum (Oil and Gas) Exploration Operations (Drilling of Stratigraphic Wells) in Petroleum Exploration Licence (PEL) 73'. The licence covered blocks 1719, 1720, 1721, 1819, 1820 and 1821, Kavango Basin, Kavango West and East Regions of Northern Namibia.

[22] On 15 June 2022, the EC issued a letter addressed to REN. In this letter the EC communicated a decision in terms of s 37(2) of the EMA in respect of REN's application for amendment of the conditions of the ECC (ECC 009) to undertake a listed activity had been reached. In this connection, REN was authorised to amend the conditions included in EEC 009 to 'include the drilling of the following new stratigraphic wells and its associated services:
No's P23, P32, P33, and P2-7Ga and the side-tracking of the 6.2 Kawe well drilled in 2021.'[1]

[23] It is the applicants' case that this decision by the EC authorised an amendment to the wells REN was initially allowed to drill. In so doing, contend the applicants, they were not afforded an opportunity to make representations on the proposed amendment of REN's previous licence. It is the applicants' case that the amendment authorised by

[1] Letter from the EC dated 15 June 2022 at p. 219 of the record of proceedings.

the EC was based on an updated EIA and EMP which were provided by REN but in respect of which the applicants were not afforded an opportunity to make representations.

[24] It is the applicants' contention that they were not aware at the time the application for amendment was made that REN had made any public notification of the intended amendment to update its EIA or the conditions of the ECC. The applicants contend that the only affected individuals who appear to have had notice were recorded in a transcript of comments and questions of meetings ostensibly held over four days between 10 and 13 March 2022. Persons in communities surrounding the wells implicated were not afforded a hearing.

[25] The applicants' further state that a notice dated 6 May 2022, inviting for comments to REN's application to amend its licence was not known to or seen by the applicants as they did not have access thereto. It is alleged that the notice was published in the Sun newspaper but that due to the circumstances of their lives, not many people in the Kavango Region were aware of the notice as they generally do not read English newspapers.

[26] The applicants state that its legal practitioners of record, Legal Assistance Centre did, however, write a letter to the EC dated 27 May 2022 registering objections to the proposed amendments of REN's licence. There was no response to this letter. It is the applicant's case that aggrieved as they are by the granting of the amendment sought by REN, they noted an appeal to the Minister against the decision of the EC in terms of s 50 of the EMA.

[27] The applicants further depose that they applied to the Minister in terms of s 50(6) of the EMA, to suspend the operation of the decision of the EC in the meantime, pending the hearing and determination of the appeal. Notwithstanding the appeal and the application to the Minister for the stay of the operation of the decision of the EC, the Minister did not respond to their letter, which left them very little choice other than to approach this court on an urgent basis as they did. Any delay in approaching this court, they depose, would result in irreparable harm on their part with degradation of the environment.

[28] It would appear that the respondents have a different version on the account of events given by the applicant. In particular, it would seem that they contend that the wells authorised by the 15 June 2022 decision, are not new. It is unnecessary, for present purposes, to investigate and to rule on that aspect. This is so because the approach of the respondents is to apply for the application to be struck from the roll with costs, alternatively, for it to be dismissed for transgression of one legal principle or the other. I will deal with the respondents' contentions in this regard below.

Respondents' points of law *in limine*

[29] In recording the legal contentions of the respondents and the bases on which they moved the court to either strike the application from the roll, or to dismiss it altogether, I will not identify any particular applicant in relation to a particular legal contention. I do not do so because on the whole, it seemed to me that the approach to the legal questions arising was generally shared, with one set of respondents placing emphasis on one or other point.

[30] In essence, the following issue was raised on the respondents' behalf with the battle cry that the application should be struck from the roll in the first place. It was argued that the application, properly considered, is not urgent. If any urgency was to be attributed to it, that urgency was in any event of the applicants' own engineering, so to speak. It was specifically argued that the provisions of rule 73(4) of this court's rules ('the rules'), in particular, were not complied with. If anything, mere lip service was minimally paid thereto.

[31] In the unlikely event that the court would find that the application complied with rule 73, so argued the respondents, the application should fail because the applicants individually did not show that they each have the *locus standi in judicio* (standing in law) to bring the application. It was also argued on the respondents' behalf that the court does not have jurisdiction to entertain the application for granting an interim interdict in the circumstances. This, it was argued on the respondents' behalf, was because the right to grant interim relief sought by the applicants in terms of the law resides exclusively in the bosom of the Minister.

[32] Having sketched the legal contentions raised by the respondents' representatives in broad strokes, it now behoves the court to deal with the matters raised. I should, in this connection point out that depending on the conclusions the court reaches on one or other issue, it may not be necessary to traverse all the legal issues raised by the respondents. I proceed to deal with the issue of the applicants' *locus standi* and will, if necessary proceed to deal with the other issues in turn, as presently intimated.

The applicants' *locus standi*

[33] The respondents argued that when proper regard is had to the applicants' papers, there is a nagging question that should give the court a persistent headache. It is this – have the applicants demonstrated to the court that they have a right in law, to bring the application, otherwise known as *locus standi in judicio*?

[34] All the respondents, in unison, proclaimed that the applicants do not have standing to bring the proceedings. It was contended in this connection that the applicants were management committees of the respective community forests and conservancies as the case may be. Although an allegation was made that the applicants were *universitas ad personorarum,* there was no evidence or proper facts provided to the court in that connection.

[35] I am of the considered view that the respondents' contentions in this regard may carry legal favour, regard being had to what has been placed before court by the applicants. Considering the nature of the application and the matters at play, I will assume in the applicants' favour that they have the necessary standing in law to bring the application. I make that assumption without actually deciding in their favour that they do. I not only consider the nature of the application but also the manner in which it has been brought, considering also the interim nature of the relief sought.

[36] Having assumed the presence of standing in favour of the applicants as explained above, I now proceed to deal with the issue of urgency. I hasten to point out

that if upheld, the question of lack of urgency would not entitle the court to dismiss the application on the merits. The court would be at large to strike the matter from the roll.[2]

Service

[37] I think that I should briefly dispose of an argument raised by the 7th respondent REN regarding service of the application on it. It was submitted that there was no proper service on the said respondent for the reason that the papers were served on an address in Windhoek other than its principal place of business.

[38] Although respondents should be served properly on the specified addresses, in the instant case, it is plain that REN was, after service at the wrong address, made aware of the application and in this connection, filed its intention to oppose and also filed some affidavit in response. It is abundantly obvious in the premises that the objects of service, namely, to make a party aware of the case it has to meet, were fulfilled. The less than perfect service, must be allowed to stand considering that the court is satisfied that REN became aware of the case against it and managed to file its limited opposition to the relief sought.[3]

Urgency of the application or lack thereof

[39] The requirements relating to urgency have, like the majestic Baobab tree, become firmly entrenched and rooted in the legal and jurisprudential soils of this Republic. Rule 73(4) (*a*) and (*b*) for what it is worth, considering their celebrated nature of their interpretation, provide the following:

> '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 circumstances which he or she claims he or she could not be afforded substantial redress at a hearing in due course.'

[2] *Shetu Trading CC v Chair of the Tender Board of Namibia and Others* (3) (SA 26/2011) [2011] NASC 12 (04 November 2011), para 15.

[3] *Knouwds v Josea and Another* (PA 227 of 2005) [2007] NAHC 99 (11 December 2007).

[40] It has been observed that the language employed by the rule-maker in this rule is mandatory, or peremptory. Testimony to this fact is the employment of the word 'must', occurring in subrule (1) above. The import of this is that where an applicant fails to comply with the mandatory terms of the provisions quoted above, the court would be well within its rights to refuse to dispose of the matter on an urgent basis.

[41] The reason for these stringent requirements is that parties, in terms of the rules, are entitled to procedural rights, which afford them adequate time within which and facilities entitling them to receive, consider and decide whether and further, how to oppose or defend proceedings launched against them.

[42] Urgent applications in this connection, constitute a radical departure from the norm in the sense that they allow, in appropriate cases, abridged time lines within which an application can be lodged, heard and determined. In this connection, there is a resultant and I may add necessary sacrificing to some acceptable and justifiable extent, of the procedural rights of the respondent.

[43] In *Bergmann v Commercial Bank of Namibia*[4] Maritz J adumbrated the applicable principles in the following compelling language:

'When an application is brought on the basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen. Urgent applications should always be brought as far as practicable in terms of the Rules. The procedure contemplated in the Rules is designed, amongst others, to bring about procedural fairness in the ventilation of disputes.

Whilst Rule 6(12) allows a deviation from those prescribed procedures in urgent applications, the requirement that the deviated procedure should be "as far as practicable" in accordance with the Rules constitutes a continuous demand of procedural fairness when determining the procedure in such instances. The benefits of procedural fairness in urgent applications are not only for the applicant to enjoy, but should also extend and be afforded to a respondent. Unless it would defeat the object of the application or, due to the degree of urgency or other exigencies of the case, it is impractical or unreasonable, an applicant should effect service of an urgent

[4] *Bergmann v Commercial Bank of Namibia* 2001 NR 48 (HC) at 50 G – 51 – B

application s soon as reasonably possible on a respondent and afford him or her, within reason, time to oppose the application. It is required of any applicant to act fairly and not delay the application to snatch a procedural advantage over his or her adversary.' (Emphasis added).

[44] The above injunctions by the learned judge are timeless in their force and application. This is so for the reason that although the lapidary remarks were in relation to the predecessor of the present rules, they remain of equal force under the new dispensation ushered in by the 2014 rules of this court.

[45] The respondents complain vociferously that their procedural rights to receive, consider and meaningfully oppose the application were seriously compromised, if not totally negated by the applicants. This is so because after service of the application, they were afforded one day within which to file their opposition and be ready to appear in court.

[46] The question to determine, with regard to *Bergmann,* is whether the degree of urgency or the exigencies of the matter were such that they rendered it necessary to have considerably abridged the timelines available to the respondents in a manner that detrimentally affected the respondents' procedural rights?

[47] The answer to this critical question must be sought and found in the founding affidavit, considered *in tandem* with argument presented but finding its being in the founding papers. I have looked high and low at the founding affidavit and I have not found any portion thereof that issuably deals with the requirements of subrule 4 of rule 73. What the applicants appear to have contented themselves with doing, was to depose to allegations relating to the granting of an interim interdict. That does not suffice at all.

[48] In this connection, Mr. Narib referred the court to *Baltic CC v Chairperson of the Review Panel*[5]. In that case, the court, at paras 14 to 32 dealt with the separateness and distinguishability of the requirements on an interim interdict, on the one hand, and

[5] *Baltic CC v Chairperson of the Review Panel* (HC-MD-CIV-MOT-REV-2020/00031 [2020] NAHCMD 69 (07 February 2020).

urgency, on the other. It is important that an applicant for urgency does not conflate these two concepts as they relate to different requirements.

[49] Where an application is alleged to be urgent and an interim interdict is also sought, the applicant is in duty bound to fully and comprehensively address both requirements. A conflation of the requirements leads an applicant for urgency on an inevitable detour to striking out the application. A reading of the founding affidavit suggests inexorably that the applicants whether out of haste or neglect, or both, did not issuably, or at all, deal with the mandatory requirements of rule 73.

[50] Dealing only, even if comprehensively, with the requirements of an interim interdict, which are in the nature of substantive law, does not at all soften the need to deal with urgency, which is a procedural requirement explicitly stated in the rules. In the absence of allegations on oath dealing with rule 73, the court may not come to the rescue of an applicant by allowing him or her to jump the proverbial queue. Such is the inevitability of applicants' fate in the instant matter.

[51] It is thus plain that the applicants did not, in their founding affidavit, deal with the requirements of rule 73(4)(*a*). What one cannot take away from them were the pious words recorded in para 2 of their notice of motion, quoted in full in para 18 above. Notwithstanding the lofty statements in para 2, of the notice of motion, the applicants could only pay lip-service to them as the time periods afforded the respondents did not in any shape or form, become in accordance with the procedures and time limits prescribed by the rules. The deviation was enormous and to the irreversible detriment of respondents' procedural rights.

[52] It must be stressed that a respondent's procedural rights to be observed by the applicant are not designed to enable the respondent to only appear in court. The respondent must ordinarily have sufficient time to consider the application, instruct a legal practitioner and obtain legal advice. In appropriate cases, this right would also have to include the respondent's right to instruct counsel. This answers to the equality of arms and thus enables the respondent to meet the applicant's case pound for pound. Sufficient and reasonable time periods must be afforded the respondent if his or her procedural rights are not to be rendered hollow or illusory.

[53] Rule 73(4)(*b*) requires the applicant in the founding affidavit, to explicitly state the reasons why he or she claims he or she cannot be afforded substantial redress at a hearing in due course. In other words, the applicant must show that the court should perforce hear the matter on an expedited basis, failing which the applicant's rights or interests will be ruined with finality by not having other relief open to explore in due course.

[54] The applicants did not address this requirement in their founding affidavit either. What is more, the respondents have, by reference to the EMA argued that the applicants do, as a matter of law, have substantial redress in that s 50(6) of the EMA grants the Minister power, in appropriate cases, to issue interim interdicts on application by an affected party.

[55] In dealing with this aspect, the applicants state the following at para 100 of their founding affidavit:

> 'Urgency remains. As a result, the Applicants were compelled to abandon that application made in terms of Section 60(5) of EMA and to now approach this court urgently in order to obtain necessary and appropriate relief in the circumstances set out more fully below.'

[56] It becomes abundantly obvious that the applicants are aware that they could be afforded substantial redress by the Minister but they decided to 'abandon' that relief. They instead, sought to approach this court directly, when an avenue for relief, which may have yielded fairness and easy and cheap access to substantial redress was open to them.

[57] I am of the considered view, in the circumstances that the applicants failed dismally, to convince the court that they would not have been afforded substantial redress outside the confines of the court. In the instant case, it is not a situation where the applicants would allege that they could not be afforded substantial redress in due course but it is a situation where they could possibly obtain immediate redress, thus obviating the need even to approach the court for redress in the first place.

[58] Having regard to the discussion above, it becomes plain as noonday that the applicants failed to show that the application warranted the court to allow them to jump the queue. They simply failed to meet the requirements of rule 73, especially those of subrule (4) thereof. The applicants have themselves to blame in that regard. The proper order, in the premises would be to strike the matter from the roll for want of compliance with the mandatory provisions of rule 73.

[59] In closing on this matter, I take on board the lamentations by Mr. Narib that the application is wholly without merit when it comes to urgency for the reason that the applicants say nothing in particular regarding the facts and circumstances that render the matter urgent. As recorded earlier, this is correct. Not one of the applicants takes the court into its confidence about what works are on-going that endanger their lives or livelihood of their crops or the environment. The application as it relates to urgency, is accordingly still-born and the position cannot be stated any better.

[60] There is another argument raised especially by Mr. Namandje for the Government respondents. He argued in the form of an exception and that if upheld by the court, it would render the applicants meet to be non-suited by the court, which would be a far cry from an order merely striking the matter from the roll. The issue raised is that of lack of the court's jurisdiction to entertain the matter at all. It is to that legal issue that I presently turn.

Absence of the court's power to grant the relief sought

[61] At the core of this contention are the provisions of s 50(6) of the EMA. Because of their centrality, it is necessary to quote the relevant parts of the entire s 50. This will conduce to an understanding of the import of s 50(6) in particular.

[62] Mr. Namandje, for the Government respondents argued and quite forcefully too, that in view of the provisions of s 50(6) of the EMA, this court does not have jurisdiction to deal with the present application. I do not quite agree with Mr. Namandje's broad characterisation of the word jurisdiction in the instant matter. The reason for my disagreement with his submission, will be apparent as the discussion on this issue evolves.

[63] Before I consider the provisions of s 50, it is necessary that I point out that the word jurisdiction in this matter will be used in the narrow sense, meaning the power or authority of a court to deal with a matter. Pollak[6] opines that 'Jurisdiction in the present context means the power vested in a court by law to adjudicate upon, determine and dispose of a matter . . . In the original edition the learned author pointed out that the word 'jurisdiction' may be used in a variety of meanings but with reference to the jurisdiction of the South African courts, he defined it to mean the right or authority, under South African law to entertain actions or other legal proceedings.'

[64] In this context, the enquiry will be whether the court, in view of the provisions of s 50 has the power or authority to issue an interim order staying the execution of the EC's decision whilst an appeal is pending before the Minister. This is quite apart from the question whether this court has jurisdiction in the wider sense envisaged in s 16 of the High Court Act, Act No. 16 of 1990, to intervene and issue an appropriate order in matters connected with s 50 of the EMA, the provisions of that section notwithstanding. (See para 81 *infra*)

[65] It is accordingly necessary in this regard to quote the relevant provisions presently. Section 50 reads as follows:

'(1) Any person aggrieved by a decision of the Environmental Commissioner in the exercise of any power in terms of this Act may appeal to the Minister against that decision.
(2) An appeal made under subsection (1), must be noted and must be dealt with in the prescribed form and manner.
(3) The Minister may consider and determine the appeal or may appoint an appeal panel consisting of persons who have knowledge of, or are experienced, in environmental matters to advise the Minister on the appeal.
(4) The Minister must consider the appeal made under subsection (1), and may confirm, set aside or vary the order or decision or make any other appropriate order including an order that the prescribed fee paid by the appellant, or any part thereof, be refunded.
(5) Any expenditure resulting from the performance of duties by the appeal panel in terms of subsection (3) must be paid from the State Revenue Fund from moneys appropriated by Parliament for that purpose.

[6] David Pistorius, Pollak on Jurisdiction, Juta & Co, 2nd ed, 1993, p 1.

(6) An appeal made under subsection (1) does not suspend the operation or execution of the decision pending the decision of the Minister, unless the Minister, on the application of a party, directs otherwise.'

[66] It is clear, when regard is had to the above provisions that once a party is aggrieved by a decision of the EC, that party may appeal to the Minister. It is also clear that whilst the Minister's decision on the appeal is pending, the decision of the EC continues to operate and is not suspended by the noting of the appeal.

[67] The applicants allege in their founding affidavit that they noted an appeal to the Minister against the decision of the EC dated 15 June 2022. Unfortunately, the applicants did not file a copy of the appeal and it is just their say so that an appeal was noted. The nature of the appeal and the grounds thereof are totally unknown to the court and this does not conduce to proper adjudication, should the court find that it has jurisdiction to entertain the application.

[68] It is salutary practice in matters where an appeal has been noted and the appellant, in the interregnum seeks an order staying the operation of the order appealed against, to file a copy of the appeal. This is not just a pedantic practice or requirement. The court being moved to grant an interim interdict will be able to properly exercise its powers in granting the stay or refusing by reference to the prospects of success of the appeal.

[69] To this end, the grounds of appeal play a pivotal role in enabling the court to properly decide whether the interim interdict should be granted or refused. It would be an exercise in futility and irresponsible for the court to grant an application for stay of a decision when from a reading of the grounds of appeal, there are no prospects of success of the appeal. It is on this basis that the failure to file the grounds of appeal should return to haunt the applicants. The court cannot, in good conscience consider an application for an interim interdict in complete darkness as to the question of prospects of success on appeal.

[70] What the applicants did was to write a letter to the Minister, ostensibly in terms of s 50(6). The letter reads as follows:

‘APPLICATION IN TERMS OF SECTION 50(6)

KINDLY TAKE NOTICE THAT the appellants apply for an order in terms of Section 50(6) of the Environmental Management Act, pending the determination of the Appeal hereby lodged, directing that the operation or execution of the decision of the Environmental Commissioner pending the decision of the Minister.

The basis of the application is as follows:

1. the exercise of administrative powers of the Environmental Commissioner was unlawful in that inter alia, no cognisance was taken of the fact that irreparable harm would ensue due to the fact that a proper environmental impact assessment was not conducted in respect of the operations introduced into the ambit of the Environmental Clearance Certificate, In addition many shortcomings of the Existing Impact Assessment and Environmental Management Plans are noted which remain unaddressed pertinently in the submissions made to the EC in terms of the Letters of the Legal Assistance Centre dated January 31st, 2022 and 27th of May, 2022.

2. The appellants submit that the application takes cognizance of the fact that the precautionary principle should be applied to avoid irreparable environmental harm;

3. The applicants request that such directive be given within five days of the date herein, failing which the Appellants shall be compelled to seek redress in a competent court for such urgent and other relief that may be deemed appropriate reasonable and necessary in the circumstances.’

[71] It is clear from reading the letter that the Minister was afforded five days to make a decision, failing which the applicants ‘shall be compelled to seek redress in a competent court for such urgent and other relief that may be deemed appropriate, reasonable and necessary in the circumstances.’ Do the applicants have a right to seek redress in a competent court in light of the provisions of s 50(6)?

[72] Mr. Namandje stated categorically that the applicants by approaching this court, were clearly barking the wrong tree as the matter of granting or refusing an interim interdict connected to the decision of the EC which has been appealed to the Minister, lies with the Minister and no other authority or power, when proper regard is had to the scheme of the EMA and the particular provisions in question.

[73] Ms. Van Wyk, for her part, argued that where as in this case, the Minister did not act within the period afforded him, the applicants were at large to approach this court in which case it would be able to exercise its inherent jurisdiction and thus grant the applicants much needed relief. Is she correct when proper regard is had to the tapestry of the Act?

[74] I am of the considered view that Mr. Namandje is eminently correct in his exposition of the applicable law in this connection. Section 50(6) grants power to the Minister only to make a decision regarding the question whether the decision of the EC should be stayed or not. In point of fact, in terms of the provision, the default position is that the decision of the EC must be implemented pending the appeal. It is only where the Minister is satisfied, on application by an affected party that he may, on good grounds alleged by the appellant, which satisfy him, decide to stay the decision of the EC.

[75] It is clear in this connection that the legislature reposed all the powers relating to a stay of the decision of the EC exclusively in the Minister and in no other authority or power, this court included. It is, in the premises clear that this court cannot properly entertain an application that the lawmaker decreed should be decided only by the Minister. The maxim *expression unius exclusio alterius* (i.e. the express mention of one thing excludes the other), finds application in this matter. The fact that the power to grant a temporary stay of the EC's decision rests with the Minister, means that the court is excluded from exercising that power.

[76] I am of the considered view that the policy considerations that may have influenced the identity of the repository for the power of granting a stay of the EC's decision being the Minister and not the court, may lie in the easy and inexpensive access that an aggrieved party, who may, in these circumstances, be a person or community without means to approach the court, whose processes are not only expensive, but also complex for the rank and file as much as they are time-consuming.

[77] It cannot be correct in the circumstances to argue, as did Ms. Van Wyk, that the court should, in this situation, have recourse to its inherent jurisdiction, to do justice between persons. That reservoir of power is not lightly resorted to, especially where the

legislature has, as in this case, provided an avenue for seeking redress in a forum other than the court.

[78] The Supreme Court, in *National Housing Enterprise v* Beukes,[7] stated the following regarding the resort to inherent powers:

'Inherent jurisdiction is the reserve or fund of powers, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and secure a fair trial between them.'

[79] In *Ex Parte Millsite Investment Co (Pty) Ltd,*[8] Vieyra J stated the following:

'. . . Apart from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain a claim or give any order which, at common law, it would be entitled so to entertain or give. It is to that reservoir of power that reference is made where in various judgments Courts have spoken of the inherent power of the Supreme Court: see *Union Government and Fisher v West* 1918 AS 556 at 572-3. The inherent power is not merely one derived from the need to make the court's order effective, and to control its own procedure, but to hold the scales of justice where no specific law provides for a given situation.' (Emphasis added).

[80] In view of the not so easy resort to inherent power, as stated by the Supreme Court above, I accordingly do not agree with Ms. Van Wyk. Where the legislature has in clear language reposed jurisdiction to a particular functionary to make a decision, the court cannot assume that jurisdiction, save in very exceptional circumstances and to do justice between the parties. There are none *in casu*.

[81] What is clear is that the court does have power to intervene later in the day. This is where the Minister has made a decision on the appeal, assuming that the decision of the EC is carried out in the meantime, unless the Minister otherwise orders, on application. Where a party is dissatisfied with the Minister's decision on the appeal, only

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[7] *National Housing Enterprise v Beukes* SA 21/2013, para 13.
[8] *Ex Parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at 585G-H.

then does the court, in terms of the Act have power in terms of s 51 of the EMA to deal with the appeal emanating from the Minister's decision in terms of s 50(4).

[82] I am of the considered view that in a case where the Minister, in exercise of his powers under s 50(6), refuses to grant the application for stay of the EC's decision, it cannot be correct to contend that the court has no jurisdiction in the wider sense, to deal with the Minister's refusal on review. If for instance the Minister refuses the application for staying of the EC's decision, there is nothing in my considered view that prevents an aggrieved party from approaching the court for review of the Minister's decision, for instance, in terms of the relevant provisions of the Constitution.

[83] It is accordingly clear that if the applicants were of the view that the Minister delayed in making the decision on the stay of the EC's decision, they had every right to approach the court to issue a *mandamus,* to compel the Minister to make a decision on the application – not to order the Minister to make a particular decision. A *mandamus* is, in my considered view, not excluded in the instant case, if the public official, who is empowered to make decision, does not perform his or her functions in that regard.

[84] In *Thorburn NO v Namibia Sports Commission and Others*[9] Smuts J had the following instructive remarks:

'It is well settled that the failure on the part of a functionary to perform an administrative act is irregular and unlawful as an administrative decision not properly taken. An aggrieved person may under the common law succeed in compelling a functionary to perform an administrative act where that functionary is under a statutory duty to do so. This common law remedy flows from the common law remedy of review, thus described by Innes CJ in *Johannesburg Town Council in the following terms:*

'Whenever a public body has a duty imposed on it by statute, and disrespects important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature: it is inherent in the Court,

[9] *Thorburn NO v Namibia Sports Commission* Case No. A 202/2013 [2013] NAHCMD 264 (25 September 2013), para 14.

which has jurisdiction to entertain all civil causes and proceedings arising . . . in such a cause as falls within the ordinary jurisdiction of this Court.'

[85] The above quotation, which is sound law puts paid to any doubt regarding the applicants' argument possibly carrying the day. It is accordingly clear that Ms. Van Wyk's argument flies in the face of this judgment and should not be accepted in the premises. The route open to the applicants, if they properly perceived that the Minister was unreasonably refusing or delaying in carrying out his statutory functions, was to approach this court for a *mandamus*. This is not inconsistent with the scheme of EMA as it is read in.

[86] In the light of the contents of para 81 above, it is clear that the court is not denied jurisdiction in the wider sense. Furthermore, the ability of the court to issue a *mandamus* also attests to the fact that the court is not bereft of jurisdiction to issue appropriate orders. What s 50(6) appears to do, is to provide an internal remedy to an aggrieved party and which should be exhausted before that party approaches the court. One cannot, as the applicants did, abandon the statutory remedy and rush to court as there is no case that the remedy is unavailable or ineffectual. It must thus be exhausted and the applicants failed to do so.

[87] It must be stressed that the jurisdiction of the court is not lightly excluded, even by legislation. In this connection, the remarks that fell from the lips of Lord Reid, bear particular resonance. His Lordship had this to say on clauses that purport to oust the court's ordinary jurisdiction in *Anisminic v Foreign Compensation Commission*:[10]

'It is well established that a provision ousting the jurisdiction of the court must be strictly construed – meaning, I think, that, if such provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.'

[88] It would appear to me that the statement of the law pronounced above is correct and not inconsistent with what is the law in Namibia. To the extent that it is argued or submitted that s 50(6) ousts this court's jurisdiction, I am of the view that the proper

[10] *Anisminic v Foreign Compensation Commission* 1969 (2) AC 147; [1969] All ER 208, per Lord Reid.

approach is to adopt an interpretation that preserves the jurisdiction of this court, as I have done above.

[89] On a different note, I should mention that in my considered view, the 5 days accorded the Minister by the applicants to make a decision on the application, failing which they would approach this court was unreasonable in the circumstances. Whilst the courts have in the past criticised some ministers and government functionaries for failure to respond to enquiries or requests and demands, in the instant case, the period unilaterally afforded the Minister by the applicants is on any consideration, unreasonable.

[90] It would also appear to me that the application for the Minister to exercise his power to stop the implementation of the decision *pro ha vice*, must be comprehensive in scope and detail, stating the pros and cons of allowing the decision in question to operate. A short missive of pedestrian standards will not do in this regard. This is so because the other party in whose favour the decision was made must also have an opportunity to deal with the substance of the application and place his or her case before the Minister to enable him to make an informed judgment on the application for stay. This evidently does not appear to have happened in this case.

[91] The importance of an office exercising power appropriated to it by legislation, is not new. In *Mpasi NO v Master of the High Court*[11], the Supreme Court, in different circumstances, reasoned as follows regarding this very question:

'Undoubtedly, our High Court which is the court with the requisite jurisdiction in terms of the Act, has the power to remove an executor from office pursuant to s 54(1)(*a*). Similarly, s 95 empowers the court on appeal or review to confirm, set aside or vary the appointment by the Master. There is, however, no provision in the Act for appointment of an executor by the court. As no such authority can be derived from the common law either, it follows that the High Court has no such power. The power in question is vested in the Master. In light of this conclusion, I agree with counsel for Ms. Mpasi that the court *a quo* erred in appointing Mrs. Hausiku. Consequently, the appointment of Mrs. Hausiku ought to be set aside and the matter remitted to

[11] *Mpasi NO v Master of the High Court* 2018 (4) NR 909 para 27.

the Master with the direction to appoint an executor/executrix in accordance with the law.' (Emphasis added). See also *Minister of Finance and Another v Hollard*[12]

[92] In the circumstances, it appears to me very clear, having regard to the language of the EMA and the tapestry of its provisions that the legislature decided with its eyes wide open, to grant jurisdiction only to the Minister to grant an application to stay an order of the EC pending appeal. Had it been the legislature's intention to imbue that power to the court, it would have done so in clear and unambiguous terms. The jurisdiction of the court is reserved for later, namely, in cases where the appeal to the Minister causes disaffection to one of the parties. It is only to that eventuality that the court's jurisdiction is confined, the Minister having fully exercised his powers and functions.

Conclusion

[93] I am, in view of the aforegoing analysis and conclusion, of the firm view that the point raised by Mr. Namandje regarding the lack of jurisdiction by this court to grant the interim interdict applied for by the applicants, is perfectly sound and correct in law. It is accordingly not necessary to consider the other legal issues that were raised by the respondents. The lack of this court's jurisdiction is clearly dispositive of the applicants' application in its entirety.

[94] In the premises, it is clear that the lack of urgency as stated above, is not dispositive of the application. Having proceeded to find that this court has no jurisdiction to grant the relief sought by the applicants, I am of the considered opinion that the proper order, that definitively settles the rights of the parties, is that of the court's jurisdiction. The application is accordingly dismissed.

Costs

[95] The ordinary rule applicable to costs is that costs will normally follow the event. This will be the default position unless there are some peculiar facts, which require the

[12] *Minister of Finance and Another v Hollard Insurance Co of Namibia and Others* 2020 (1) NR (SC).

court to otherwise exercise its discretion in relation to costs. In the instant case, the respondents have applied for costs to follow the event.

[96] In argument, Ms. Van Wyk moved the court not to grant costs against the applicants because of their impecuniosity. I am of the considered view that this consideration, even if it were true, cannot, without more avail the applicants. In this connection, it is clear that the applicants did not move the court to apply the provisions of rule 20, which deal with protective costs. The respondents have been to hell and back, opposing the application, subject to very unreasonable and oppressive time constraints. I am of the view that costs should follow the event in the premises.

Order

[97] Having due regard for the discussion and conclusions above, the order that commends itself as appropriate in the circumstances, is the following:

1. The applicants' application is dismissed.
2. The applicants are ordered to pay the costs of the application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed legal practitioner, where so employed.
3. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku

Judge

APPEARANCES:

APPLICANTS:	C. Van Wyk Of Legal Assistance Centre (Windhoek)
1ST to 5th RESPONDENT:	S. Namandje Of Sisa Namandje & Co. Inc. (Windhoek)
6TH RESPONDENT:	D. Khama
Instructed by:	Shakwa Nyambe & Company Incorporated
7TH RESPONDENT	G. Narib
Instructed by:	Shakwa Nyambe & Company Incorporated