



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

**CASE NO: CASE NUMBER: HC-MD-CIV-MOT-GEN-2017/00156**

In the matter between:

**IMMANUEL SHAWANAMETITI NASHINGE  
SIONI IIKELA  
JOB AMUPANDA  
ELIJAH NGURARE**

**FIRST APPLICANT  
SECOND APPLICANT  
THIRD APPLICANT  
FOURTH APPLICANT**

and

**SWAPO PARTY YOUTH LEAGUE  
SECRETARY OF THE  
SWAPO PARTY YOUTH LEAGUE  
THE DEPUTY SECRETARY OF THE  
SWAPO PARTY YOUTH LEAGUE  
VEIKKO NEKUNDI  
MANDELA KAPERRE  
SECRETARY FOR LABOUR AND JUSTICE  
OF THE SWAPO PARTY YOUTH LEAGUE  
SWAPO PARTY OF NAMIBIA**

**FIRST RESPONDENT  
  
SECOND RESPONDENT  
  
THIRD RESPONDENT  
FOURTH RESPONDENT  
FIFTH RESPONDENT  
  
SIXTH RESPONDENT  
SEVENTH RESPONDENT**

**Neutral citation:** *Nashinge v Swapo Party Youth League* (HC-MD-CIV-MOT-GEN-201700156) [2017] NAHCMD 242 (25 August 2017)

**Coram:** UEITELE, J  
**Heard:** 07 JULY 2017  
**Delivered:** 04 AUGUST 2017  
**Reasons released** 25 AUGUST 2017

**Flynote:** *Practice* — Applications and motions - Authority to institute proceedings - Irrelevant whether deponent to opposing affidavit authorised to depose to that affidavit - It is the opposition and prosecution of proceedings that must be authorised - Minimum requirement for deponent of opposing affidavit to state authority - Applicant, in challenging such authority, must adduce evidence to the effect that deponent has no such authority - respondent's deponent clearly stating his authority in the opposing affidavit - Challenge by applicant a weak one and accordingly dismissed.

**Voluntary Association** - Meeting of - Chairman of - When entitled to adjourn meeting - Adjournment of a meeting is the interruption and suspension of the business of the meeting with the object of its resumption at a later date.

**Voluntary association** - Rules of - Non - compliance with by association - When Court will interfere - Disregarding of rules - When Court will interfere - Onus on an applicant.

**Summary:** Initially the first two applicants approached this court on an urgent basis on 23 May 2017 seeking, in Part A of their notice of motion an order interdicting the first, second, third and fourth respondents from proceeding in any way with the implementation of the resolutions or decisions or both resolutions and decisions taken at the meeting of the Central Committee of the Swapo Party Youth League on the 13th May 2017 pending the outcome of the application for declaratory orders sought under Part B of their notice of motion.

The applicant's allege that the meeting of 13 May 2017 was not held in accordance with the Swapo Party Youth League's constitution. The core of the applicants' complaint is that Nekundi on 13 May 2017 convened an irregular meeting of the Youth League's Central Committee which meeting excluded certain members of the Youth League from its decision making process.

The applicants initially cited nine respondents. The respondents, except the sixth and seventh respondents (who later applied and were joined as third and fourth applicants) opposed the application. The issues that the court was called upon to decide were: the representation of the second respondent, the authority of the fourth respondent to oppose the application, the constitutionality of the 13 May 2017 meeting, the status of the fourth respondent within the Swapo Party Youth League and the validity of the nomination of the fifth respondent as a candidate for the Swapo Party Youth League's Secretary.

*Held that* this Court refused to reinstate the fourth applicant as Secretary of the Youth League. The Court thus concluded that the fourth applicant had no authority to act on behalf of the second respondent and his purported authorisation for Kamanja to act on behalf of the second respondent was a nullity.

*Held that* the court was satisfied that the averments by Mr Nekundi (that he was authorised to oppose the application) meet the 'minimum-evidence' requirement and that the challenge to fourth respondent's authority is a bad one and the court rejects it.

*Held that* the power to adjourn a meeting rests entirely with the meeting itself and that when a meeting is adjourned the next meeting is a continuation with the same, or part of the same agenda. The adjournment of a meeting is the interruption and suspension of the business of the meeting with the object of its resumption at a later date. The court thus found that the Swapo Party Youth League's National Executive Committee did not need to sanction the meeting of 13 May 2017 as the National Executive Committee already approved that meeting on 16 January 2017.

*Held further that* the third respondent was since 25 July 2015 no longer a member of the Swapo Party Youth League's Central Committee, there is therefore nothing irregular or unlawful in him being not invited to the Central Committee's meeting.

*Held further that* the Youth League's constitution permits the fourth respondent to hold office until his term of office expires and that at the expiration of his term of office the fourth respondent would simply not be eligible for re-election. The court was thus of the view that the fourth respondent has not lost his membership of the Swapo Party Youth League.

*Held furthermore that* the mere non-compliance with the rules of a voluntary association is ordinarily not sufficient justification for a court to intervene in the proceedings of such an association. Besides the disregarding of the rules or the provisions of the constitution there must be actual prejudice of the civil rights of the person who avers that he was aggrieved by the disregarding of the rules or the constitution of the association of which he is or was a member. The *onus* rests on the applicant to show that the irregularity on which he relies was calculated to prejudice him in his civil rights or interests.

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### ORDER

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1. The application is dismissed.
2. The applicants must, jointly and severally the one paying the others to be absolved, pay the respondents' costs.
3. The costs must include the costs of one instructing and one instructed counsel.

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### JUDGMENT

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**UEITELE, J**

Introduction

[1] Namibia is a constitutional democracy. It is a system of governance that 'we the people'<sup>1</sup> consciously and purposefully opted for to constitute a truly free, just and united nation, with a promise to secure to all its citizens *justice*, liberty and equality. In order to make the promise of justice, liberty and equality to all its citizens a reality the Constitution of Namibia guarantees its citizens the right to:

'...participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and; subject to such qualifications prescribed by law as are necessary in a democratic society to

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<sup>1</sup> This is the phrase used in the Preamble to the Namibian Constitution.

participate in the conduct of public affairs, whether directly or through freely chosen representatives.<sup>2</sup>

[2] The applicants and some of the respondents (the fourth, fifth, and the sixth respondents) in this matter are members of the Swapo Party, the seventh respondent, in this application. Swapo Party is a political party. A political party is a group of voters organized to support or advance certain public policies. Political parties as we know them today did not begin to develop until about four hundred years ago (that is, in the late 1600s). The ancient Greeks, who were pioneers in developing democracy, had no organized political parties in the modern sense. In Namibia political parties did not exist until the late 1950s when the first political party, SWANU, was formed in 1959.

[3] The aim of a political party is to elect officials who will try to carry out the party's policies. A political party offers candidates for public office. It sets out positions on issues that may range from war and taxes to how children should be educated. In a modern democracy the vehicle to the reigns of governance of a given Nation is generally through a political party. The 7<sup>th</sup> respondent has formed the Government of the day in Namibia since the country became a Nation State in March 1990.<sup>3</sup> Thus, says Justice Parker 'if the [7<sup>th</sup> respondent] sneezes, the nation will indubitably catch a cold'.

[4] The evolution of Swapo as a political party (which has since 1990 when Namibia became an independent Nation formed the government of the day) was inspired by the yearning of the Namibian (then South West African) people for freedom from colonialism and oppression. Prior to the formation of Swapo, there were uncoordinated, anti-colonial activities which were expressed in the form of localized strikes against colonial rule and individuals petitioning to the United Nations concerning the South African racist oppression in Namibia. It was thus realized then that the establishment of a political organization was the most appropriate and effective way to achieve genuine independence. Swapo as a political party was thus formed with the aim of establishing a political organization that will lead the struggle for independence.

[5] Therefore, Swapo was not formed to advance individual scheme or ambition, but on a national platform of noble cause to articulate the hopes and aspirations of all the

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<sup>2</sup> Article 17(1) of the Namibian Constitution.

<sup>3</sup> See the as yet unreported judgment of this Court in *Amupanda v Swapo Party of Namibia* (A 215/2015) [2016] NAHCMD 126 (22 April 2016) at para [2].

people of Namibia.<sup>4</sup> Swapo then, as a national liberation movement, attracted supporters and sympathizers from all sectors of the population, men and women, young and old, peasants, intellectuals and workers. Swapo achieved the purpose for which it was established with the attainment of independence for Namibia and the adoption of the Namibian Constitution as the fundamental law of our Sovereign and Independent Republic.<sup>5</sup>

[6] Parker opines that political parties in Namibia (as elsewhere) exert considerable powers over its members and has great impact on its members in pursuit of their right 'to freedom of association, which shall include freedom to form and join associations ... including political parties', guaranteed to them by Art 21(1)(e) of the Namibian Constitution.<sup>6</sup> He continues and states that 'Like the powers of Government, these powers of political parties are capable of misuse or abuse.' This case concerns itself with an alleged abuse of power by a perceived 'powerful faction' within the first respondent which is a 'wing' of the Swapo Party.

#### Context of this application

[7] As I have indicated above third and fourth applicants<sup>7</sup> in this matter are members of the seventh respondent, the Swapo Party.<sup>8</sup> Apart from being members of the Party they were also members of the Youth League. During the Youth League's Congress held during August 2012 Amupanda was elected as a member of the Youth League's Central Committee and during the same congress Ngurare was elected as the Youth League's Secretary.

[8] On the 17<sup>th</sup> July 2015 the Politburo of the Party resolved to expel Amupanda and Ngurare together with two other persons who are not parties to this application from the Party and its wings. The decision to expel Amupanda and Ngurare from the Party was

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<sup>4</sup> The aspiration to eschew individualism was documented in the Swapo Party Policy documents of 1976 as follows;

'The government of a truly liberated Namibia will, therefore, be called upon to take the following measures: Wage the struggle towards the abolition of all forms of exploitation of man by man and the destructive spirit of individualism and aggrandizement of wealth and power by individuals, groups or classes.'

<sup>5</sup> See the Preamble to the Namibian Constitution.

<sup>6</sup> *Supra* footnote 4.

<sup>7</sup> I will, in this judgment and for the sake of convenience, refer to the third applicant as Amupanda and the fourth applicant as Ngurare.

<sup>8</sup> I will, in this judgment and for the sake of convenience, refer to the seventh respondent as the 'Party'.

confirmed and ratified by the Party's Central Committee on 27 July 2015. When Ngurare was deprived of his membership of the Party and its wings the Central Committee of the Youth League resolved to appoint the fourth respondent<sup>9</sup> as the Acting Secretary of the Youth League.

[9] Amupanda and Ngurare (together with the other two persons) challenged their expulsion from the Party and its wings, they approached this Court seeking the relief set out in their notice of motion. This Court, on 22 April 2016, partially granted the relief that was sought by Amupanda and Ngurare, in that the Court declared the decision taken by the Party, to deprive Amupanda and Ngurare of their membership of the Party, unlawful and set that decision aside. The Court ordered the Party to, with immediate effect, restore Amupanda and Ngurare's membership of the Party. I will in the course of this judgment return to the relief that was sought by Amupanda and Ngurare and the relief that was granted by this Court on 22 April 2016.

[10] The constitution of the Party in Chapter VI, Article XVII (A) provides for the Wings of the Party. Article XVII (A)(1), provides that there shall be a Swapo Party Youth League<sup>10</sup> and Article XVII (A)(5) provides that the Swapo Party Youth League must adopt its own constitution to govern its activities and administration. The Swapo Party Youth League is the first respondent in this application, I will, in this judgment, for the sake of convenience refer to the first respondent as the Youth League.

[11] The Youth League, did, as contemplated in Article XVII (A) (5) of the Swapo Party constitution, adopt its own constitution. The Swapo Party Youth League constitution that is currently in force was adopted in the year 2002. That constitution amongst other things sets out the powers of its various administrative structures/organs and officers. The administrative structures of the Youth League that are relevant to this judgment are its Congress, its Central Committee and its National Executive Committee.<sup>11</sup> The Congress is the highest decision-making body of the Youth League.<sup>12</sup> The Congress ordinarily meets once every five years. The Central Committee consists of 50 members and is the highest authority between Congresses<sup>13</sup> and the National Executive Committee which consists of 11 members elected from the Central Committee members

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<sup>9</sup> I will, in this judgment and for the sake of convenience, refer to the fourth respondent as Nekundi.

<sup>10</sup> In its documents and materials the Party refers to the Youth wing by its acronym SPYL.

<sup>11</sup> See Article 9 of the Swapo Party Youth League's constitution.

<sup>12</sup> Article 10 (2) of the Swapo Party Youth League's constitution.

<sup>13</sup> Article 11 of the Swapo party Youth League's constitution.

and it meets at least once a month.<sup>14</sup>

#### Events leading to the launching of this application

[12] On the 14<sup>th</sup> day of January 2017 the National Executive Committee of the Youth League had its monthly meeting in Windhoek. At that meeting the National Executive Committee resolved that the meeting of the Youth League's Central Committee must be held on 18 February 2017. Mr Nekundi, on 16 January 2017, caused a notice of the Central Committee meeting to be sent to all the members of the Youth League's Central Committee. Nekundi, did not invite Amupanda and Ngurare to the Central Committee meeting that was scheduled for 18 February 2017. His justification for not inviting them is that he was of the view that they were not members of the Swapo Party Youth League's Central Committee.

[13] Despite the fact that he was not invited to the Central Committee's meeting of 18 February 2017 Amupanda nonetheless turned up for the meeting. At the registration, which takes place before the meeting starts, a dispute arose as to whether Amupanda should be registered and permitted to attend the Central Committee's meeting. It was agreed that the matter be referred to the National Executive Committee whose meeting was in session at the time. The National Executive Committee, debated the question of whether or not to admit Amupanda to the Central Committee meeting. The National Executive Committee failed to reach consensus on the question and it decided to refer the matter to the Central Committee.

[14] The Central Committee's meeting commenced as scheduled on 18 February 2017. After the opening and roll call, the agenda that had been circulated was adopted with some additions. One of the issues that was added to the agenda of the meeting of 18 February 2017 was the question of whether or not Amupanda must be admitted to that meeting. The meeting discussed the question and there were divided opinions as regards Amupanda's status within the Youth League's Central Committee. After intense debate, the Central Committee members could not reach consensus on the issue. As a result of the divided opinions the Chairperson of the meeting (Nekundi) made the following ruling, which was accepted as a resolution of the meeting:

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<sup>14</sup> Article 12 of the Swapo party Youth League's constitution.



'The meeting is adjourned till further notice and the Acting Secretary shall consult with the [Swapo] Party leadership on the matter in order to obtain a clear position on the matter from the Party and re-convene the meeting thereafter.'

[15] The Youth League's Central Committee meeting of the 18<sup>th</sup> February 2017 was therefore not concluded, meaning that most of the agenda items of that meeting were not discussed and resolved. On 20 February 2017 Nekundi wrote to the Secretary General of the Party asking him what the Party's position is with respect to Amupanda's membership of the Youth League's Central Committee. On 23 February 2017, the Party's Secretary General responded. As regards Amupanda's membership of the Youth League the Secretary General wrote (I quote verbatim):

'[Comrade] Job Amupanda is an ordinary member of SWAPO Party and the Swapo Party Youth League. He is not a member of the Central Committee of the SWAPO Party Youth League.'

[16] On 27 March 2017 the National Executive Committee of the Youth League held its monthly meeting, the number of items that were on the agenda of that meeting for discussion were nine in total, and the items included the position of Amupanda on the Youth League's Central Committee. The National Executive Committee's meeting discussed all the items and adopted resolutions in respect of each item. In respect of Amupanda's position the meeting resolved to acknowledge and accept the response from the Party's Secretary General. The meeting furthermore resolved that a meeting of the Youth League's Central Committee must take place on 29 April 2017.

[17] The Youth League's Central Committee meeting that was scheduled for the 29<sup>th</sup> April 2017 did not take place. On the 3<sup>rd</sup> May 2017, Nekundi, addressed, individual invitation letters to the Youth League's Central Committee members informing them that the Youth League's Central Committee meeting that was scheduled for 29 April 2017 has been rescheduled to take place on the 13<sup>th</sup> May 2017. Amupanda and Ngurare were not invited to that meeting.

[18] After receiving the invitation letters of 3 May 2017 some members of the Youth League's Central Committee responded to Nekundi's invitation questioning the legality and constitutionality of the Central Committee's meeting scheduled for 13 May 2017 (From the documents filed of record it is six members, including the sixth respondent,

who queried the constitutionality of the 13<sup>th</sup> May 2017 meeting). The main objection to the meeting of 13 May 2017 was the allegation that the Central Committee's meeting was not requested, convened and set by any resolution of the National Executive Committee as is required by Article 11(5) (d) of the Youth League's Constitution.

[19] The first applicant, (Nashinge) also addressed a letter to Nekundi with respect to the Youth League's Central Committee's meeting that was scheduled for 13 May 2017. In that letter Nashinge stated the following (I quote verbatim):

'I write this letter to inquire and get an understanding why some members of the CENTRAL COMMITTEE of SPYL are not invited. I am aware that Cde. Dr. Elijah Ngurare and Cde, Job Amupanda are not invited by the office that you personally control of late without the blessings of NEC of CC.

Personally I am not aware of any Extraordinary Congress, NEC or CC meeting that removed/suspended or expelled any member from the Central committee of our Wing. This is the second time you are committing this constitutional crime against SWAPO PARTY/SPYL. Could you please care to make me understand this? Cde Job Amupanda an elected member of the SWAPO PARTY YOUTH LEAGUE attended the last CC meeting and participated in the discussions as per the records of the previous meeting. What made you deny him his constitutional right and obligation this time? This is unbecoming of you and unconstitutional!

The other issue is on the venue and the manner your invitation was send through to us. Why are we being invited individually suddenly? What weapons are you talking about? What with security measures? Why Parliament facility? Has the National Headquarters become small for us? With whom did you make this decision? Do u want to use state machinery against us at the expense of our glorious movement SWAPO, for you imaginary threats? What are you trying to achieve?

YOU do not own SPYL, SPYL is not your Close Corporation!

Stop this shenanigans of yours Comrade! Else history will judge you harshly! '

[20] Despite the protestations from some of the Youth League's National Executive Committee and Central Committee members (the six members), the meeting that was scheduled for 29 April 2017 and rescheduled by Nekundi to 13 May 2017 proceeded on that day. At the Youth League's Central Committee meeting of 13 May 2017 Nekundi

presented the agenda of that meeting to the delegates. A reading of the minutes of the Youth League's Central Committee meeting of 13 May 2017 reveals that, at the opening of that meeting, Nekundi made reference to the resolution with which the meeting of 18 February 2017 had adjourned and that he also indicated that the meeting of 13 May 2017 was a continuation of the meeting of 18 February 2017. Paragraph 1 of the minutes of the meeting of 13 May 2017 amongst other things reads as follows:

'...Further the chairperson [Nekundi] of the meeting presented to the meeting the resolution of 18 February 2017 adjourning the meeting that casts the continuation of the 13 May 2017 CC meeting. The meeting enormously endorsed the resolution on the adjournment and the deliberations of the 18 February 2017 meeting.

Thus the chairperson stressed that the meeting stand as the continuation of the 18 February 2017 meeting.'

[21] The minutes of the meeting of 13 May 2017 furthermore reveal that after the roll call (which was item No. 2 on the agenda) was taken the meeting proceeded to deal with the next item on the agenda (item No. 3 on the agenda), namely, the position of Amupanda and Ngurare on the Youth League's Central Committee. After the discussion the minutes indicate the resolution that was taken to be the following:

'The CC meeting jointly resolved to accept the response from the SWAPO Party Politburo as stated in its letter dated 23 February 2017.'

[22] The Youth League's Central Committee meeting of 13 May 2017 proceeded, and added some items to the agenda and adopted resolutions on the issues and items that were discussed at that meeting. Some of the items that were discussed at the National Executive Committee meeting of 27 March 2017 and which were discussed and approved at the Central Committee's meeting of 13 May 2017, were the congress preparations and nominations for candidates for the Youth League's Secretary and Deputy Secretary positions. The meeting (i.e. Youth League's Central Committee meeting of 13 May 2017) resolved to approve the proposal that the Youth League's congress takes place during 24 to 27 August 2017. It also discussed the proposed congress agenda and made a number of amendments to that agenda.

[23] The meeting furthermore resolved that the nominations of candidates for the Secretary and Deputy Secretary positions would take place at that meeting and not on another date. Thereafter, a shortlist of those to be nominated was compiled after a vote was taken on the nominated candidates. The meeting amongst other things also resolved to nominate the following persons as the contenders for the position of the Youth League's Secretary; Ephraim Nekongo, Mandela Kapere and Meriam Nghidipo at the planned Congress of the Youth League.

[24] The applicants, alleging that the meeting of 13 May 2017 was not held in accordance with the Youth League's constitution, on 23 May 2017 on an urgent basis approached this Court seeking, in Part A of their notice of motion an order interdicting the first, second, third and fourth respondents from proceeding in any way with the implementation of the resolutions or decisions or both resolutions and decisions taken at the meeting of the Central Committee of the Youth League on the 13<sup>th</sup> May 2017 pending the outcome of the application for declaratory orders sought under Part B of their notice of motion.

[25] The applicants initially cited nine respondents. On 23 May 2017 the respondents, except the sixth, seventh (who as it will become clear later applied and were joined as the third and fourth applicants) and eight respondents signified their intention to oppose the application. The application launched by the applicants was assigned to me for hearing and I scheduled a hearing of the urgent application for 2 June 2017. Prior to the 2<sup>nd</sup> of June 2017 the parties' legal representatives came to see me in chambers.

[26] At the meeting in my chambers we discussed two items first, I asked the legal practitioners representing the parties to obtain instructions from their clients as to whether they are comfortable with me presiding over this matter. The second item was for the applicants to indicate their attitude to the request for postponing the hearing of the application so as to allow the respondents to file their affidavits. The legal practitioners representing the parties indicated that they are all comfortable with me hearing the application and the legal practitioners for the applicants indicated that they have no objection if the matter was to be postponed so that the respondents were afforded more time to file their affidavits. In view of the extension of time sought by the respondents I indicated to the parties that, since these proceedings do not involve the

review of any decision it will be appropriate for the parties to get more time to file their papers so that on the hearing date I hear the merits of the application, that is of Part B of the notice of motion. The parties agreed and I regulated the filing of the affidavits and I postponed the matter to 7 July 2017 for hearing.

[27] On 30 June 2017 Amupanda and Ngurare (who were initially cited as the sixth and seventh respondents) gave notice that they will on 6 July 2017 or at the hearing of this application on 7 July 2017 move an application to be joined as co-applicants with the first and second applicants. The legal practitioners representing the parties again came to see me in chambers on 6 July 2017 and during that meeting the legal practitioners representing the first to fifth respondents indicated that they will not oppose the application and I, in chamber, granted the application for Amupanda and Ngurare to be joined as third and fourth applicants. It is for this reason that I have cited Amupanda and Ngurare as third and fourth applicants in the judgment.

#### The basis on which the applicants have approached this court

[28] The applicants contend that as citizens of the Republic of Namibia they have a right (under Articles 17 and 21(e) of the Namibian Constitution ) to participate in political activities within the State. They further contend that they have chosen to exercise that right through the medium of a political party, and when they joined the political party a contract came into existence between them and that political party. The contract so concluded created obligations on the part of the political party, one such obligation being that the political party must act lawfully and in accordance with its constitution. The applicants furthermore contend that adherence to procedures contained in the political party's constitutions ensures that, individual party members are not disenfranchised by 'powerful factions' within the party. It ensures that political parties are governed by a lawfully elected leadership.

[29] The applicants in their replying affidavit raised the authority of Nekundi to oppose this application and depose to an affidavit on behalf of the Youth League. The applicants further allege that 'a powerful faction' in the Youth League abuses power resulting in a range of illegalities. The core of the applicants' complaint is that Nekundi on 13 May 2017 convened an irregular meeting of the Youth League's Central Committee which meeting

excluded certain members of the Youth League from its decision making process. The applicants thus base this application on the allegation that:

- (a) Nekundi breached the Youth League's constitution when he decided to convene a Central Committee meeting on 13 May 2017 without a decision by the Youth League's National Executive Committee.
- (b) The Youth League's constitution sets out who qualifies to participate in the Youth League's activities, participation in the activities of the Youth League is limited to persons who are not older than 35 years. The only exception is made for the Secretary, who may continue in that position until the age of 45.
- (c) Nekundi, who presently is 39 years old, breached the Youth League's constitution when he failed to relinquish his membership in the Youth League when he turned 35 years of age.

[30] In light of these alleged breaches the applicants ask this Court to declare:

- (a) That the Youth League's Central Committee meeting of 13 May 2017 and the resolutions emanating from that meeting to be unlawful, as it was not constituted in accordance with the Youth Leagues constitution.
- (b) That Nekundi has lost his membership in the Youth League by virtue of Article 5(a) (c) of the Youth Leagues constitution, and
- (c) That Kapere's nomination for the position of Secretary of the Youth League as invalid because by the time the Youth League's congress is held, Kapere will be older than 35 years and must lose his membership in terms of Art 5(a)(c) of the Youth League's constitution.

The basis on which the respondents oppose the application

[31] As I have indicated above the first, second, third, fourth and fifth respondents opposed the application. The first basis on which they oppose the application is that, the matter is not urgent. The second basis on which the respondents oppose the application

is that, on the expulsion of Amupanda and Ngurare in July 2015, all parties, including applicants, Amupanda and Ngurare and the Youth League's Secretary of Labour and Justice, accepted that Amupanda and Ngurare had lost their membership of the Youth League and all positions they had held in the Youth League. Although ordering that they (i.e. Amupanda and Ngurare) be reinstated as members of the Party (and its wings), in its judgment of 22 April 2016 this Court pointedly refused to reinstate them into their former positions. Amupanda and Ngurare were expressly told in October 2016 that they no longer held positions in the Youth League and that Ngurare had accordingly lost his membership of the Youth League (on account of his age).

[32] The respondents further oppose the application on the basis that the applicants' reliance on Article 17(1) and Article 21(1)(e) of the Namibian Constitution is misplaced, because those provisions are designed to protect membership of members and participation in political parties and voluntary associations. In this case, the applicants have not been deprived of their right to be members of or to participate in a political party or voluntary organisation.

#### The issues

[33] From the background information that I have set out in the preceding paragraphs this matter raises the following issues:

- (a) Whether Nekundi is authorised to oppose the application and to depose to the affidavit on behalf of the Youth League;
- (b) Whether the Youth League's Central Committee meeting of 13 May 2017 was irregular;
- (c) Whether Nekundi lost his membership in the Youth League;
- (d) Whether the nomination of Kapere for the position of Secretary of the Youth is invalid; and
- (e) Whether by virtue of these alleged irregularities the Youth League's Central Committee meeting of 13 May 2017 is invalid.

The representation of the second respondent (Secretary of the Youth League)

[34] On 30 May 2017 Mr Kamanja of Amupanda Kamanja Incorporated filed a notice indicating that he represents the Secretary of the Youth League, Amupanda and Ngurare. He furthermore indicated that his clients are not opposing the application and are actually making common cause with the application. The notice by Mr Kamanja was filed despite the fact that Mr Gilroy Kasper of Murorua, Kurtz & Kasper Incorporated had already on 23 May 2017 filed a notice indicating that his firm represents the Secretary of the Youth League. When my attempts to get clarity as to who is representing the Secretary of the Youth League failed I ordered Mr Kamanja and Mr Soni to, before I commenced with the hearing of the application address me on the representation of the Secretary of the Youth League.

[35] After I heard arguments from both Messrs Kamanja and Soni I ruled that Mr Ngurare, is not the Secretary of the Youth League and his purported authorisation of Mr Kamanja to represent the Secretary of the Youth League was thus invalid. I now provide reasons for that ruling.

[36] Mr Kamanja argued that Article 13(1) of the Youth League's constitution makes provision for the filling of the position of Secretary of the Youth League. That Article amongst other things reads as follows:

(a) The Secretary of SPYL shall be the leader and the Chief Executive Officer of SPYL.

(b) He or she shall be the Chairperson of the Central Committee, National Executive Committee, and the Congress.

(c) He or she shall be elected by the Congress through secret ballot for a period of five years and shall be eligible for re-election....'

[37] Mr Kamanja thus argued that the position of Secretary of the Youth League is created by the Youth League's constitution and is occupied substantively by election alone. The constitution of the Youth League also contemplates the manner in which the position may be vacated, argued Mr Kamanja. He further argued that since no such



event (vacating the office of the Secretary) took place and the fact that Nekundi was not elected to the position of Secretary of the Youth League only Elijah Ngurare can lay claim to being the Secretary of the Youth League, the second respondent, at this moment, by virtue of a democratic process of election. To argue otherwise is to controvert democracy said Mr Kamanja.

[38] Mr Kamanja's argument is not entirely correct, because it overlooks Article 5.A. (5) of the Youth League's constitution which provides as follows:

'5. Individual membership may be lost through:

- (a) resignation; or
- (b) expulsion, or
- (c) when the member except the Secretary attains the age of 35.' (Underlined for emphasis).

[39] It is common cause that Ngurare was, during July 2015, expelled from the Party and its wings thus depriving him of the membership of the Party and the wings of the Party. The expulsion is an event contemplated by the Youth League's constitution to deprive a member of his or her membership. It is correct that Amupanda and Ngurare successfully challenged their expulsion from the Party and its wings but it is equally so that they were unsuccessful in their pursuit to be reinstated in the positions (that is Amupanda as a member of the Youth League's Central Committee and Ngurare as the Secretary of the Youth league) they held prior to their expulsion. In the notice of motion filed on 17 August 2015, in which Amupanda and Ngurare (and the other two persons) sought to challenge their expulsion from the Party and its wings Amupanda and Ngurare amongst other relief sought the following relief:

'A. An Order

(1) ...

(2) setting aside the decisions referred to under paragraph (1) above and ordering the first respondent to, with immediate effect, restore the applicants' membership in the first respondent

and restore them in and to all and any respective positions they held by virtue of their membership in the first respondent, together with all right and privileges the applicants had as before 17 July 2015.' (Italicized and underlined for emphasis)

[40] This Court said the following in respect of that relief sought by Amupanda and Ngurare.

[60] From what I have said previously about the interconnectivity between the declaratory order sought in para A(1) and the two consequential orders sought in para A(2), the aforementioned trite principle should reasonably have a critical bearing on the consideration of the two orders applied for in para A(2). A consideration of the application for the two orders in para A(2) of the notice of motion gives rise to the following crucial question: Can the court make an order that the 1<sup>st</sup> respondent restore membership of the 1<sup>st</sup> respondent to each of the four applicants, and at the same time order that 1<sup>st</sup> respondent restore them in all and any respective positions they held by virtue of their membership in the first respondent, together with all the rights and privileges the applicants had prior 17 July 2015? The second order is basically an order to reinstate each applicant in any position he held in the 1<sup>st</sup> respondent prior to their expulsion from the 1<sup>st</sup> respondent.

[61] I am inclined to grant the first order applied for in para A(2) of the notice of motion, but I think it will be inequitable (see *Halsbury's Law of England*, loc. cit.) and unsafe and unreasonable for the court to go further and grant the second order. I do not think on the facts and in the circumstances of this case, the jurisdiction of the court to interfere in the internal dispute of a political party, an unincorporated voluntary association, at the instance of the applicants improperly expelled in order to reinstate them should be extended beyond granting an order to restore their membership of the 1<sup>st</sup> respondent of which they were unlawfully deprived.

[62] Consequently, for the foregoing reasons in paras 53-61, I decline to grant the second order sought by the applicants in para A(2) of the notice of motion ...' (Underlined for Emphasis)

[41] The above quotation makes it abundantly clear that this Court per Justice Parker refused to reinstate Amupanda as a member of the Youth League's Central Committee and Ngurare as Secretary of the Youth League. It thus means that Ngurare lost (in terms of Article 5.A.(5)(b) of the Youth Leagues constitution) his position as Secretary of

the Youth League and he did not regain that position on 22 April 2016 when his membership of the Party was restored. Having disposed of the representation of the second respondent I will now proceed to consider the issues that I have identified above in paragraph [32].

Nekundi's authority to oppose the application

[42] Amupanda and Ngurare in their answering affidavits which turned out to be their supporting affidavit questioned Nekundi's authority to oppose the application. Ngurare who deposed to his and Amupanda's affidavit states the following:

'20.3 There is a Notice to Oppose filed on behalf of the first respondent and I accordingly herewith anticipate and object to this in the absence of a resolution to that effect. I object for the reason that I am well aware as the Secretary to the first respondent that no such resolution was ever taken, more over the first respondent was maliciously misdirected into holding the meetings and decisions which are the subject of the challenge in this application. I accordingly challenge any party to produce a valid and authentic resolution to the above Honourable Court authorising this opposition.

20.4 Accordingly in the absence of a valid and authentic resolution which authorizes this opposition this Honourable Court is enjoined by law to strike and dismiss the purported opposition by the first respondent.'

[43] Mr Nashinge dealt with Nekundi's authority in their replying affidavit, he stated the following:

'I specifically deny that Nekundi is authorised to depose to the answering affidavit on behalf of the SPYL. No document evincing such authority has been attached.'

[44] Mr Nekundi responded to the challenge of his authority to oppose the application: he stated the following:

'13 Insofar as my authority to oppose the application is concerned, I submit that in my position as Acting Secretary of SPYL, in terms of SPYL's constitution I have the requisite authority to oppose the application on behalf of SPYL.

14 In any case, at its meeting of June 2017 the NEC of SPYL confirmed that the application should be opposed. I annex hereto as “VN 18” the minutes of the meeting.’

[45] The question of whether or not proceedings instituted or defended on behalf of an artificial person are properly instituted have been before this Court on a number of occasions. I had the occasion to consider that question in the matter of *Ondonga Traditional Authority v Elifas*<sup>15</sup> where I quoted Damaseb JP as saying:

‘...a company [or an artificial person] has no soul of its own and acts through human beings who must be authorised to act on its behalf; and, secondly, if there is undisputed evidence that no such authority existed, the purported actions by persons purporting to act on its behalf are invalid. The latter gives rise to the principle that where there is a challenge to authority, those relying on it must prove it. But it is not any challenge; and that is where Mr. Bava misses the point: I apprehend, the question is not so much whether in the face of a challenge to authority and being afforded the opportunity to prove it, Shimwino failed to produce a resolution authorising him; rather it is this: was the respondent, on the facts of this case, justified to question the indubitably necessary allegation by Shimwino that he was duly authorised to act on behalf of the applicant in launching this application?’

[52] It is now settled that in order to invoke the principle that a party whose authority is challenged must provide proof of authority, the trigger-challenge must be a strong one. It is not any challenge: Otherwise motion proceedings will become a hotbed for the most spurious challenges to authority that will only protract litigation to no end. This principle is firmly settled in our practice. It was stated as follows in *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1190E – G:

“In cases in which the respondent in motion proceedings has put the authority of the applicant to bring proceedings in issue, the Courts have attached considerable importance to the failure of the respondent to offer any evidence at all to suggest that the applicant is not properly before the Court, holding in such circumstances that a minimum of evidence will be required from the applicant. This approach is adopted despite the fact that the question of the existence of authority is often peculiarly within the knowledge of the applicant and not his opponent. A fortiori is this approach appropriate in a case where the respondent has equal access to the true facts.” ‘

<sup>15</sup> An unreported judgment of this Court Case No.HC-MD-CIV-MOT-EXP-2017/00134) [2017] NAHCMD 142 (delivered on 15 May 2017).

[46] After I referred to the authorities on the subject (i.e. authority to institute or defend legal actions on behalf of an artificial person) in the *Ondonga Traditional Authority v Elifas*<sup>16</sup> I stated that what is clear is that there must at least be something to show that the litigation on behalf of an artificial person has been authorised. In the matter of *Otjozondjupa Regional Council v Dr. Ndahafa Aino-Cecilia Nghifindaka*<sup>17</sup> matter Muller J accepted that in several matters Courts have regarded a statement under oath by a deponent that he or she had been duly authorised to bring the application, as sufficient.

[47] I have shown the way in which the Mr Nashinge challenged Nekundi's authority to oppose this application. It is indeed a weak challenge. Nashinge does not challenge or deny Nekundi's allegation that he was duly authorised to oppose the present application only that he was not authorised to depose to the affidavit. In the matter of *Ganes v Telecom Namibia Ltd*<sup>18</sup> we are told that such a challenge is a worthless challenge. Streicher JA who delivered the judgment on behalf of the Court said:

'...In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.'

[48] Mr Nekundi in his affidavit in answer to Mr Ngurare's challenge reiterated that he has the authority to oppose the application and attached minutes of a meeting of the National Executive Committee of the Youth League at which the decision to confirm the opposition of the application was taken. Mr Kamanja argued that the minutes which Mr Nekundi attached to his affidavit were not signed and the Court must therefore disregard those minutes. Mr Kamanja's argument is fallacious the signature of the minutes does not go to prove whether such a meeting took place or not, the absence of the signature is in this matter of no moment.

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<sup>16</sup> *Supra*.

<sup>17</sup> An unreported judgment of the Labour Court of Namibia Case No.: LC 1/2009 delivered on 22 July 2009.

<sup>18</sup> 2004 (3) SA 615 (SCA) at 624G – H para [19].

[49] I say the absence of the signature is of no moment because, first these proceedings are motion proceedings and disputes of facts are resolved not on probabilities but in accordance with the guidance set out in the *Plascon Evans* case. Second the minutes of that meeting (i.e. the meeting of 11 June 2017) indicate that both Nashinge and lileka were present at the meeting where the decision to confirm the opposition of the application was taken, this explains why Nashinge in his replying affidavit (in which he raises the question of Mr Nekundi's authority to depose to the affidavit for the first time) does not deny that the National Executive Committee of the Youth League resolved to confirm the opposition of the application. Third Mr Ngurare cannot deny that such a decision was taken he is not a member of the Youth League's National Executive Committee and he was not present at the meeting of 11 June 2017. I am therefore satisfied that the averments by Mr Nekundi meet the 'minimum-evidence' requirement. The challenge to Nekundi's authority is a bad one and I reject it. In fact, in light of especially the *dicta* in *Ganes* case, the challenge borders on the frivolous.

Was the Youth League's Central Committee meeting of 13 May 2017 irregular?

[50] Mr Marcus who appeared on behalf of the first and second applicants based his argument that the Youth League's Central Committee meeting of 13 May 2017 was irregular and thus not in accordance with the Youth League's constitution on two basic propositions. The first proposition was that there was no decision by the National Executive Committee of the Youth League to convene a Central Committee meeting of the Youth League for 13 May 2017. The second proposition was that the fourth respondent excluded from or did not invite some of the members (notably Amupanda and Ngurare) of the Central Committee to the meeting of 13 May 2017. Mr Kamanja who appeared for Amupanda and Ngurare equally attacks the validity of the Youth League's Central Committee meeting of 13 May 2017 on the basis that the meeting was not convened at the behest of the Youth League's National Executive Committee.

[51] Mr Marcus argued that the power to convene extra-ordinary meetings of the Youth League's Central Committee vests, by virtue of Article 11.B.5.(d)<sup>19</sup> of the Youth League's

<sup>19</sup> Article 11.B.5.(d) of the Youth League's constitution reads as follows:

'5. The Central Committee of SPYL shall have the power to:

(a) ...

(d) meet every twelve months or as often as requested by the National Executive Committee so as to review reports of SPYL's activities and to approve programmes of action;'

constitution, in the National Executive Committee of the Youth League. Counsel argued that Central Committee's meeting of 18 February 2017 did not authorise Nekundi to reconvene the meeting, without the blessing of the National Executive Committee.

[52] Mr Marcus further argued that the proposition that the Central Committee's meeting can only be convened and held with the blessing of the National Executive Committee of the Youth League finds support in what transpired after the meeting of 18 February 2017 namely that the National Executive Committee of the Youth League continued to assert its power of determining the next Youth League's Central Committee meeting. This it did when it resolved at its meeting of 27 March 2017 that the next Youth League's Central Committee meeting will be held on 29 April 2017, argued Mr Marcus.

[53] Mr Kamanja for the third and fourth applicants, argued that the purported meeting of the Youth League's Central Committee of 13 May 2017 would be a second meeting in a 12 months cycle in terms of Article 11.B.5.(d) of the constitution of the Youth League, he thus argued that the Youth League's Central Committee is empowered to meet once every twelve months. An additional meeting within the same period would constitute an extra ordinary meeting. Such an extra ordinary meeting may only be called by the National Executive Committee in terms of Article 12.4.(c)<sup>20</sup> of the Youth League's constitution.

[54] Mr Kamanja continued and argued that without the sanction of the National Executive Committee of the Youth League acting in in terms of Article 12.4.(c) of its constitution, it is baffling to any reasonable minded person how Nekundi could lawfully convene an additional meeting of the Youth League's Central Committee on 13 May 2017.

[55] As regards the second proposition of his argument Mr Marcus argued that the reconvening of the Youth League's Central Committee meeting was irregular because Amupanda ought to have been invited to attend that meeting. He argued that this follows from the simple fact that, until the 13 May 2017 meeting, the Youth League's Central Committee had not yet decided on Amupanda's membership of the Central Committee.

<sup>20</sup> Article 12.4.(c) of the Youth League's constitution reads as follows:

'4. The National Executive Committee shall have the power to:

(b) ...

(c) call for an extra ordinary meeting of the Central Committee of SPYL.'

He proceeded and argued that both the Youth League's respondents National Executive Committee of 16 January 2017 and the Youth League's Central Committee meeting of 18 February 2017 decided to allow Amupanda to attend the Central Committee's meeting of 18 February 2017 while a decision on his continued membership was to be taken. On that basis, argued counsel, Amupanda participated in the Central Committee's meeting until it was adjourned as the Central Committee could not reach consensus on the issue.

[56] Counsel thus submitted that since the meeting of 13 May 2017 was a continuation of the meeting of 18 February 2017, of which Amupanda was a part, he should have been invited to the meeting of 13 May 2017. The failure to invite him was irregular. He furthermore submitted that, Amupanda should have been invited and given an opportunity to be heard on the position of the Party. The failure to invite him was prejudicial to him. He was robbed of the opportunity to convince the Youth League's Central Committee that the position of the Party was based on an incorrect interpretation of this Court's judgment in *Amupanda v the SWAPO Party of Namibia*. It cannot be said with certainty that the Youth League's Central Committee would have accepted the position of the Party if the third applicant had attended and participated in the discussion.

[57] Mr Soni who appeared for the respondents, on the other hand argued that the minutes of the meeting of 13 May 2017, formally and expressly accepted that the meeting (of 13 May 2017) was a continuation of the Youth League's Central Committee meeting that had been adjourned on 18 February 2017. The agenda followed at the meeting was the agenda that had been amended at the meeting of 18 February 2017 and this agenda was further amended at the meeting of 13 May 2017; and the meeting of 13 May 2017 further accepted that the date had validly been changed from 19 April to 13 May 2017.

[58] Mr Soni further argued that the adjournment of a meeting is the interruption and suspension of the business of the meeting with the object of its resumption at a later date. An adjourned meeting is in law a continuation of the original meeting in light of the foregoing there is no substance in the allegations or contention that the meeting of 13 May 2017 was invalid in any way, argued Mr Soni.

[59] In this matter the applicants sought an order without resorting to oral evidence, this application therefore has to be determined on the facts stated by the respondents



together with the facts admitted in the applicants' affidavit. Where it is clear that the facts, though not formally admitted, cannot be denied, they must be regarded as admitted.<sup>21</sup> In this matter the facts are not in dispute.

[60] The parties accept that on 16 January 2017 the National Executive Committee of the Youth League resolved that a meeting of the Youth League's Central Committee be held on 18 February 2017 and that the Central Committee's meeting was properly convened and held further at that meeting the Central Committee resolved that the meeting (of 18 February 2017) be adjourned till further notice and the Acting Secretary shall consult with the Party's leadership on the matter in order to obtain a clear position on the matter from the Party and re-convene the meeting thereafter.

[61] The usual place to look in order to ascertain whether and, if so, in what circumstances the person presiding over a meeting is empowered to adjourn the meeting is the constitution of the body which is holding the meeting or, if they exist, its Standing Rules and Orders. It is common cause in this matter that the Youth League did not adopt any Standard Rules and Orders to govern proceedings at its meetings. I have perused the constitution of the Youth League and there is also, no provision in that constitution which deals with the powers of the chairperson of the Central Committee to adjourn the proceedings of the Central Committee.

[62] In the matter of *Jonker v Ackerman*<sup>22</sup> the Court held that:

'It is the duty of the chairman of a meeting to preserve order and to ensure that the proceedings are properly conducted, so that the sense of the meeting regarding any relevant question is duly ascertained. He has no authority to terminate the meeting at his own will and pleasure but has an inherent power to adjourn the proceedings in the event of disorder. This power to adjourn must be exercised *bona fide* for the purpose of facilitating and forwarding the business and not for the purpose of procrastination. Such adjournment should be for no longer than is required in the circumstances for the restoration of order.'

[63] Arthur Lewin<sup>23</sup> argues that although the chairperson of a meeting does not have the power to adjourn a meeting except in circumstances where he must keep order, the

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<sup>21</sup> See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E to 635C).

<sup>22</sup> 1979 (3) 575 (O).

<sup>23</sup> *The Law, Procedure and Conduct of Meetings in South Africa* 5th Ed Juta at p 35.

power to adjourn a meeting rests entirely with the meeting itself. He proceeds and argue that when a meeting is adjourned the next meeting is a continuation with the same, or part of the same agenda. In the case of *Wolmarans v Pretoria Town Council*<sup>24</sup> Wessels J said '*an adjourned meeting is nothing more nor less than a continuation over a more convenient time.*' And Joubert<sup>25</sup> argues that '*The adjournment of a meeting is the interruption and suspension of the business of the meeting with the object of its resumption at a later date.*'

[64] In the present matter the facts which have been set up by the respondents and which the applicants cannot deny are that the meeting of 18 February 2017 was, by a unanimous decision of the Youth League's Central Committee, adjourned and that Nekundi was mandated to reconvene that meeting. The minutes of the meeting of 13 May 2017 unequivocally states that the meeting of 13 May 2017 was a continuation of the adjourned meeting. It therefore follows that once one accepts as Mr Marcus does that the meeting of 18 February 2017 was adjourned, it will be and it is fallacious to argue that the continuation of the meeting on another date had to be sanctioned by the National Executive Committee. The National Executive Committee had already, on 16 January 2017, sanctioned the meeting.

[65] Mr Kamanja's argument that the meeting of 13 May 2017 was the second meeting of the Youth League's Central Committee, within a space of twelve months is not borne out by the facts. The argument that the National Executive Committee of the Youth League had resolved that the meeting be held on 29 April 2017 is in my view irrelevant for two reasons. The first reason being that Nekundi was mandated by the meeting (Youth League's Central Committee meeting of 18 February 2017) itself to reconvene and continue with the meeting, he did not require the authority of the National Executive Committee to decide on what day he will reconvene and continue with the adjourned meeting. Secondly the applicants are reminded that in motion proceedings a dispute of facts is not resolved by probabilities but on the basis what I have already set out above in paragraph [59]. I therefore accept Nekundi's version that he consulted the members of the National Executive Committee when he decided to reschedule the meeting from 29 April 2017 to 13 May 2017.

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<sup>24</sup> 1909 TS 532, at 536.

<sup>25</sup> LAWSA, Volume 17, Part 2 (Second Edition), par 204.

[66] I have in paragraphs [34] to [40] dealt with the position of Ngurare's membership of the Youth League's Central Committee. The arguments that I dealt with in those paragraphs apply to Amupanda and I will not repeat them here, I therefore find that Amupanda was, since 25 July 2015, no longer a member of the Youth League's Central Committee, there is therefore nothing irregular or unlawful in him not being invited to the Central Committee's meeting. I therefore find that there is nothing unlawful or irregular about the Youth League's Central Committee meeting of 13 May 2017. That meeting was validly called in accordance with the Youth League's constitution.

Has Nekundi lost his membership in the Youth League?

[67] Counsel for Nashinge and Iileka argued that anybody who wishes to be a member of a voluntary association must comply with the foundational instruments of that voluntary association. In this case, it entails compliance with the provisions of the Youth League's constitution. He submitted that membership of the Youth League is regulated by Article 5.A.(1) which reads as follows:

'Subject to Article XVI (A) (2) of the SWAPO Party Constitution, membership of SPYL shall be open to every Namibian citizen who agrees with the aims and objectives of SWAPO Party and SPYL, and who is between 18 and 35 years of age.'

[68] Counsel further submitted that Article 5.A.(1) must be read with Article 5.A.(5)<sup>26</sup> which provides that a member of the Youth League may lose his or her membership when that member, except the Secretary, attains the age of 35 years. Age therefore constitutes a bar to membership of the Youth League, argued Mr Marcus. He accordingly submitted that Nekundi who is now 39 years of age is not a member of Youth League, in fact he lost his membership by operation of the law more than three years ago as he is currently 39 years of age, argued Mr Marcus.

[69] Counsel for the respondents on the other hand argued that when the Court considers the question of whether or not Nekundi lost his membership in the Youth League, the court is essentially dealing with the interpretation of the Youth League's constitution. Mr Soni thus implored the Court to adopt the approach set out by the

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<sup>26</sup> I have quoted Article 5.A.(5) in paragraph [37] of this judgment.

Supreme Court in the matter of *Total Namibia v OBM Engineering and Petroleum Distributors*<sup>27</sup> when interpreting the Youth League's constitution.

[70] Mr Soni furthermore argued that the congress of the Youth League is its highest decision-making body and it ordinarily meets once every five years. In addition it elects the two most powerful officers of Youth League, the Secretary and the Deputy Secretary. In respect of the Deputy Secretary, Article 13(2)(c) provides that he or she shall be elected by the congress through secret ballot *for a period of five years* and shall be eligible for re-election and Article 14 provides for the loss of office it provides that:

'In accordance with Article IX (P) (2) of Swapo Party Constitution, no SPYL national officer, except the secretary, *shall be eligible for re-election* if he or she has attained the age of 35 years *when his or her term of office expires*.

[71] Counsel for the respondents thus submitted that the sensible interpretation of the relevant provisions of the Youth League's constitution, insofar as the position of Deputy Secretary is concerned is that he or she may be elected by congress so long as he has not attained the age of 35. His or her term of office is for a period of five years. At the end of the five-year period, he or she would be eligible for re-election, unless he or she attained the age of 35 years before the five-year period ended.

[72] Mr Soni thus submitted that having regard to Nekundi's election as Deputy Secretary when he was 34 years of age, it must have been clear that that is how the 2012 Congress interpreted the applicable provisions. In addition, that must also have been how the Central Committee and National Executive Committee interpreted the applicable provisions. Otherwise, they would have asked Nekundi to step down as soon as he turned 35. More importantly, the Central Committee would not have appointed Nekundi to act as Secretary till elections, if its members, who included the applicants, were of the view that he had not been elected for five years. In light of the foregoing, the contention by the applicants that Nekundi had lost his membership of the Youth League when he attained the age of 35 years is without any substance submitted Mr Soni.

[73] In the *Total Namibia*<sup>28</sup> matter O' Regan, who delivered the court's judgment accepted that:

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<sup>27</sup> 2015 (3) NR 733 (SC), at [23].

<sup>28</sup> *Ibid.*

[18] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[74] The learned judge proceeded and said:

[23] ... context is an important determinant of meaning. It also makes plain that interpretation is 'essentially one unitary exercise' in which both text and context, and in the case of the construction of contracts, at least, the knowledge that the contracting parties had at the time the contract was concluded, are relevant to construing the contract. This unitary approach to interpretation should be followed in Namibia. A word of caution should be noted. In accepting that the distinction between 'background circumstances' and 'surrounding circumstances' should be abandoned, courts should remember that the construction of a contract remains, as Harms JA emphasised in the KPMG case, 'a matter of law, and not of fact, and accordingly, interpretation is a matter for the court and not for witnesses'.

[24] The approach adopted here requires a court engaged upon the construction of a contract to assess the meaning, grammar and syntax of the words used, as well as to construe those words within their immediate textual context, as well as against the broader purpose and character of the document itself. Reliance on the broader context will thus not only be resorted to when the meaning of the words viewed in a narrow manner appears ambiguous. Consideration of the background and context will be an important part of all contractual interpretation.'

[75] I turn now to the interpretation of the Youth League's constitution. That constitution in Article 5.A.(5) deals with the loss of individual membership, it provides

that a member may lose his or her membership when that member, except the Secretary, attains the age of 35 years. The word 'may' has as a general rule been interpreted to be permissive, importing a discretion<sup>29</sup>, but as O' Regan emphasized interpretation is the process of attributing meaning to the words used in a document, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

[76] Article 14 of the Youth League's constitution provides for the loss of office. It provides that no Youth League's national officer, will *be eligible for re-election* if he or she has attained the age of 35 years *when his or her term of office expires*. Reading the articles of the constitution contextually, one of two possible interpretations can be placed on Article 5.A.(1), (5) and Article 14. One possible interpretation that may be placed on the Articles is that the constitution contemplates a scenario where a Youth League member who attains the age of 35 years while holding office may remain in the office and will not automatically lose his or her membership of the Youth League upon attaining the age of 35 years, but the member will not be eligible for re-election at the expiry of his or her office. This interpretation leads to a sensible meaning, and it is that interpretation that I place on the Articles.

[77] In the present matter the fourth respondent was elected to the office of Deputy Secretary for a period of five years and at the time (that is during August 2012) he was so elected he had not yet attained the age of 35 years. On the interpretation that I have set out in the preceding paragraph, Article 14 of the Youth League's constitution permits the fourth respondent to hold office until his term of office expires. At the expiration of his term of office which is five years later (that is during 2017) the fourth respondent would simply not be eligible for re-election. I am thus of the view that Nekundi has not lost his membership of the Youth League.

[78] As regards the applicants' complaint that Kapere, the fifth respondent, by the time the Youth Leagues congress commences, would have attained the age of 35 years and would thus have lost his membership, I find it appropriate to refer to what the South

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<sup>29</sup> *Volkswagen Bpk. N.O v Barclays Bank (D.C. & O.)* 1955 (3) SA 104 (T), *Gunn and Another NNO v Barclays Bank DCO* 1962 (3) SA 678 (A). *McCulloch v Munster Health Committee* 979 (4) SA 723 (D).

African Courts said in the matter of *Jonker v Ackerman en Andere*<sup>30</sup> where the Court held that:

'The mere non-compliance with the rules of a voluntary association is ordinarily not sufficient justification for a court to intervene in the proceedings of such an association. The same applies in regard to the breach or disregarding of the so-called "principles of natural justice". Besides the disregarding of the rules or the provisions of the constitution there must be actual prejudice of the civil rights of the person who avers that he was aggrieved by the disregarding of the rules and/or the constitution of the association of which he is or was a member. The *onus* rests on the applicant to show that the irregularity on which he relies was calculated to prejudice him in his civil rights or interests.'

[79] Furthermore in the matter of *Garment Workers' Union v de Fries & Others*<sup>31</sup> the following was said:

'In considering questions concerning the administration of a lay society governed by rules, it seems to me that a court must look at the matter broadly and benevolently and not in a carping, critical and narrow way. A court should not lay down a standard of observance that would make it always unnecessarily difficult and sometimes impossible, to carry out the constitution. I think that one should approach such enquiries as the present in a reasonable common sense way, and not in the fault finding spirit that would seek to exact the uttermost farthing of meticulous compliance with every trifling detail, however unimportant and unnecessary, of the constitution. If such a narrow and close attention to the rules of the constitution are demanded, a very large number of administrative acts done by lay bodies could be upset by the courts. Such a state of affairs would be in the highest degree calamitous...'

[80] I find the above comments instructive and I am favourably disposed to applying them to the present matter. In my view it is not necessary for me to find whether Kapere will by the time the Youth Leagues congress commences, have attained the age 35 of years. I say this in the light of the fact that Nekundi states that the Youth League has its rules of vetting delegates and candidates who are contesting for positions. The applicants have therefore failed to prove that Youth League's Central Committee meeting of 13 May 2017 was not held in accordance with the Youth League's constitution. In view of the above issues, I am of the view that the application ought to fail.

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<sup>30</sup> 1979 3 SA 575 (O).

<sup>31</sup> 1949 1 SA 1110 at 1129.

Order

I therefore make the following order:

1. The application is dismissed.
2. The applicants must, jointly and severally the one paying the others to be absolved, pay the respondents costs.
3. The costs must include the costs of one instructing and one instructed counsel.

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SFI Ueitele  
Judge



**APPEARANCES****1<sup>st</sup> & 2<sup>nd</sup> APPLICANTS:**

Nixon Marcus.

Instructed by Kadhila Amoomo Legal Practitioners, Windhoek.

**3<sup>rd</sup> & 4<sup>th</sup> APPLICANTS:**

Eino - Amupanda Kamanja

Of Amupanda Kamanja Inc, Windhoek.

**1<sup>st</sup> to 5<sup>th</sup> RESPONDENTS:**

V Soni SC

Instructed by Murorua, Kurtz & Kasper, Windhoek.

**6<sup>th</sup> RESPONDENT:**

Henry Shimutwiken

Henry Shimutwiken & Co. Inc,  
Windhoek.

**7<sup>th</sup> RESPONDENT:**

No appearance.