REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING *I.T.O.* PRACTICE DIRECTIVE 61

CASENO. HC-MD-CIV-MOT-GEN-2018/00413

In the matter between:

MIRJAM SHITUULA	**1ST APPLICANT**
SELMA MEGAMENI NAMBONGA	**2ND APPLICANT**

and

SWAPO PARTY	**1ST RESPONDENT**
SECRETARY-GENERAL OF SWAPO PARTY	**2ND RESPONDENT**

Neutral Citation: *Shituula v Swapo Party* (HC-MD-CIV-MOT-GEN-2018/00413) [2018] NAHCMD 403 (6 December 2018)

Coram:	Masuku, J
Heard on:	**27 November 2018**
Delivered on:	**6 December 2018**

ORDER

1. The applicants be and are hereby granted leave to withdraw the application contemplated in Part A of the Notice of Motion dated 15 November 2018.

2. The applicants be and hereby are granted leave to, on or before 05 December 2018, bring an application for the joinder of all such persons as they may be advised to join as parties contemplated in Part B of the Notice of Motion dated 15 November 2018.

3. The applicants are granted leave to bring the application for joinder contemplated in paragraph 2 above by way of substituted service in a manner to be endorsed at a status hearing on 06 December 2018.

4. The case is postponed to 06 December 2018 at 08:30 for a status hearing to determine paragraph 3 hereof and the further conduct of the matter in so far as the further exchange of papers in relation to Part B of this application is concerned. Papers in relation to Part B of this application is concerned.

5. The applicants are ordered to pay the costs of the respondents at the normal scale, consequent upon the employment of one instructing and two instructed counsel.

REASONS FOR THE ORDER

MASUKU J:

Introduction

[1] On 27 November 2018, after listening to argument presented by counsel for both parties, namely the applicants and the respondents, I issued an order as follows:

‘1. The applicants be and are hereby granted leave to withdraw the application contemplated in Part A of the Notice of Motion dated 15 November 2018.

2. The applicants be and hereby are granted leave to, on or before 05 December 2018, bring an application for the joinder of all such persons as they may be advised to join as parties contemplated in Part B of the Notice of Motion dated 15 November 2018.

3. The applicants are granted leave to bring the application for joinder contemplated in paragraph 2 above by way of substituted service in a manner to be endorsed at a status hearing on 06 December 2018.

4. The case is postponed to 06 December 2018 at 08:30 for a status hearing to determine paragraph 3 hereof and the further conduct of the matter in so far as the further exchange of papers in relation to Part B of this application is concerned. Papers in relation to Part B of this application is concerned.

5. The question of costs in relation to Part A of the application is reserved for determination until 06 December 2018.’

Background

[2] The applicants had approached this court on urgency, seeking relief, the bases of which I will not capture for the purposes of this brief ruling. The relief sought by the applicants was the following:

‘1. Leave is granted to dispense with the time periods, forms and service provided for in the Rules of the High Court of Namibia, enrolling this matter for hearing on the urgent roll of this Court and disposing of it in such a manner and in accordance with such procedure that is deemed appropriate under Rule 73.

2. Pending the final determination of the relief sought in Part B of this notice of motion, the first respondent is interdicted and restrained from proceeding with its Extra-ordinary Congress scheduled for 29 November to 2 December 2018.

3. The first respondent is directed, within five days of the date of this order to notify all the members of Congress whose membership is impugned, namely those persons

listed in the attachments "**MS6", "MS 7", "MS 8", "MS 9", "MS10"** and **"MS12A"** to the founding affidavit, of this application and of the relief sought in both Parts A and B.

4. It is directed that the costs of Part A in this notice of motion are to be determined at the hearing of Part B, unless any of the respondents oppose the relief sought in Part A, in which case, those that so oppose it are ordered to pay the costs of Part A, jointly and severally, the one paying, the other to be absolved.

5. Further and/or alternative relief.'

[3] The respondents filed papers opposing the relief sought, including the interdict sought by the applicants. In particular, the respondents took the point of law *in limine* of non-joinder, together with other points of law that need not be adverted to at this juncture because they were not argued.

[4] The pith and marrow of the respondents' argument was that there are parties who have a direct and substantial interest in the matter and the relief sought, who have not, however, been cited nor served with the application. It was Mr. Ngcukaitobi's submission that these parties have a right to argue all the legal questions that arise, including those raised *in limine,* particularly that of urgency, raised by the present respondents.

[5] Mr. Madonsela for the applicants argued that the point of non-joinder, although well articulated by his opponent and the principles set out are not disputed, the respondents had not made out a proper case for non-joinder, and that the point of law should be dismissed and for the matter to proceed.

[6] He argued in the main, and quite forcefully too, that the persons alleged to be entitled to be joined do not have any peculiar interest outside the 1st respondent. As long as the 1st respondent is cited, he further contended, all its hands, feet and other important organs will have been made aware and their interests taken care of, thus obviating the need to serve each and every member of the 1st respondent, I understood him to say.

[7] In *Fernandes v Baleia do Mar Industrial Safety Supplies CC*[1], Angula DJP dealt with the issue of intervention by a party to existing proceedings. He held that such a party must show that he or she has a direct and substantial interest in the subject matter of the proceedings and that those interests are likely to be prejudiced by the judgment or order the court may be minded to issue.[2]

[8] It would appear to me that the law applicable to intervention, is the same as that which obtains where it is alleged that a party, who has a direct and substantial interest in the proceedings, has not been joined. It is just a converse regarding the parties not involved or seeking to be involved. In the one case, a party seeks to be joined and in the other, it is argued that a party that needs to have been joined has not been so joined. The test, in both instances is markedly similar.

[9] In *Independence Catering (Pty) Ltd and Others v Minister of Defence and Others,*[3] this court held the following regarding an application for joinder:

'It is now our settled position that a direct and substantial interest is an interest in the right which the subject matter by the litigant and not merely a pecuniary interest, . . . These courts have adopted a paradigm shift towards the strict application of this principle to an extent that where the need arises for joinder they will ensure that interested parties are afforded an opportunity to be heard . . .'

[10] In this case, there is, for instance, the Central Committee, which in terms of the 1st respondent's resolution, and the 1st respondent's constitution,[4] is to organise the Extra Ordinary Congress. It has not been joined in these proceedings although it has an interest in the matter, or less still, in the *dictum* cited above, has a right to be afforded an opportunity to be heard before any order is granted touching upon the deferred congress. It may have light to

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[1] (2017/00204) [2018] NAHCMD 337 (17October 2018).
[2] *Ibid* at para [34].
[3] 2014 (4) NR 1085 (HC) at 2093 para 24.
[4] See Art. IV (6) of the SWAPO Constitution.

shed regarding why it would inopportune or improper to halt the congress train, as it were. See generally, in this regard *Mungendje v Kavari*.[5]

[11] Furthermore, it is common cause that the congress sought to be interdicted, was scheduled pursuant to Resolution 18 at the last Congress in November 2017, where certain issued needed to be addressed because time did not permit. In this regard, the individual delegates who formed part of the Congress and who had outstanding issues to deliberate, have an interest and must have a say where an order is sought to interdict the Congress which they are, by virtue of their positions within the party, and their previous participation, entitled attend and to contribute to the debate.

[12] Resolution 18.3, in particular, reads as follows:

'To direct that delegates to the 6th congress be the delegates to the Extra-Ordinary Congress.'

They thus have a direct and substantial interest in the order sought. It would thus not be sufficient to merely cite and serve the 1st and 2nd respondents in the circumstances where delegates entitled and expected to attend, are deprived of having a say in the interdict sought to be obtained by the applicant.

[13] Furthermore, when regard is had to para 4 of the notice of motion, quoted in full above, the applicants seem to recognise the rights of the persons referred to in the annexures but those persons would have, if the order had been issued in terms of Part A, been deprived of the right to have a say in the granting of the order, although the applicants appear to recognise their right and interest by seeking that they be served with the order interdicting the Congress *ex post facto*. That cannot be fair, nor in the interests of justice. It is for the following brief reasons that the order was issued.

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[5] (HC-MD-CIV-MOT-GEN-2017/00399) [2018] NAHCMD 153 (22November 2017), per Angula DJP.

Costs

[14] The respondents' counsel argued that since the point relating to non-joinder was upheld, the respondents are entitled to their costs without more. Mr. Madonsela, for his part, argued that since Part B is still to be heard, the issue of costs in relation to Part A should be reserved for future determination, when the determination of the sustainability of Part B is also decided.

[15] I do not agree with the applicants in their posture on this matter. The ordinary rule applying to costs is that costs follow the event. In this case, a preliminary point of law was upheld in the respondents' favour and there is no reason why they should be deprived of their costs even at this stage.

[16] Second, it is uncontested that the applicants decided, after the upholding of the point relating to non-joinder, to withdraw Part A of the application altogether, thus conceding defeat in the process. A withdrawal of a claim o part thereof is normally accompanied with a tender for costs. I can see no reason why the respondents should be denied of their costs in this matter.

[17] Lastly, the applicants, in prayer 4, quoted in full above, asked for costs in their favour in relation to Part A immediately in the event that any of the respondents opposed the grant of Part A unsuccessfully. What is sauce for the goose must be sauce for the gander. It cannot be that where the respondents successfully oppose the grant of Part A, and it is accordingly withdrawn, then the costs thereof must wait for determination of Part B as well. The applicants cannot be allowed to have their cake and eat it as well.

[18] In the premises, an order for costs in relation to Part A of the notice of motion, is granted in favour of the respondents.

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TS Masuku

Judge

APPEARANCES

APPLICANTS:	TG Madonsela (with him T Muhongo) instructed by Isaacks & Associates, Windhoek
RESPONDENTS:	TN Ngcukaitobi (with him S Makando) instructed by Conradie & Damaseb, Windhoek