REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2016/00221

In the matter between:

FRANZINA NOWASES	**FIRST APPLICANT**
JAMES CAMM	**SECOND APPLICANT**
LORENTS KUZATJIKE	**THIRD APPLICANT**
SAGEUS KEIB	**FOURTH APPLICANT**
KASHIDINGE LUKAS NGHIPUILEPO	**FIFTH APPLICANT**
JOHN GUIDAO-OAB	**SIXTH APPLICANT**
FLORENCE USES	**SEVENTH APPLICANT**
IMMANUEL /NANUB	**EIGHTH APPLICANT**
FRANS NAWATISEB	**NINTH APPLICANT**
KATHLEEN !NARUSES	**TENTH APPLICANT**
WILLEM GAWESEB	**ELEVENTH APPLICANT**

and

EVANGELICAL LUTHERAN CHURCH IN THE REPUBLIC OF NAMIBIA (ELCRN)	**FIRST RESPONDENT**
BISHOP ERNST //GAMXAMÛB	**SECOND RESPONDENT**
MICHAEL UIRAB	**THIRD RESPONDENT**
WILLEM BEUKES	**FOURTH RESPONDENT**
DANIEL IMBILI	**FIFTH RESPONDENT**
ISAK KAULINGE	**SIXTH RESPONDENT**

Neutral citation: *Nowases v Evangelical Lutheran Church* (HC-MD-CIV-MOT-GEN-2016-00221) [2016] NAHCMD 231 (9 August 2016)

Coram: PARKER AJ
Heard: **21 July 2016**
Delivered: **21 July 2016**
Reasons: **9 August 2016**

Flynote: Applications and motions – Urgency – Requirements set out in rule 73(4)*(a)* and *(b)* of the rules of court – No urgency where urgency is self-created – In instant case court found that any urgency is due to culpable remissness of applicants – Consequently court refused to condone the non-compliance with the rules or hear the application as a matter of urgency.

Summary: Applications and motions – Urgency – Requirements set out in rule 73(4)*(a)* and *(b)* of the rules of court – No urgency where urgency is self-created – In instant case court found that any urgency is due to culpable remissness of applicants – Applicants were aggrieved by decision of second respondent and they requested second respondent to withdraw that decision, failing which they would approach the court for redress – It became clear in the beginning of April 2016 that second respondent would not withdraw decision – Applicants did not follow up their threat by acting with speed and promptness – Consequently, court found that any urgency in the application was due to the culpable remissness of applicant – Accordingly, court refused to condone non-compliance with the rules or hear the application as a matter of urgency.

Flynote: Voluntary association – Unincorporated voluntary association – A church – Jurisdiction of court to intervene in affairs of a church (first respondent) – Court held that it has jurisdiction to intervene in the internal dispute of first respondent – Court's power to intervene is founded on its jurisdiction to protect contractual rights – Court held further that first respondent's Constitution constitutes the written contract expressing terms on which members associate together and with first respondent – Court rejected submission by counsel that the canons, doctrine

and liturgy of first respondent constitute the terms of such contract – Court held that people who join an unincorporated voluntary association and subscribe to its Constitution and other rules should be taken to intend to be bound by them and should be entitled to invoke the courts in appropriate circumstances to have their disputes settled no jurisdiction to intervene in the affairs of first respondent – Court found that the applicants have not approached the court to adjudicate on matters of doctrine, canons and liturgy but on applicants' contractual rights which are civil rights. *Amupanda v Swapo Party of Namibia* (A 215/2015) [2016] NAHCMD 126 (22 April 2016) applied.

Summary: Voluntary association – Unincorporated voluntary association – A church – Jurisdiction of court to intervene in affairs of a church (first respondent) – Court held that it has jurisdiction to intervene in the internal dispute of first respondent – Court's power to intervene is founded on its jurisdiction to protect contractual rights – Court held further that first respondent's Constitution constitutes the written contract expressing terms on which members associate in and with first respondent – Court rejected submission by counsel that the canons, doctrine and liturgy of first respondent constitute the terms of such contract; and so, the court has no jurisdiction to intervene in the affairs of first respondent – Court found that the applicants have not approached the court to adjudicate on matters of doctrine, canons and liturgy but on applicants' contractual rights which are civil rights – Applicants instituted application to declare certain decisions of second respondent to be unlawful in terms of the first respondent's Constitution – Having found that the court has jurisdiction to intervene in the internal affairs of first respondent, court proceeded to consider question of urgency – Court having refused to condone non-compliance with the rules or to hear the matter on urgent basis, court did not consider merits of the case.

JUDGMENT

PARKER AJ:

[1] Before this court is an application by notice of motion. The applicants, represented by Mr Phatela, pray the court to hear the matter on the basis of urgency. The first, second, third, fifth and sixth respondents have moved to reject the application on the basis that first, the urgency is self-created and so the court should not hear the matter on urgent basis, and second, the court has no jurisdiction to adjudicate the matter, apart from other basis on the merits. Ms Nambinga represents the first and second respondents, and Ms Katjipuka-Sibolile third, fifth and sixth respondents.

[2] After hearing arguments, the court made an order, with a rider to the order that reasons would follow. This is the order and the reasons for it.

> '1. The application is refused on the ground of lack of urgency, with costs.
>
> 2. Reasons will follow on or before 13 August 2016.'

[3] In the instant proceedings the court considered first, the issue of jurisdiction, and second, the question of urgency. If I found that the court had jurisdiction, then I should decide whether in terms of the rules of court I should grant an indulgence to the applicants and hear the matter on the basis of urgency. It was only when I decided that the court had jurisdiction should I consider the question of urgency; and it was only when I granted the indulgence should I consider the merits of the case.

Jurisdiction

[4] The respondents contended that being a church the court had no jurisdiction to interfere in the internal dispute of the church. Both Ms Nambinga and Ms Katjipuka-Sibolile made common cause and they argued the respondents case along that line. The bone and marrow of their argument was that the church was governed by canon law and there was no civil right in issue on which the court could intervene. We have heard such argument before, barely five months ago, albeit in relation to a political party in *Amupanda v Swapo Party of Namibia* (A 215/2015) [2016] NAHCMD

126 (22 April 2016); a case referred to this court by Mr Phatela. The argument in that case was rejected on the following basis. The applicants there had approached the court for the court to protect their contractual right as members of the first respondent. And -

'… the written contract expressing the terms on which the members of first respondent associate together for political purposes is the first respondent's constitution, as supplemented by the Code. See *Dawkins v Antrobus* 1881 Ch D 615 (Court of Appeal), at 620.) Accordingly, I accept Mr Maleka's submission (in an answer to a question raised with him by the court) that the court is always competent to enforce a contract that is valid and which is for lawful purposes. Indeed, in the instant case, the political purposes are not only lawful, they are also given constitutional blessing by art (1)*(e)* of the Namibian Constitution.

[13] As I have said previously, the first respondent's Constitution, as supplemented by the Code, contains the contract between the members, and between the member and first respondent; "and is just as much subject to the jurisdiction of courts as any other contract". (*Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 239 (Court of Appeal) at 34 The Guild, it is noted, like the first respondent, is an unincorporated voluntary association.'

[5] It should be noted that in the instant proceedings, too, the first respondent is an unincorporated voluntary association through and through; and so, the question now is this. Would there be any difference in principle or result if, as was in the present proceeding, the dispute concerned a church? Mr Phatela, in effect, said there was no difference: *Amupanda* should apply with equal force to the instant matter. Ms Nambinga and Ms Katjipuka-Sibolile contended contrariwise. And why did they so contend? It was only this. The church is governed by canon law, not civil law, counsel argued. And in support they referred to me certain provisions of the Constitution of the Church, including art 2:

'**ARTICLE 2: NATURE AND DOCTRINAL BASIS**

2.1 The Church is founded on the gospel of Jesus Christ as revealed in his Holy Scriptures of the Old and the New Testament as the only norm and guide for faith, doctrine and human existence.

2.2 Together with other Christian churches it confesses its faith in the True God through the early Christian Creeds, namely the Apostles Creed, the Nicene and the Athanasian Creed and the Confessional Writings of the Lutheran Reformation, especially the Catechisms of Martin Luther and the unaltered Augsburg Confession. The Church deems the Word of God to be the only and absolute measure of faith, doctrine and life.'

[6] I agreed with counsel's submission that the first respondents, a church, is governed by its doctrine and canons. The Church (first respondent), like any other Church, is governed by canons and doctrine (and liturgy) of the Church (the first respondent), as provided in the Constitution. If the canons and the doctrine of the Church in the instant proceeding were the instruments expressing the terms on which the members of the first respondent associate together and associate with first respondent for religions purposes, why – and this is superlatively significant – did they find the need to make a Constitution also; it should be asked rhetorically. The argument of Ms Nambinga and Ms Katjipuka-Sibolile on this point is with respect, very weak and has no merit. The Constitution is the contract expressing the terms on which the members of the first respondent associate together for political purposes. And art 2 of the Constitution is a term of the contract which binds all parties to the contract, that is, the first respondent's members. Thus, the canons and the doctrines of the Church (first respondent) are not the instruments expressing the terms on which the members of the first respondent associate for religions purposes but the Constitution of which the canons and doctrine are but terms on which the members associate with each other and with the first respondent, and which give the article containing the canons and doctrine legal force.

[7] To illustrate the point; a group of Namibians come together to form a political party called the Maxist-Lenist Communist Party of Namibia (M-LCPN) and make a Constitution of the M-LCPN. One of the provisions of the Constitution is this:

'Article 2: The Marxist-Lenist Communist Party of Namibia is founded on the teachings of Karl Marx and Vladimir Ilyrich Ulyanov Lenin as contained in the *Communist Manifesto* (by Karl Marx); and *Imperialism: The Highest Stage of Capitalism* (by Lenin) and

those teachings are considered to be the only true doctrines of Communism and the M-LCPN.'

[8] It would be extremely illogical and absolutely fallacious for one to argue that the teachings of Karl Marx and Lenin are the terms on which members of M-LCPN associate together for political purposes, when indeed, the fact that the party is founded on the teachings of Karl Marx and Lenin are considered to be the true doctrines of communism is itself given force by the party's Constitution.

[9] Indeed, in *Amupanda*, applicants' counsel referred the court to art II of the first respondent's Constitution which provides that the first respondent is 'founded on the principles of democracy, solidarity, freedom, social justice and progress'. There, the court did not find that the members of the first respondent were association together by 'the principles of democracy, solidarity, freedom, social justice and progress'; and I do not find in the instant proceeding that the canons, doctrine and liturgy upon which the first respondent is founded constitute the terms of the contract binding the members of the first respondent.

[10] Doubtless, as a matter of law, what is irrefragable is that just like the first respondent in *Amupanda*, the first respondent in the instant proceeding is an unincorporated voluntary association and as such it is governed by the common law on unincorporated voluntary associations. The fact that in *Amupanda* the unincorporated voluntary association is a political party and in the instant matter the unincorporated voluntary association is a church is of no moment. And it matters tuppence that first respondent in the present matter is founded on the gospel of Jesus Christ. I can see no reason – none at all – why the doctrinal foundation of the first respondent should stand as the terms of the contract, as explained previously. Indeed, the doctrinal foundation of the first respondent cannot alter the legal nature of the first respondent, an unincorporated voluntary association. The provisions of art 2 of the first respondent's Constitution, as mentioned previously, are canons, doctrine and liturgy. But it is not the case of the applicants that the court consider the canons, doctrine and liturgy of first respondent.

[11] In sum, the Constitution of the first respondent should be considered as creating legal relations between members amounting to an enforceable contract. This is the response to argument by Ms Nambinga and Ms Katjipuka-Sibolile that the court cannot intervene in the dispute within the first respondent because the first respondent is government by canon law, and the applicant has not established a civil right. Without a doubt, a contractual right is a legal right amenable to the jurisdiction of the court.

[12] Thus, the Constitution of the first respondent contains the contract between the members, and between the members and first respondent; 'and is just as much subject to the jurisdiction of the courts as any other contract'. (*Amupanda*, para 13)

[13] For the sake of completeness, and as I have said previously, the applicants have not approached the court to adjudicate on canons, doctrine and liturgy of the first respondent. It is for this reason that I find that *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC); and *New African Methodist Episcopal Church in the Republic of Namibia and Another v Kooper and Others* 2015 (3) NR 705 (HC), referred to me by respondents' counsel, are not of assistance on the point under consideration.

[14] Based on these reasons, I have no difficulty – none at all – in finding that the court has jurisdiction to intervene in the affairs of an unincorporated voluntary association like the first respondent where the dispute relates to the applicants' contractual rights under the first respondent's Constitution which derive its legal force from the acceptance, by the members, of the terms and conditions of the association (first respondent) when they joined it.

[15] I hold that people who join an unincorporated voluntary association and subscribe to its Constitution and other rules should be taken to intend to be bound by them and should be entitled to invoke the courts in appropriate circumstances to have their disputes settled. The circumstances in the instant proceeding are appropriate for the court to intervene in the affairs of the first respondent, as I did. In words of one syllable; the court has, on the facts and in the circumstances of the

case, jurisdiction in the matter before it. I now proceed to consider the question of urgency.

Have the requirements of urgency been met?

[16] On the interpretation and application of rule 73(4) respecting the issue urgent applications, it was said in *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15 (5 February 2015), para 2 thus:

> 'Urgent applications are now governed by rule 73 of the rules of court (ie rule 6(12) of the repealed rules of court), and subrule (4) provides that in every affidavit filed in support of an application under subrule (1) the applicant must set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. Indeed, subrule (4) rehearses para (b) of rule 6(12) of the repealed rules. The rule entails two requirements: first, the circumstances relating to urgency which must be explicitly set out, and second, the reasons why an applicant claims he or she could not be afforded substantial redress in due course. It is well settled that for an applicant to succeed in persuading the court to grant the indulgence sought, that the matter be heard on the basis of urgency, the applicant must satisfy both requirements. And *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 tells us that where urgency in an application is self-created by the applicant, the court should decline to condone the applicant's non-compliance with the rules or hear the application on the basis of urgency.'

[17] On the papers I make the following factual findings, including findings on the 26th ordinary Synod of first respondent that was held on 3 February 2016 during which elections to office were conducted. It follows that the critical date to be taken into account when considering the question of urgency is 3 February 2016. It was on the critical date that the cause of action in the instant proceeding arose.

[18] The applicants contend that material irregularities tainted the electoral process. In virtue of the alleged irregularities, the second respondent has refused to

induce those who were elected to office in terms of the first respondent's Constitution. On 11 March 2016, first respondent issued a Circular Letter 01/2016 to all ELCRN institutions, all Parish Councils of parishes and all pastors and co-workers in which first respondent announced that the newly elected Church Council Members 'cannot be induced'. First respondent announced further that the pre 3 February 2016 'Church Council will continue together with me to lead the ELCRN (first respondent)'. The contents of this 11 March 2016 letter aggrieved the applicants. Thus, on 13 March 2016 the newly elected deans and pastors, including third, sixth and seventh applicants addressed a letter to second respondent in which they requested second respondent to proceed with the 'planned induction', as resolved by the ordinary Synod of 20 March 2016. On 17 March 2016, first applicant ('chairperson Elect') and second applicant ('Deputy Chairperson') addressed a letter to the office of the Bishop (for 'attention of second respondent') in which they requested second respondent to withdraw the 11 March 2016 Circular Letter' with immediate effect, failing which they would seek 'the intervention of the court of law to enforce our request'. That was 17 March 2016, as I have said.

[19] The second respondent's Circular letter was not withdrawn. Instead, a letter, dated 31 March 2016, issued under the hand of the General Secretary of first respondent, and addressed to the outgoing Church Council Members, Church Council Members Elect, outgoing Acting Synod Chairperson and Deputy Chairpersons and Chairperson elect, and Co-Chairperson elect inviting them to a joint meeting to be held on 7 April 2016. 'The main reason for this meeting should be seen as a search for a practical solution, progress and the best interest of the ELCRN'.

[20] It should have been very clear to the applicants that by issuing the 31 March 2016 invitation, the second respondent called the bluff of the writers of the 17 March 2016 letter. Indeed, the 7 April 2016 meeting was called 'to clear the air and to iron out the misunderstandings and to find an amicable solution to be confusion with regard to the Circular letter dated 11th March 2016, written by Bishop E //Gamxamûb (second respondent)'. The meeting was called not to enable second respondent to accede to the request of the applicants that he should withdraw the 31 March 2016

Circular letter. By inviting the aforementioned persons to the 7 April 2016 meeting, second respondent crossed the rubicon. And applicants should have approached the court immediately for redress, if they were minded to make good threat they had issued to second respondent.

[21] As I said in *Inter-Africa Security Services CC v Transnamib Holdings Limited* (A 236/2015) [2015] NAHCMD 276 (17 November 2015), para 10, 'Parties who make such threats and do not follow their threats through timeously should have their request for the court's indulgence that the matter be heard on the basis of urgency refused'. And unlike in *Petroneft International and Another v The Minister of Mines and Energy and Others* Case No. A 24/2011 (Unreported), there is nothing complex in the instant matter, requiring laborious putting together of papers and protracted consultations with clients who live in different countries abroad.

[22] Based on these reasons and upon the authority of *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48, I hold that 'urgency in this application is self-created by the culpable remissness on the part of the applicants'. (*Bergman* at 51E) I, therefore, accept submission by Ms Nambinga and Ms Katjipuka-Sibolile on the point.

[23] For these reasons alone 'this court is entitled to refuse to exercise its discretion in favour of hearing the application as a matter of urgency'. (*Inter-Africa Security Services CC*) Accordingly, I declined to condone applicants' non-compliance with the rules of court or hear the application as one of urgency; whereupon, I made the order appearing in para 2 of this judgement.

C Parker

Acting Judge

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APPEARANCES

APPLICANTS:	T C Phatela Instructed by Chris Brandt Attorneys, Windhoek
FIRST, SECOND RESPONDENT:	S Nambinga Instructed by AngulaCo., Windhoek
THIRD, FIFTH AND SIXTH RESPONDENTS:	U Katjipuka-Sibolile Instructed by Nixon Marcus Public Law Office, Windhoek