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.

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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 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

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

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

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]

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[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.

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 –
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> (a) the circumstances which he or she avers render the matter urgent; and
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> (b) the circumstances which he or she claims he or she could not be afforded substantial redress at a hearing in due course.'

[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

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