

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-CIV-MOT-GEN-2017/00378

In the matter between:

JEREMIAH NAMBINGA

APPLICANT

and

RALLY FOR DEMOCRACY AND PROGRESS

FIRST RESPONDENT

STEVE BEZUIDENHOUT

SECOND RESPONDENT

MIKE RATOVENI KAVEKOTORA

THIRD RESPONDENT

AGNES LIMBO

FOURTH RESPONDENT

KANDY NEHOVA

FIFTH RESPONDENT

PETER NAHOLO

SIXTH RESPONDENT

DR. OLGA KAMORUAO

SEVENTH RESPONDENT

ASSER HIDIPOHAMBAMBA SHEUYANGE

EIGHTH RESPONDENT

PENDA GUAVA NANGOLO

NINTH RESPONDENT

NICANOR NDJOZE

TENTH RESPONDENT

MIRIAM HAMUTENYA

ELEVENTH RESPONDENT

CORINNE POULTON

TWELFTH RESPONDENT

SACKY AMENYA

THIRTEENTH RESPONDENT

BRUNHILDE CORNELIUS

FOURTEENTH RESPONDENT

EINO HEELU

FIFTEENTH RESPONDENT

KENNEDY SHEKUPAKELA

SIXTEENTH RESPONDENT

NGHININGILWANDUBO KASHUME

SEVENTEENTH RESPONDENT

NICKLAAS DAWSON
EKONIA KAMATI

EIGHTEENTH RESPONDENT
NINETEENTH RESPONDENT

Neutral citation: *Naminga v Rally for Democracy and Progress* (HC-MD-CIV-MOT-GEN-2017/00378) [2018] NAHCMD 102 (20 April 2018)

Coram: UEITELE J

Heard: **03 November 2017 & 21 December 2017**

Delivered: **20 April 2018**

Flynote: ***Voluntary association*** – Unincorporated voluntary association – Political party – Rules of - Non - compliance with by association - When Court will interfere - Disregarding of rules - When Court will interfere.

Political Rights – Political choices – Freedom of citizens to participate in the political activities of a political party Article 17 of the Constitution – Scope and ambit of right – Right to participate in the activities of political party confers on every political the duty to act lawfully and in accordance with its own constitution.

Summary: The applicant's application was primarily on the ground that the decision to pass a vote of no confidence was taken without having been an item on the agenda of the National Executive Committee meeting of 12 August 2017 and without the applicant being given adequate notice to prepare for and to properly address the issue. He furthermore contend that he was thus not given a hearing before the decision was taken.

The applicant further avers that the decision to pass a vote of no confidence in him was taken, contrary to the provisions of Article 19 of the constitution of the first respondent, which requires not only that application of any disciplinary sanction be preceded by a prudent and meticulous investigation and only after the accusation has been duly proved correct, but also that the fundamental objective of application of any sanction is education of RDP cadres aiming at strengthening or reinforcing the RDP unity and safeguarding the ideological purity of the RDP.

The respondents contend that the applicant is bound by the constitution and procedures set out in the constitution of the first respondent. This includes the obligation to first exhaust the domestic remedies provided for in the constitution of the first respondent, in the event where he feels aggrieved by a decision of a constitutional structure of the first respondent such as its National Executive Committee. To resort to Court without first exhausting the domestic remedies provided for in the first respondent's constitution is not competent.

Held that the mere fact that a statute creates an internal remedy does not imply that access to court is prohibited pending the exhaustion of that remedy.

Held that there is nothing in the language of the RDP's constitution that prohibits a member from approaching a court if that member is aggrieved by a decision of one of the organs of the first respondent. Since there is no general principle at common-law that an aggrieved person may not go to court while there is hope of extrajudicial redress, the court is of the view that the applicant was, as he did, entitled to approach this Court for relief.

Held further that the decision to adopt a motion of no confidence in the applicant was a clear breach of the contractual terms between the applicant and first respondent and can therefore not be allowed to stand.

ORDER

- a) The *rule nisi* issued out of this Court on 3 November 2017 is hereby confirmed.
- b) The applicant's noncompliance with the forms and service is condoned and this matter is heard as one of urgency, as contemplated in Rule 73 of the Rules of court.
- c) The decision of the National Executive Committee of the RDP, which was taken on 12 August 2017, and in terms of which the National Executive Committee of the RDP adopted a vote of no confidence in the applicant as President of the RDP is declared unlawful and invalid.

d) The decision to convene a meeting of the Central Committee for 03 - 05 November 2017, to discuss and decide on the vote of no confidence, is declared unlawful and invalid.

e) The respondents are restrained and interdicted from proceeding with the meeting of the Central Committee of the first respondent, which is slated for 03 - 05 November 2017.

f) The first to the tenth, twelfth, thirteenth and fourteenth respondents must jointly and severally the one paying the others to be absolved, pay the applicant's costs of this application such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

UEITELE J:

Introduction

[1] Namibia is a constitutional democracy. It is a system of governance that 'we the people'¹ 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 participate in the conduct of public affairs, whether directly or through freely chosen representatives.'²

[2] Parker³ argues that, in the 19th Century the individual was predominant in the affairs of the State. In the 20th Century and 21st Century it is the group. Thus,

¹ This is the phrase used in the Preamble to the Namibian Constitution.

² Article 17(1) of the Namibian Constitution.

³ In the unreported judgement of *Amupanda v Swapo Party of Namibia* (A 215/2015) [2016] NAHCMD 126 (22 April 2016).

nowadays, the political scene is dominated by groups, i.e. of political parties: elitist political parties and mass political parties, argued Justice Parker.

[3] Political parties in Namibia exert considerable powers over its members and have great impact on their 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.

[4] Like the powers of Government, these powers of political parties are capable of misuse or abuse. This case thus concerns the use or abuse of political power by a political party. The applicant is a member of the Rally for Democracy and Progress,⁴ the first respondent in this matter, a political party and a voluntary association with perpetual succession. The applicant was, during July 2015, elected as the President of the first respondent. The 19 respondents are also members of the first respondent and they hold office as members of the first respondent's National Executive Committee and its Central Committee.

[5] On 17 October 2017 the applicant, on an urgent basis, commenced proceedings out of this Court by way of a notice of motion seeking amongst other reliefs the following relief:

(a) an order condoning his non-compliance with the forms and service and for the Court to hear his application as one of urgency, as contemplated in Rule 73 of the rules of court;

(b) a rule *nisi*, calling on the respondents to show cause why a final order declaring the decisions, of the National Executive Committee (NEC) of the RDP, which were taken on 12 August 2017:

- (i) to adopted a vote of no confidence in him as President of the RDP; and
- (ii) to convene a meeting of the Central Committee for 03 - 05 November 2017, to discuss and decide on the vote of no confidence, null and void and setting same aside must not be made; and

⁴ I will, in this judgment, refer to the Rally for Democracy and Progress as the first respondent or where the circumstance so require as the RDP.

(c) a rule *nisi*, calling on the respondents to show cause why they must not be interdicted and restrained from in any way proceeding with the meeting of the Central Committee of the first respondent, which is slated for 03 - 05 November 2017.

Events leading to this application

[6] On 26 April 2017 certain members of the first respondent addressed a letter to the Secretary General of the first respondent in which letter they sought audience, for either the 20th or 21st May 2017, with the 'top four leaders' that is the President, Vice President⁵, Secretary-General⁶ and Deputy Secretary-General⁷ of the first respondent to discuss matters pertaining to the party (i.e. the first respondent). The letter was delivered and received by the office of the Secretary-General.

[7] On 06 June 2017, the applicant met with the Secretary-General in the office of the Secretary for Information, a certain Nghiningiludubo Kashume.⁸ The Secretary-General there informed the applicant that he wanted to meet with applicant, together with the Vice President and the Deputy Secretary-General. On 07 June 2017, the applicant met with the Secretary-General, the Vice President and the Deputy Secretary-General. During that meeting, the Secretary-General informed the meeting that he received a letter from some members of the first respondent who wanted to see the top four leadership of the first respondent either on the 20th or 21st of May 2017 on matters of concern to the first respondent. At the meeting of 7 June 2017, the Secretary-General further informed the applicant that he was not available during the time when the letter was delivered to his office and could therefore not bring this letter to applicant's attention. It became apparent that the letter of 26 April 2017 by the members of the first respondent was not replied to and the requested meeting did not take place.

[8] The National Executive Committee of the first respondent had its scheduled meeting on 10 June 2017. During the course of that meeting certain members of the first respondent demonstrated outside the venue of the meeting, protesting their

⁵ The Vice President is the second respondent in this application.

⁶ The Secretary General is the third respondent in this application.

⁷ The Vice Secretary General is the fourth respondent in this application.

⁸ Nghiningiludubo Kashume is the seventeenth respondent in this application.

unhappiness with the fact that, according to them, they did not receive a timeous reply from the Secretary-General regarding their letter of 26 April 2017.

[9] Some of the National Executive Committee members suggested that the applicant must go and meet the demonstrators whilst others were of the view that the applicant must not meet the members because what the members were doing was not procedural. The demonstrators, however, disrupted the meeting before a decision (whether the applicant must or must not meet the demonstrators) could be taken. The National Executive Committee in view of the disruption decided to disband and adjourn the meeting.

[10] The persons who demonstrated and protested at the National Executive Committee's meeting of 10 June 2017 arranged a meeting with the applicant for 28 July 2017, at which meeting the Vice President and the Deputy Secretary-General were present, where they handed over a petition to the applicant to which the applicant responded on the same date.

[11] The National Executive Committee was scheduled to meet on 12 August 2017. The agenda for the National Executive Committee meeting of that day had nine items for discussions, the nine items were; (1) Welcoming, (2) Roll, (3) Disruption of the National Executive Meeting on 10 June 2017, (under this item there were to sub – items namely (a) Evidence of NEC members' involvement in demonstration, and (b) Petition from RDP members), (4) Matters arising from Previous Minutes – 16 February 2017, (5) Matters arising from Previous Minutes – 8 April 201, (6) Secretary-General's Report, (7) Financial Update (8) Vacancies-NEC and Directorate of Elections and (9) AOB.

[12] The applicant as chairperson of the National Executive Committee presided over the meeting of the National Executive Committees meeting of 12 August 2017. During the deliberations of the agenda items especially the items under item (3), one of the members of the National Executive Committee, a certain Dr. Olga Kamoruao,⁹ moved a motion of no confidence in the applicant as President of the first respondent. Another member of the National Executive Committee, a certain Penda Guava

⁹ Dr. Olga Kamoruao is the seventh respondent in this application.

Nangolo¹⁰) stated that since the applicant had a hand in the matter, he must, handover the chairmanship of the meeting to the Vice President, which the applicant did.

[13] The applicant objected to the procedures adopted, but his objections were overruled and the motion seconded. Mr. Kashume then rose to move a motion that the motion by Dr. Olga Kamorua was un-procedural and not in accordance with the constitution of the first respondent which motion was also seconded. However, the discussion persisted with the motion of Dr. Olga Kamorua and the applicant persisted with his objection. When he realised that his objection will not be heeded he walked out of the meeting. A group of other four more persons followed him and also walked out of the meeting, leaving only thirteen persons to deliberate further.

[14] On the same day (i.e. 12 August 2017) the second respondent issued a Press Statement in which he on behalf of the National Executive Committee amongst other matters said:

'We have called you to inform you and the public at large that today, Saturday 12 August 2017, the National Executive Committee (NEC) of the Rally for Democracy and Progress (RDP) has deliberated on issues hampering progress in the RDP.

We wish to affirm to you our commitment to uphold our original founding values, principles of unity, democracy, freedom, integrity, justice and social progress. In view of this and after painstaking discussion, the NEC has reached consensus on a motion of No Confidence against the President of RDP comrade Jeremiah Nambinga.

We will ensure that all Party constitutional obligation are precisely followed to guarantee the smooth running of the party in the interim until the holding of the next Central Committee...'

[15] In response to the Press Statement of 12 August 2017, the applicant, through his legal practitioners of record, on 18 August 2017, addressed a letter to the second respondent in which letter he pointed out what he perceived as unlawful actions by the National Executive Committee of the first respondent. He furthermore in that letter demanded that:

¹⁰ Penda Guava Nangolo is the ninth respondent in this application.

- (a) The motion of no confidence in the President be recalled and be declared null and void;
- (b) There be no NEC meeting that is to take place without the President of the RDP chairing same;
- (c) There be no organization of Central Committee meetings without the participation and consent by the President of the RDP;
- (d) Any further course to be taken with respect to the issue at hand be taken with full consideration of the ambit of the Constitution and the Code of Conduct which are to be implemented strictly; and
- (e) If the issue at hand is to be tackled than then same is to be tackled in terms of Article 46 of the Constitution of the RDP.

[16] The second respondent, through his legal practitioners of record, responded to the applicant's letter of 18 August 2017 on 6 September 2017. In the letter of response the legal practitioners denied that the applicant was suspended or expelled. The legal practitioners furthermore denied transgressing any provision of the first respondent's Constitution and rejected the demands made on behalf of the applicant in the letter of 18 August 2018.

[17] On 27 September 2017, the applicant was, through his personal assistant, served a notice in which notice it was recorded that the National Executive Committee decided on 12 August 2017 to convene a Central Committee meeting for 03 to 05 November 2017, in Windhoek. Being of the view that the decisions of the National Executive Committee of the first respondent are unlawful and null and void the applicant set in motion the process to seek the relief that I have set out above in paragraph [5], of this judgement. The application was served on the respondents on 17 October 2017. The first to third respondent and ten other respondents opposed the application and the application was set down for hearing on 30 November 2017. The respondents were not ready and requested a postponement to 3 November 2017 which I granted.

[18] On 03 November 2017, after hearing arguments I issued an order in the following terms:

'1. A *Rule Nisi* is hereby issued calling upon the respondents to show cause, if any to this Court, on or before the 08 December 2017 at 10:00, why:

1.1. The applicant's noncompliance with the forms and service must not be condoned and this matter be heard as one of urgency, as contemplated in Rule 73 of the Rules of court.

1.2 The decisions of the National Executive Committee (NEC) of the RDP, which was taken on 12 August 2017, and in terms of which the NEC adopted a vote of no confidence in the applicant as President of the RDP must not be declared invalid.

1.3 The decision to convene a meeting of the Central Committee for 03 - 05 November 2017, to discuss and decide on the vote of no confidence, must not be declared invalid.

1.4 The respondents must not be restrained and interdicted from proceeding with the meeting of the Central Committee of the first respondent, which is slated for 03 - 05 November 2017.

1.5 The first to the tenth, twelfth, thirteenth and fourteenth respondents must not be ordered to jointly and severally the one paying the others to be absolved, to pay the applicant's costs of this application such costs to include the costs of one instructing and one instructed counsel.

2. The orders referred to in paragraph 1.4 will operate as interim interdict having an immediate effect, pending the return date of the *rule nisi*.'

[19] On the 8th of December 2017, the legal representatives of the first to tenth, and twelfth to fourteenth respondents (the respondents) sought and were granted an indulgence to file a further affidavit. In the supplementary affidavit the respondents sought to address the questions as to why the *rule nisi* issued on 3 November 2017 must not be confirmed. I furthermore ordered the parties to file supplementary heads of arguments by 18 December 2018. I thereafter postponed the matter to 21 December 2017 for hearing arguments.

[20] This Court has held that the relationship between a political party and its members is contractual. The Court went on to hold that a political party's Constitution and its Code of Conduct (if it has one) constitute the contract between the political party and the members of that political party and that the terms of the political party's Constitution and Code of Conduct are justiciable in a Court of law.¹¹ It is for this reason that I find it appropriate to, before I deal with the merits of this matter, first set out the parts of the first respondent's constitution that are in my view relevant to this matter.

The first respondent's constitutional framework.

[21] Chapter 12 of the first respondent's constitution deals with the RDP's structural organization. Article 32, establishes a National Convention, which is the supreme organ of the party (the first respondent). It is the body that elects the President, Vice President, Secretary General and Deputy Secretary General and the full members of the Central Committee of the first respondent. It furthermore is vested with the powers to decide on appeals and queries submitted by the party's members and the parties' organizations. The Central Committee must convene a national convention at intervals of five years.

[22] The second highest organ of the first respondent is the central committee, which is also the highest organ of the first respondent between two conventions.¹² The central committee is amongst other things empowered to ensure that the policy of the first respondent, is adhered to and that the decisions, resolutions and other directives of the national convention are implemented. It is also responsible to elect members of the National Executive Committee. It is also the organ that appoints the director of the RDP's National Commission on Election, and the Chairperson of the RDP's Discipline and Audit Commission and elect members of the National Executive Committee. The Central Committee meets, at least two times per year.¹³

¹¹ See: the unreported judgments of *Nashinge v Swapo Party Youth League and Others* (HC-MD-CIV-MOT-GEN-201700156) [2017] NAHCMD 242 (25 AUGUST 2017), *Amupanda v Swapo Party of Namibia* (A 215/2015) [2016] NAHCMD 126 (22 APRIL 2016) at para [2], *Nghidimbwa v Swapo Party of Namibia* (HC-MD-CIV-MOT-REV-2016/00257) [2017] NAHCMD 298 (16 OCTOBER 2017).

¹² See Article 38 of the RDP's Constitution.

¹³ See Article 41 of the RDP's Constitution.

[23] The next organ of the first respondent is the National Executive Committee, which is the organ of authority that directs the RDP activities in the period between meetings, of the Central Committees it is also the technical management body steering the daily activities of the Central Committee. Amongst the powers of the National Executive Committee is the power to implement all decisions, resolutions and directions of the National Convention and Central Committee.¹⁴ Article 46, of the first respondent's Constitution empowers the National Executive Committee to refer all issues pertaining to serious misconduct (including the violation of the RDP Constitution and RDP Political Program) to the Discipline and Audit Commission.

[24] The Discipline and Audit Commission is dealt with in Chapter 5 of the first respondent's constitution. The Discipline and Audit Commission, must function under, and be guided by, its own rules approved by the Central Committee of the RDP. The Discipline and Audit Commission is headed by a chairperson who is appointed by the Central Committee. The Discipline and Audit Commission must:¹⁵ ensure that the provisions of the RDP constitution and the party political program are implemented to the letter; protect the unity and purity of the policies of the RDP through the detection and examination of the actions or activities of cadres who contravene the provision of the RDP constitution and the party political program and the RDP discipline, those who violate RDP resolutions, RDP morality and the laws of the country; fight all attempts of forming factions within the RDP designed to falsify the political line of the RDP or defend opportunistic thesis and incorrect or even wrong conceptions about RDP work or the building of the RDP; defend the prestige of the RDP and that of RDP cadres through combating slanders, tendentious information, false accusations and rumours; ensure the correct management of the budget and that of finances and appropriate administration of RDP resources; institute processes with regard to disciplinary measures against DRP members of the Central Committee, RDP members of Parliament all other RDP members; make recommendations on requests for re-admission of expelled or resigned members in the RDP; make recommendations on the interpretation of the present constitution and the party political program of the RDP and propose resolutions thereon; act on the resolution of conflicts in the RDP and intervene in other disciplinary processes upon requests made

¹⁴ See Article 44 of the RDP's Constitution.

¹⁵ See Article 14 (1) to (10) of the RDP's Constitution.

by the national organs of the RDP and be accountable to the National Executive Committee.

[25] Chapter 13 of the first respondent's constitution deals with the office bearers of the first respondent. The highest office bearer of the first respondent is the President, who is elected at the National Convention for a term of office of five years. He is the leader of the party and must direct the general strategy of the RDP. The other powers of the President are to: ensure the implementation of the resolutions and decisions of the National Convention, the Central Committee and National Executive Committee of the RDP; preside over meetings of the National Convention, the Central Committee and National Executive Committee of the RDP; execute other tasks outlined in the RDP constitution and political program; perform such tasks as may be assigned to him by the National Executive Committee and Central Committee of the RDP; deliberate and vote at meetings of the National Executive Committee and the Central Committee of the RDP where he has a casting vote.

[26] Chapter 8 of the first respondent's Constitution deals with the discipline within the first respondent. Article 19 (1) of the first respondent's Constitution provides that any RDP cadre who violates its constitution or its political program, who does not obey the code of conduct, resolutions manifesto, or norms as established, who abuses his or her functions in the RDP, or in any other way behaves in a manner that degrades the good name or prestige of the RDP is liable to the RDP disciplinary sanctions.

[27] Article 19 (3) provides that the application of sanctions must be preceded by a prudent and meticulous investigation of the accusations laid down and it should be only after the accusations have been duly proved correct that the decision to apply sanctions shall be taken and this must be preceded by a fair and adequate hearing where the accused member has been granted a hearing and has been guaranteed an appropriate legal defence.

[28] Having sketched the first respondent's constitutional framework I now proceed to consider the basis on which the applicant relies for the relief he is seeking and the grounds on which the respondents are opposing the application.

The basis of the application and the grounds of opposing the application.

The grounds of the application

[29] The applicant basis his application on the ground that the decision to pass a vote of no confidence was taken without this having been an item on the agenda of the National Executive Committee meeting of 12 August 2017 and without the applicant being given adequate notice to prepare for and to properly address the issue. He furthermore contend that he was thus not given a hearing before a decision which is clearly adverse to his interest was taken.

[30] The applicant further avers that the decision to pass a vote of no confidence in him was taken, contrary to the provisions of Article 19 of the constitution of the first respondent, which requires not only that application of any disciplinary sanction be preceded by a prudent and meticulous investigation and only after the accusation has been duly proved correct, but also that the fundamental objective of application of any sanction is education of RDP cadres aiming at strengthening or reinforcing the RDP unity and safeguarding the ideological purity of the RDP. What the National Executive Committee has done is completely against this ethos of the RDP says, the applicant.

[31] The applicant further contends that there is no provision made for the National Executive Committee to declare a vote of no confidence in the leaders of the RDP. At best, it may refer serious misconduct to the Discipline and Audit Commission, who must then investigate as contemplated in article 19(4) of the constitution of the RDP, make findings and refer the matter to Central Committee or the National Executive Committee with the recommendations of the appropriate action to be taken.

[32] It is furthermore the applicant's contention that the first respondent specifically proscribes punishment before investigation and finding of liability for punishment in that its constitution clearly states in Article 12(8) states that:

'The members of the RDP shall have the right not to suffer any sanctions before one is heard in a properly constituted disciplinary process in accordance with the provisions of the competent rule.'

The applicant thus concludes that the vote of no confidence, arbitrarily deprives him of the powers and functions reposed in him as President of the first respondent, one of which is to preside over the meetings of the National Executive Committee and the Central Committee of the first respondent.

The grounds for opposing the application

[33] The respondents contend that the applicant is bound by the constitution and procedures set out in the constitution of the first respondent. This includes the obligation to first exhaust the domestic remedies provided for in the constitution of the first respondent, in the event where he feels aggrieved by a decision of a constitutional structure of the first respondent such as its National Executive Committee. To resort to court without first exhausting the domestic remedies provided for in the first respondent's constitution is not competent, contended Mr Kavekatora who deposed to the opposing affidavit on behalf of the respondents. The respondents thus maintain that the applicant has not availed himself of the domestic remedies applicable to him, in the event where he is aggrieved by decisions of the National Executive Committee of the first respondent. Instead, the applicant seeks to entrench his position through a resort to the court.

[34] Mr Kavekatora further contended that the first respondent's National Executive Committee met on 12 August 2017, to discuss a host of issues including a discussion on the disruption of the meeting of the first respondent's National Executive Committee held on 10 June 2017 and the petition by RDP members. The applicant, said Mr Kavekatora, was made aware of these agenda items and during the discussion of these agenda items the members present raised and seconded a motion of no confidence in the President of the RDP. The applicant, by walking out of that meeting, elected not to partake in the further discussion of the motion of no confidence after the motion was seconded. This, continued Kavekatora, is a clear election made by the applicant. He continued and said:

'In any event, it never occurred to me that members of the National Executive Committee are barred from discussion and to raise motions of no confidence. I say that discussion of fitness of those who hold position in political parties is central to any political party, and possibly a

right guaranteed by amongst others one or more of Articles 17 and 21 of the Namibia Constitution.'

[35] The respondents continue and contend that what the applicant seeks to achieve is to prevent continuous discussion and lawful decision-making by the members of first respondent, and this, say Mr Kavekatora he is advised, is an impermissible intrusion in the affairs of political parties. He says, 'in fact, the effect of the far-reaching order sought, is that there will never be a debate on the fitness of those who hold political office in the first respondent'. Mr Kavekatora continues and say:

'It is not properly explained, for example, why the applicant resist that a meeting of the 72 member Central Committee take place, planned in advance, with venues booked and with all logistical arrangements made for the meeting. In fact, the applicant, invited as he is, in his capacity as President of the first respondent can attend the 03-05 November 2017 meeting of the Central Committee and make contributions and representations at the meeting. For example, applicant can remonstrate the processes followed to convene the 03-05 November 2017 meeting at such meeting. In fact applicant can take issue with virtually everything, but as said, at the meeting not in court, as he does now. I place this on record. The attempt to interdict a meeting to be properly convened, and to which applicant was invited on 26 September 2017, will no doubt undermine respondents constitutional rights.'

Was the motion of no confidence in the applicant taken validly?

[36] Before I deal with the question of whether or not, the motion of no confidence in the applicant, was lawfully taken I will briefly digress and deal with one or two contentions advanced by Mr Kavekatora. Mr Kavekatora's assertion that members of the applicant's National Executive Committee cannot be barred from discussing and raising motions of no confidence, because discussing the fitness of those who hold position in political parties is central to any political party, and is a right guaranteed by Articles 17 and 21 of the Namibia Constitution, is on the face of it correct.

[37] But what Mr Kavekatora loses sight of is the fact that constitutions and rules of political parties must be consistent with the Namibian Constitution which is our supreme law. Mr Kavekatora further more loses sight of the nature of the legal relationship that arises from membership of a political party. At common law a

voluntary association like the first respondent is taken to have been created by agreement as it is not a body established by statute.¹⁶ As I have said earlier the first respondent's constitution together with its code of conduct and any other rules collectively constitute the terms of the agreement entered into by its members. Thus the relationship between the party and its members is contractual. It is taken to be a unique contract.

[38] As in the case of an ordinary contract, if the constitution and the rules of a political party, like the RDP, are breached to the prejudice of certain members, those members are entitled to approach a court of law for relief. In the matter of *Saunders v Committee of the Johannesburg Stock Exchange*,¹⁷ the Court said:

'There is no doubt that rules and regulations of a body like the Stock Exchange, just like the rules and regulations of an ordinary club, or the Articles of Association of a Company constitute a contract between its members and that is the reason why any particular member, if the contract is broken to his disadvantage, has the right to come to the Court for the appropriate remedy'.

[39] In this matter, that is the applicant's complaint. He alleges that the members of the National Executive Committee of the first respondent broke the rules. He says:

'... members of the NEC and RDP are bound by the constitution of the RDP and owe to me as a fellow member, a duty to observe and adhere to the terms of that constitution, unless we all agree to the contrary. I did not consent to such a procedure and vehemently object to same. They can thus not act unilaterally.'

[40] The question whether or not the members of the National Executive Committee of the first respondent indeed breach the constitution is matter that is justiciable before this Court and when the court does so, it does not, as Mr Kavekatora seems to suggest intrude in the affairs of political parties.

[42] The second aspect that I deal with is, is the argument that the applicant did not exhaust the domestic (internal) remedies available to him and therefore this Court must dismiss his application.

¹⁶ See *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).

¹⁷ *Saunders v Committee of the Johannesburg Stock Exchange* 1914 WLD 112. 59 at 115.

[43] Mr Hengari who appeared for the respondents argued that it was incompetent for the applicant to have rushed to this Court before the internal remedies available to him, in terms of the first respondent's constitution had been exhausted. In support of this submission Mr Hengari referred me to the matter of *Koyabe and Others v Minister of Home Affairs and Others*¹⁸ where the Constitutional Court of South Africa said:

'Internal remedies are designed to provide immediate and cost effective relief, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigant's access to justice (i.e. court justice), the importance of more readily available and cost effective internal remedies cannot be gainsaid.'

[44] In the matter of *National Union of Namibian Workers v Naholo*¹⁹ this Court per Tötemeyer AJ held that where a statute created an internal remedy, it was a matter of statutory interpretation as to whether that remedy had first to be exhausted before recourse could be had to a court. The mere fact that a statute creates an internal remedy does not imply that access to court is prohibited pending the exhaustion of that remedy.

[45] Discussing the duty to exhaust internal remedies at common law, Hoexter²⁰ notes the following:

'The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted ... (T)here is no general principle at common-law that an aggrieved person may not go to court while there is hope of extrajudicial redress. In fact, there are indications that the existence of a fundamental illegality, such as fraud or failure to make any decisions at all, does away with the common-law duty to exhaust domestic remedies altogether.'

[46] Tötemeyer AJ, in the *Naholo* matter identified two criteria relevant to determining whether the remedy needed to be first exhausted before an aggrieved person can approach court. The first relates to the language of the statutory provision, and the second to the time that the internal remedy will take to pursue and whether,

¹⁸ 2010 (4) SA 327 (CC), paragraph 35.

¹⁹ 2006 (2) NR 659 at paras 50 – 62.

²⁰ Hoexter C: *Administrative Law in South Africa* (Cape Town, Juta 2007) at 479.

given the time that it might take, it would, in effect, deprive an applicant of a remedy as a result of delay. In essence the second question is whether the internal remedy provides an effective remedy. This approach was endorsed and followed by the Supreme Court in the matter of *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated*.²¹

[47] Considering the first of the two criteria identified by Tötemeyer AJ, in the *Naholo* matter the question that arises is whether the first respondent's constitution expressly or implicitly prevents a member, who is dissatisfied with the decision of any of the organs the party (RDP), from approaching a court in all circumstances, until the domestic remedy provided for in the first respondent's constitution has been exhausted.

[48] During oral argument, I enquired from Mr Hengari which provisions of the first respondent's constitution provide domestic remedies for the applicant. His reply was that the National Executive Committee is answerable and reports to the Central Committee, the applicant should therefore first have approached the Central Committee before he decided to approach Court.

[49] In my view, the argument of Mr Hengari is fallacious for two reasons. The first being that, Article 46 of the first respondent's Constitution empowers the National Executive Committee to refer all issues pertaining to serious misconduct (including the violation of the RDP Constitution and RDP Political Program) to the Discipline and Audit Commission. The conduct which the applicant was being accused of is disciplinary in nature, and it is the Discipline and Audit Commission that must investigate it and make a finding on it, the National Executive could therefore not report a disciplinary matter to the Central Committee without first reporting it to the Discipline and Audit Commission.

[50] Second there is nothing in the language of the RDP's constitution that prohibits a member from approaching a court if that member is aggrieved by a decision of one of the organs of the first respondent. Since there is no general principle at common-law that an aggrieved person may not go to court while there is hope of extrajudicial

²¹ 2012 (1) NR 69 (SC).

redress, I am of the view that the applicant was, as he did, entitled to approach this Court for relief.

[51] I have set out the specific clauses in the first respondent's constitution which the applicant claims were violated. It emerges from the papers that the applicant's material grievance concerns the question whether the motion of no confidence was adopted in accordance with the RDP's constitution. Proof of that grievance entitles the applicant to obtain the relief he seeks.

[52] The applicant's main complaint is that the vote of no confidence was discussed and taken when it was not part of the agenda of the meeting of 12 August 2017. The second complaint is that in terms of the first respondent's constitution the National Executive Committee is not the appropriate body to discuss and pass a vote of no confidence in the applicant. The third complaint is that the applicant has, in violation of the RDP's constitution, been found guilty without a proper investigation having been conducted. I now turn to these complaints.

[53] The word 'agenda' means things to be done.²² It, as a general rule, refers to a list of items or matters to be transacted at a meeting. An agenda must be clear, explicit, free from ambiguity, informative and in summary form.²³ An agenda must enable the members to the meeting to ascertain what matters will be discussed at the meeting and, if circulated beforehand, give the members an opportunity on forming some opinion as to the course they will adopt at the meeting.

[54] It is indisputable that the notice of the meeting (which included the agenda) sent out did not notify the members of the first respondent's National Executive Committee that the members' confidence in the President was to be dealt with at the meeting of 12 August 2017. In this matter the National Executive Committee of the first respondent consists of 21 members.²⁴ At its meeting only 18 members were present of these five members walked out leaving only 13 members present at the meeting. The resolution passing a vote of no confidence in the applicant was passed by a majority of 12 with one member abstaining. The question confronting me is whether the resolution adopting a motion of no confidence in the applicant is valid.

²² Arthur Lewin: *The Law, Procedure and Conduct of Meetings in South Africa* 5th Ed Juta at p 37.

²³ *Ibid.*

²⁴ See Article 45 of the RDP constitution.

[55] I am not prepared to go to the length of saying that no resolution whatsoever of the first respondent's National Executive Committee, even of the most trivial routine character, is invalid unless it follows upon the inclusion of the subject matter on the agenda. Common sense would indicate the contrary. It must depend in each case on the importance of the particular matter there in issue. It is sufficient to say that in my view, where the subject matter involves the capability of any of the first respondent's leaders to lead the first respondent, it is essential for the validity of the resolution that the existing directions of the first respondent's constitution as to the procedure for the adoption of that resolution must be strictly carried out.

[56] Mr Kavekatora was of the view that the motion of no confidence in the appellant emanated from points or items that were on the agenda that was sufficient notice. Though the notice is not to be construed with excessive strictness it must give members fair notice of the matters to be dealt with, and any resolution beyond the notice is invalid.²⁵ A fundamental difficulty with the resolution is that the resolution was motivated by the alleged conduct of the applicant. It cannot be gainsaid that resolution to pass a vote of no confidence in the applicant is a sanction imposed on the applicant as result of his conduct.

[57] Article 19.3 of the first respondents constitution provides that the application of sanctions must be preceded by a prudent and meticulous investigation of the accusations laid down and it should be only after the accusations have been duly proved correct that the decision to apply sanctions shall be take and this must be preceded by a fair and adequate hearing where the accused member has been granted a hearing and has been guaranteed an appropriate legal defence. This constitutional prescript was not adhered to. I am therefore of the view that the decision to adopt a motion of no confidence in the applicant was a clear breach of the contractual terms between the applicant and first respondent and can therefore not be allowed to stand. The decision to pass a vote of no confidence in the applicant was unlawful and therefore set aside.

[58] The effect of the vote of no confidence in the applicant was to deprive him of the powers vested in him by the first respondent's constitution. It follows that when the

²⁵ Compare with the case of *Visser v Minister of Labour and Another* 1954 (3) SA 975 (W).

applicant was unlawfully deprived of his power no member of the first respondent could lawfully exercise the President's power, this includes the power to chair meetings of the National Executive Committee and Central Committee of the first respondent, consult with the Secretary General in the preparation of the meetings of the first respondent's Central Committee and the power to chair the meeting of the Central Committee. For this reason the meeting of the first respondent's Central Committee that was planned for the 3rd to 5th November 2017 was unlawful and could therefore not go ahead.

[59] Finally regarding the question of costs. The applicant has succeeded in its application. The normal rule is that the granting of costs is in the discretion of the court and that the costs must follow the course. No reasons have been advanced to me why I must not follow the general rule.

[60] For the reasons that I have set out in this judgment I make the following order:

- a) The *rule nisi* issued out of this Court on 3 November 2017 is hereby confirmed.
- b) The applicant's noncompliance with the forms and service is condoned and this matter is heard as one of urgency, as contemplated in Rule 73 of the Rules of court.
- c) The decision of the National Executive Committee of the RDP, which was taken on 12 August 2017, and in terms of which the National Executive Committee of the RDP adopted a vote of no confidence in the applicant as President of the RDP is declared unlawful and invalid.
- d) The decision to convene a meeting of the Central Committee for 03 - 05 November 2017, to discuss and decide on the vote of no confidence, is declared unlawful and invalid.
- e) The respondents are restrained and interdicted from proceeding with the meeting of the Central Committee of the first respondent, which is slated for 03 - 05 November 2017.

- f) The first to the tenth, twelfth, thirteenth and fourteenth respondents must, jointly and severally the one paying the others to be absolved, to pay the applicant's costs of this application such costs to include the costs of one instructing and one instructed counsel.

S F I Ueitele
Judge

APPEARANCES

APPLICANT:

G NARIB

instructed by Shikale & Associates, Windhoek

FIRST TO THE TENTH,
TWELFTH, THIRTEENTH

FOURTEENTH RESPONDENTS:

J STRYDOM together with U HENGARI

instructed by Theunissen, Louw & Partners,
Windhoek