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 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 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.

---

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

[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,

---

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

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) 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

---

[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.

otherwise orders, on application. Where a party is dissatisfied with the Minister's decision on the appeal, only 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:*

---

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

'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, 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]

---

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

'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 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

---

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

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 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

---

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

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 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.

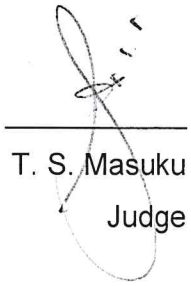
Order

[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.



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: Instructed by:	D. Khama Shakwa Nyambe & Company Incorporated
7TH RESPONDENT Instructed by:	G. Narib Shakwa Nyambe & Company Incorporated