

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-MOT-GEN-2018/00206

In the matter between:

MEUNDJU JAHANIKA

FIRST APPLICANT

ASSER MBAI

SECOND APPLICANT

HARIKI HEINZ MAUNDU

THIRD APPLICANT

VETARUHE KANDOROZU

FOURTH APPLICANT

EUNICE VEHONGA KAIJERE

FIFTH APPLICANT

NATIONAL UNITY DEMOCRATIC ORGANISATION

SIXTH RESPONDENT

and

UTJIUA ESTER MUINJANGUE

FIRST RESPONDENT

PETER KAZONGOMINJA

SECOND RESPONDENT

ELIA KANDJII

THIRD RESPONDENT

KAPUKATUA KUVARE

FOURTH RESPONDENT

JOSEPH KAUANDENG

FIFTH RESPONDENT

JOSEPH UAPINGENE

SIXTH RESPONDENT

FANUEL HAUKAMBE

SEVENTH RESPONDENT

NOKOKURE VEII

EIGHTH RESPONDENT

DANIEL MAEKOPO

NINTH RESPONDENT

UAHIMISA KAAPEHI

TENTH RESPONDENT

VINCENT KAHUA

ELEVENTH RESPONDENT

KAVENDJII TJAHUHA

TWELFTH RESPONDENT

VETONDISA TJIJENDA

THIRTEENTH RESPONDENT

RUTH BLACK KANGUATJIVI
ELECTORAL COMMISSION OF NAMIBIA

FOURTEENTH RESPONDENT
FIFTEENTH RESPONDENT

Neutral citation: *Jahanika v Muinjangue* (HC-MD-CIV-MOT-GEN-2018/00206)
 [2018] NAHCMD 363 (14 November 2018)

Coram: ANGULA DJP
Heard: 17 October 2018
Delivered: 14 November 2018

Flynote: Interlocutory – Application in terms of rule 67(1)(a) – Referral to oral evidence – Application opposed – Two points *in limine* raised; applicants lack *locus standi*; and that the resolution attached to the founding affidavit does not authorised the applicants to institute legal proceedings – Points *in limine* dismissed – Points of dispute referred to oral evidence.

Summary: The applicants and the respondents are all members of a political parties, the National Democratic Organisation (NUDO) – This application concern a dispute about the leadership of NUDO following disputed Congress held during May 2018 – A dispute of facts has arisen whether the Congress was held or not – The applicants applied to have the dispute referred to oral evidence in terms of Rule 67 (1)(a) – The respondents opposed the application and raised two points *in limine* namely that the applicants lack *locus standi* to bring the main application; and that the resolution attached to the founding affidavit does not authorise the applicants to bring the application.

Court held that the applicants have the *locus standi* to bring the application. Point in *limine* dismissed.

Court further held that *ex facie* it appeared that the resolution authorised the applicants to bring the application

Court held further: That it has a discretion to decide whether or not to refer the disputed facts to oral evidence. The discretion is exercisable whether or not either of the parties has applied for leave to invoke the procedure.

Court held further: That there is a real and genuine dispute of facts on crucial and material areas, necessary for the resolution of the dispute that material dispute was incapable of being resolved without resort to oral evidence.

ORDER

1. The two points in *limine* namely that the applicant lack locus standi and that the resolution did not authorise the applicants to bring the application are dismissed.
2. The matter is referred to oral evidence in respect of the following points in dispute:
 - 2.1 Whether or not the NUDO Congress proceedings there is a practice or procedure for an opened and closed sessions of the Congress;
 - 2.2 Whether or not the proceedings of the Congress were formally opened and if so at what stage of the proceedings were the proceedings disrupted; and
 - 2.3 Whether or not the second applicant called off or postponed the meeting and if so the reason(s) therefor.
3. Each side is allowed to call not more than three witnesses, if so advised.
4. The matter is postponed to 18 – 20 March 2019 at 09h00 to hear such oral evidence.
5. The costs of this application shall be the costs in the main application.

RULING

ANGULA DJP:

Introduction

[1] This interlocutory ruling concerns two points *in limine* raised by the respondents in the main application. It further deals with an application by the applicants to refer certain parts of the main application to oral evidence in order to resolve a dispute of facts which has arisen.

[2] In order to place the ruling in context, it is necessary to briefly set out the dispute between the parties in the main application.

[3] The natural persons in this application are all members of the National Unity Democratic Organisation (NUDO), a registered political party with seats in the National Parliament. I shall also, where applicable, refer to NUDO as 'the Party'; refer to 'the respondents' as such but exclude the Electoral Commission of Namibia which did not join in these proceedings.

[4] The dispute between the applicants and the respondents (with the exception of the fifteenth respondent, the Electoral Commission of Namibia) erupted at the NUDO Congress which was slated to take place over two days, 25 – 26 May 2018 at Windhoek. The purpose of the Congress was to elect the Party's leadership, office bearers and to formulate the political programme.

[5] Notwithstanding the fact that the delegates and other members of the Party gathered at the Greiters Centre, outside Windhoek, it is a matter of dispute between the applicants and the respondents whether the Congress envisaged by the NUDO Constitution indeed took place.

[6] The applicants' version is that the Congress never commenced with its closed session and that following a disruption of the proceedings, it was called off until further notice and that the leadership therefor remains in office. The respondents'

version is that after the Congress was opened on Friday, 25 May 2018, a deadlock arose about some branches which had been excluded. It was decided that the National Executive Committee must convene an emergency National Conference the following morning, ie Saturday, 26 May 2018 so that the latter can discuss the issue of the exclusion of the branches in question. The proceedings were adjourned. However, when the proceedings resumed the following morning, there was no resolution from either the National Executive Committee or the National Council. Those delegates who were in attendance proceeded with the Congress and elected a new leadership.

[7] The applicants then launched the main application seeking orders *inter alia* that: the purported elections held on 26 May 2018 at Greiters Centre be declared null and void for lack of compliance with the Constitution of NUDO; the purported outcome that may have arisen from the purported elections held on 26 May 2018 at Greiters Centre be declared null and void for lack of compliance with the Constitution of NUDO; the respondents be restrained and interdicted from passing off as office-bearers of NUDO on account of the purported elections; the respondents be restrained and interdicted from interfering with the applicants' possession of NUDO's Head Office situated at Erf No. 188, Clemence Kapuu Street, Katutura, Windhoek; the respondents be ordered to vacate and restore possession and control of NUDO's boardroom also situated at the aforementioned Erf and that the respondents be ordered to pay costs of the application.

[8] The respondents raised two points *in limine*. First, that the applicants lack *locus standi* and second, the resolution attached to the founding affidavit does not authorise the applicants to bring the application. I proceed to consider the first point *in limine*.

Lack of *locus standi*

[9] In support of this point the deponent to the respondents' opposing affidavit alleges that the document purporting to be a resolution taken by the emergency meeting of NUDO's National Executive Committee is invalid. This is so, because article 20(6) of NUDO's Constitution stipulates that 15 members of the National Executive shall have the right to propose the holding of an emergency meeting. In

this regard the deponent points out that it appears from the resolution that only 10 members of the said Committee attended the meeting instead of 15. Furthermore, the meeting was not called by 15 members as stipulated by the Constitution but was called by 10 members only.

[10] In opposition to this point *in limine* the deponent to the applicants' main opposing affidavit denies that article 20(6) requires that the emergency National Executive Committee be attended by 15 members. He points out that the Article only stipulates that the holding of the meeting be proposed by 15 members of the Committee. The deponent further states that all the members of the Committee were invited; and that 10 out of 18 members of the Committee were present. Furthermore, the first, fourth, seventh, eighth, ninth, eleventh and twelfth respondents were invited but absented themselves without an apology.

[11] On a proper reading of the relevant articles of NUDO's Constitution it would appear to me that applicants are correct in their interpretation of the import of Article 20(6) of the Constitution. The Article reads: 'Fifteen members of the National Executive Committee shall have the right to propose the holding of an emergency Executive meeting'. The wording of the Article is clear; 15 members of the Committee have the right to propose the holding of the Committee.

[12] As regards to the requisite quorum of the National Executive Committee, Article 13(9)(j) stipulates that 'its quorum shall be 50 per cent plus 1 of its members'. According to the applicants' undisputed version, the Committee comprises of 18 members and 10 members attended the meeting.

[13] On the question whether the meeting was properly convened, it appears from the resolution attached to the founding affidavit marked 'A' that the third applicant Mr Maundu, the National Chairperson convened and presided over the meeting of the National Executive Committee in compliance with the provisions of Article 24(3)(b) of the Constitution which provides thus that: 'National Chairperson; presides over their National Executive Committee'. *Ex facie* the document it purports to be what it is, ie a resolution.

[14] It follows therefore from the foregoing that the resolution of the National Executive Committee was adopted at a duly convened and constituted meeting of the said committee.

[15] This point *in limine* stands to be dismissed. I next move to consider the second point *in limine*.

Resolution does not authorise the applicants to institute these proceedings

[16] The deponent on behalf of the respondents states that he has been advised that the basis on which the application has been instituted is impermissible because the first to the fifth respondents lost their positions in the Party following the elections which took place on 26 May 2018. He further states that he has been advised that under those circumstances the applicants ought to have brought the application in their personal capacities. In addition even if it were to be accepted that the resolution was validly taken, it does not authorise the applicants to bring this application.

[17] On behalf of the applicants, it is denied that they lost their positions in the Party as office bearers and that their terms of office came to an end following the said elections. The applicants reiterate that the Congress never took place as it was called-off before it could formally commence with its business.

[18] In the light of the parties' conflicting claims, it is necessary to resort to case law in order to determine which version should prevail. In this connection in the *National Union of Namibian Workers v Nahole*¹ the court held with regard to the respondent's bare denial, that:

'If the respondent offers no evidence at all to suggest that an applicant is not properly before Court, a minimum of evidence will be required from the applicant to establish authority. This is the import of the frequently followed judgment of the Mall (Cape) matter *supra*. In my view, this principle should apply if the respondent avails himself of a mere non-admission or a tactical denial of authority without placing evidence before court to suggest that the applicant is not properly authorised.'

¹ 2006 (2) NR 659 (HC).

[19] In the present matter the respondents have not produced any evidence to support their assertion that the applicants have not been properly authorised to launch these proceedings. I have earlier found that the resolution authorising the applicants to bring the application has been adopted at a duly convened and constituted body of NUDO which is authorised by the Constitution to do so, and has these been properly adopted.

[20] If regard is to be had to point number 4 of the Minutes of Emergency National Executive Committee, it reads:

'Rectification of urgent application Hon. Vetaruhe Kandorozi explained the Court proceedings as well with answering affidavits to the meeting which ended up in the case to be stripped (struck) from the roll because of no urgency in it.'

Resolution

The meeting resolved to authorise Meundju Jahanika, NUDO Secretary General to institute a legal action in defence of NUDO and in terms of the Constitution in future.'

[21] There is no doubt that where the introductory paragraph speaks of the case 'being struck from the roll due to lack of urgency'; it refers to the urgent application² which was brought by some of the respondents and served before this Court a few days before the Congress was scheduled to take place. The applicants in that case, some of whom, are the respondents in the present matter, sought an order, *inter alia* to interdict the first and sixth applicants in this matter (who were the respondents in that urgent application) not to proceed in any way with the implementation of the decision taken by the first applicant on 22 May 2018 and that the sixth applicant shall not proceed with its national congress earmarked to take place on 25 May 2018. The application was struck from the roll by the Court, as the Court was of the view that the alleged urgency was self-created. The resolution which is mentioned in this regard was in connection with the preceding events before the disputed Congress.

[22] In so far as the validity of the resolution is concerned, it is to be noted that Article 13(9)(i) of the Constitution provides that: 'The National Executive Committee

² *Stefanus Zakaapi v National Unity and Democratic Organization*, HC-MD-CIV-MOT-GEN 2018/00167.

shall: Institute legal proceedings for and defend any legal proceedings against the party'. It would therefore appear that quite apart from the fact that the resolution was adopted at a duly convened meeting of the National Executive Committee, the Committee itself is empowered by the Constitution to institute and defend legal proceedings for and against the Party.

[23] Taking into account the foregoing facts and considerations, my finding in respect of this point, is that the respondents failed to substantiate their allegations that the resolution presented by the applicants as the source of their authority to institute these application, does not authorise the institutions of this proceedings. On the contrary, it is my finding, that the resolution validly and unequivocally authorises the applicants to institute this proceedings pursuant to Article 20 (13.9)(i) of the NUDO Constitution. It follows therefore this point *in limine* equally falls to be dismissed.

Application to refer certain part of the dispute fact to oral evidence

[24] In this interlocutory application the applicants, apply in terms of 67(1)(a) of the rules of this court to have certain parts or portions of the proceedings to be referred to oral evidence. Four points for referral have been identified. It is submitted on behalf of the applicants that a dispute of facts in respect of those points was not reasonably foreseen.

[25] The application is opposed by the respondents who raised three points of a technical nature. These are that: the applicants failed to submit a report in terms of rule 32(9) and (10); secondly, the application is defective in that it was not accompanied by a supporting affidavit; and finally, that the application lacks merits.

[26] In respect of the foregoing preliminarily points raised on behalf of the respondents, the court is of the view that they lack merit and need not delay the court from moving to the real issues for determination as required by rule 1(3) of this courts' rules. I proceed to deal with the applicants' application for referral of the identified disputed issues to oral evidence.

Referral to oral evidence

[27] The approach by the court to the referral of disputes fact to oral evidence has been laid down in the classic case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*³. The court has a discretion to decide whether or not to refer the disputed facts to oral evidence. The discretion is exercisable whether or not either of the parties has applied for leave to invoke the procedure. The court may refer the disputed facts to oral evidence even where the respondents resulting in such, raised the dispute by means of a counter-application.

[28] In the present matter, the court is satisfied that there are real and genuine disputes of fact on crucial and material issues, necessary for the resolution of the dispute in this matter. Such material dispute is incapable of being resolved without resort to oral evidence. The court is of the considered view that if this approach is not adopted, the alternative option, which is referring this matter to trial, will result in a protracted and costly trial. In adopting this route, the court takes into account that the NUDO Party has seats in the National Parliament and as a result, its dispute needs to be resolved without delay in order for it to participate in the National discourse in Parliament.

[29] Taking into account the foregoing considerations and facts, the court is inclined to invoke the procedure envisaged by rule 67 which deals with the procedure for referral to oral evidence of the rules of this court.

[30] In the result I make the following order:

1. The two points in *limine* are dismissed.
2. The matter is referred to oral evidence in respect of the following points of dispute:
 - 2.1 Whether or not the NUDO Congress proceedings there is a practice or procedure for an opened and closed sessions of the Congress;

³ 1949 (3) SA 1155 (T)

- 2.2 Whether or not the proceedings of the Congress were formally opened and if so at what stage of the proceedings were the proceedings disrupted; and
- 2.3 Whether or not the second applicant called off or postponed the meeting and if so the reason(s) thereof.
3. The matter is postponed to 18 – 20 March 2019 at 09h00 to hear such oral evidence.
4. The costs of this application shall be the costs in the main application.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANTS:

T Muhongo

instructed by Tjitemisa & Associates, Windhoek

FIFTH AND

TENTH RESPONDENTS:

R Rukoro

instructed by Kadhila Amoomo Legal Practitioners,
Windhoek