REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-MOT-GEN-2021/00155

In the matter between:

AFRICAN STARS SPORTS CLUB (PTY) LTD	**APPLICANT**

and

COLLIN BENJAMIN In his capacity as Trustee of **BKK AUASS SPORT TRUST**	**1ST RESPONDENT**
GUIDO KANDZIORA In his capacity as Trustee of **BKK AUASS SPORT TRUST**	**2ND RESPONDENT**
WIELAND KLINGER In his capacity as Trustee of **BKK AUASS SPORT TRUST**	**3RD RESPONDENT**
MOBILE TELECOMMUNICATIONS LTD	**4TH RESPONDENT**
HOPSOL SOLAR POWER LIMITED	**5TH RESPONDENT**
ELIM PRIMARY SCHOOL	**6TH RESPONDENT**
ONAANDA FOOTBALL ACADEMY	**7TH RESPONDENT**
RAMBLERS CLUB / ST.G	**8TH RESPONDENT**
RIVERHEIGHTS FOOTBALL ACADEMY	**9TH RESPONDENT**
GRASSROOTS SA	**10TH RESPONDENT**
CHRIS FOOTBALL ACADEMY	**11TH RESPONDENT**

DEUTSCHER TURN-UND SPORTVEREIN 12TH RESPONDENT
DELTA SECONDARY SCHOOL WINDHOEK 13TH RESPONDENT
SWALLOWS FOOTBALL CLUB 14TH TO 24TH RESPONDENTS

Neutral Citation: *African Stars Sports Club (Pty) Ltd v Collin Benjamin (In his capacity as Trustee of BKK Sport Auass Sport Trust* (HC-MD-CIV-MOT-GEN-2021/00155 [2021] NAHCMD 263 (27 May 2021).

CORAM: MASUKU J
Heard: **29 April 2021**
Delivered: **27 May 2021**

Flynote: Civil Procedure – urgent application – Rule 73 – granting of interim relief – jurisdiction of the court to entertain a matter involving football – non-joinder of a necessary party – discipline in motion proceedings.

Summary: The applicant approached the court on an urgent basis, seeking the granting of an interim order allowing the applicant's youth teams to participate in a youth football tournament. This was after the applicant had applied and participation of its teams was accepted. A decision was then made by the respondents excluding the applicant's teams from participating. The applicant sought the granting of a temporary interdict for its teams to participate, pending the filing of an action to set aside the decision barring the applicant's participation in the said tournament. The respondents raised certain points of law *in limine,* including non-compliance with rule 73, the non-joinder of the Namibia Football Association and that the court lacks jurisdiction to entertain the matter.

Held: that since the matter involves the interests of children, it should be treated as an urgent matter because the rights of children are *sui generis,* unless the circumstances and facts of such delay are palpably unreasonable.

Held that: the applicant was not culpably remiss in its institution of the application.

Held further: that it is not correct that the Supreme Court judgment of *Namibia Premier League v Namibia Football Association* (SA 71-2019) [2020] NASC (19 February 2020) totally precludes parties from approaching this court for relief. The court may decline to exercise its jurisdiction because of the availability of internal remedies within the NFA structures.

Held: that because the applicant is a member of an organization that was expelled by the NFA, the applicant did not have a contractual relationship that binds the applicant to the remedies availed by the NFA structures.

Held that: the decision by the respondents to bar the applicant from participating in the tournament without a hearing, fell within the purview of public law, namely, administrative law, because of the lack of a contractual relationship between the applicant and the NFA.

Held further: that in the circumstances, the court may exercise its jurisdiction over the matter.

Held: that a party raising the plea of non-joinder is enjoined to state the nature and basis of the plea with such precision to enable the court and the other side to appreciate and to deal with the said plea. This the respondents failed to do.

Held that: the point of non-joinder had not been made out in the papers and in any event, the NFA had been served with the application via email and would have been aware of the application.

Held further: that the discipline in motion proceedings, as stated in *Nelumbu v Shikumwa* (SA 27-2015) [2017] NASC (13 April 2017), is that the affidavits constitute both the pleadings and the evidence. As such, parties are enjoined to fully plead the nature and basis of their claim or defence in the papers and that any annexures relied on must point out the exact portions relied on in the papers.

Held: that the requirements for the granting of an interim interdict, as set out in *Nakanyala v Inspector-General of Namibia and Others* [2011] NAHC 190, are (i) a

prima facie right; (ii) a well-grounded apprehension of harm if interim relief is not granted; (iii) the balance of convenience favours the granting of an interim interdict and (iv) the applicant has no other satisfactory remedy.

Held that: the applicant had satisfied the requirements for the granting of an interim interdict, considering that the applicant had not been afforded a hearing before the prejudicial decision was taken against it.

ORDER

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1. The Applicant's non-compliance with Rule 73(1), (3) and (4) of the Rules of this Honourable Court, in so far as it pertains to forms and service is condoned, and this application is heard as one of urgency.

2. Pending the final adjudication and determination of the action to be instituted by the applicant within thirty (30) court days of the order herein, amongst others, to declare invalid and set aside the first to the third respondents' ("respondents") decision of 24 March 2021 (repudiating, alternatively, revoking, alternatively, refusing, alternatively, barring, the applicant's under 15/17/19 teams participation in the MTC Hopsol Youth Soccer League for the year 2021), the respondents are restrained and interdicted from implementing their aforesaid decision and are ordered and directed to permit the participation of the applicant's under 15/17/19 teams in the MTC Hopsol Youth Soccer League, commencing the next round of fixtures after the order herein.

3. The first to the third respondents are directed to pay the costs of this application, jointly and severally, the one paying and the other being absolved such costs being the costs of one instructing and one instructed legal practitioner.

4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Serving before court for judgment, is an application lodged by the applicant, African Stars (Pty) Limited. In it, the applicant seeks, on an urgent basis, certain interdictory relief that will be enumerated as the judgment unfolds.

[2] Briefly stated, the main object of the current application is to enable the applicant's youth teams to be allowed to participate in a youth soccer tournament, pending the adjudication and determination of an action to be lodged by the applicant. In the said action, the applicant will seek an order declaring a decision made by the 1st to 3rd respondents on 24 March 2021, barring the applicant's youth teams from participating in the MTC Hopsol Youth Soccer League for the current year unlawful.

[3] The application is hotly opposed by the 1st to 3rd respondents. They, in this regard, filed an affidavit in opposition deposed to by Mr. Collin Benjamin, the 1st respondent. In it, the said respondents raised certain points of law *in limine,* with which the court is enjoined to deal. Additionally, they pleaded over on the merits and in essence moved the court to dismiss the application with costs.

The parties

[4] The applicant, as intimated above, is African Stars (Pty) Ltd, a company duly incorporated in accordance with the Company laws of this Republic. It trades under the name African Stars Football Club and has its premises situate at 15 Garden Street, Windhoek. It has, in its affidavit, deposed to by Mr. Lesley Kozonguizi, its

Chief Executive Officer, described itself in colourful epithets in terms of its achievements. I will not burden this judgment with that eulogy.

[5] The 1st, 2nd and 3rd respondents are Messrs. Collin Benjamin, Guido Kandziora and Wieland Klinger, all male adults who are trustees of an entity known as BKK Auass Sport Trust. The 4th respondent, is Mobile Telecommunications Limited (MTC) and the 5th respondent, is Hopsol Solar Power Limited. Both the 4th and 5th respondents are sponsors of a youth soccer tournament called MTC Hopsol Youth Soccer league.

[6] The 6th to 24th respondent are various youth soccer teams which are engaged in the youth soccer league. No particular relief is sought against any of them, save the interest that they may have in the relief that the applicant seeks, as hazarded in the opening paragraphs of this judgment.

Background and the applicant's case

[7] The facts that give rise to this dispute appear to be largely common cause and are not the subject of much disputation. It may be the legal consequences that attach to those facts that may generate controversy, particularly seen in the light of the relief the applicant seeks in its notice of motion.

[8] It is pertinent to mention that as far as the current application goes, it is the first three respondents who have opposed the application. The rest of the respondents, including the sponsors, have not raised a finger, suggesting that they are content to abide by the decision of the court ultimately, whichever way the matter goes. I will, for ease of reference, refer to the applicant as such. The 1st to 3rd respondents will be collectively referred to as 'the respondents'. Should a need arise to refer to any other respondent, including the sponsors, they shall be referred to by the name cited or as the court may abbreviate for easy reference.

[9] The applicant sets out the facts giving rise to the dispute as follows: a youth soccer tournament was organised in or about February 2021. This tournament was sponsored by MTC and Hopsol. The applicant received an email from a Mr. Harald

Fulle, the Chief Executive Officer of the Namibia Premier League (NPL), who doubles up as the administrator of the Youth Soccer League (YSL). It is common cause that the applicant, like the other youth teams, received an invitation to participate in the tournament.

[10] Certain registration forms and other documents were to be completed and sent to the respondents via email. It is the applicant's case that it completed the necessary documents and sent them to the respondents and this is also common cause.

[11] Thereafter, the applicant received further communication from a Ms. Cynthia Balzar, the YSL administrator, inviting the applicant's CEO to attend an informative meeting scheduled for 2 March 2021 in relation to the YSL. The applicant's CEO attended the meeting and he attached minutes of the said meeting to the founding affidavit.

[12] It is the applicant's further case that its youth teams' participation was confirmed in the meeting, which recorded that club registration formalities had already been done. It is common cause that this included the applicant. At the meeting the participants were advised that the YSL would accommodate under 19 teams.

[13] By email dated 4 March 2019, the applicant's CEO advised Ms. Balzar that the applicant intended to apply for the inclusion of its under 19 team to participate in the YSL. Confirmation was received from Ms. Balzar that the applicant's under 19 teams had been entered onto the registration list. Further communication was received from Ms. Balzar regarding further details of the YSL, including the date for the kick-off of the tournament, namely 26 to 28 March 2021. This email was followed up by another from Ms. Balzar, dated 18 March 2021 in which the latter thanked all the teams that had submitted all the requisite documents on time. This is also common cause.

[14] It is the applicant's case that with the foregoing steps having been taken to invite it to participate and register its team to participate in the tournament, together with respondents' acceptance of the applicant's youth team, the 1st respondent on 23 March 2021 telephonically contacted the applicant's CEO. In the telephonic

conversation, the 1st respondent advised the applicant's CEO that unfortunately the Namibia Football Association (NFA) threatened not to accept the YSL as a member of the Khomas Region League structure if it allows the applicant's continued participation in the YSL.

[15] At the request of the applicant's CEO, the 1st respondent committed what he had telephonically communicated to the former to writing by email dated 25 March 2021. The said email reads as follows:

'**RE: Unable to accommodate African Stars in the MTC Hopsol league**

Dear Uncle Lesley,

I trust this communiqué finds you well.

The MTC Hopsol Youth League is in the process of obtaining full membership from the Khomas Football Region. Currently we hold the status of Provisional membership.

Kindly note as a member of the Khomas Football Region and subsequently a member of the Namibian Football Association we are obliged to adhere to Article 13(i) of the Namibia Football Association and the Khomas Football region Statutes.'

[16] It is the applicant's case that when it applied for registration for the YSL, its attention was never drawn to article 13 mentioned above and it was not stated as a pre-condition for registration and participation in the tournament. It is the applicant's further case that in any event, the email in question does not state how the applicant falls foul of the said article 13.

[17] Pursuant to the receipt of the email, the applicant's Mr. Patrick Kauta engaged the 1st respondent with a view to amicably resolving the issue of the applicant's youth teams participating in the tournament. These attempts were fruitless. The applicant then engaged its legal practitioners of record. A letter was thereafter written on the applicant's behalf by its legal practitioners of record. It is dated 1 April 2021 demanding the withdrawal of the decision made on 24 March 2021, failing which the applicant would approach the court for appropriate relief.

[18] In response thereto, the respondents indicated that they had not been afforded sufficient time to deal with the issue, in view of two public holidays that intervened. They indicated however, that a meeting of Trustees was scheduled for 29 April 2021. They promised to deliberate on this matter during that meeting and further undertook 'to provide a comprehensive response by the 30th April 2021.'[1]

[19] By letter dated 13 April 2021, the applicant's legal practitioners indicated that they were of the view that the exclusion of their youth team was illegal and premature because the Trustees were still to meet and discuss the issue. In the interregnum, the applicant insisted that it should remain part of the YSL and should participate in all the matches scheduled, pending the outcome of the decision. An invitation was extended to the respondents to revert by 14 April 2021, failing which the applicant would approach the court on an urgent basis.

[20] It would not appear that there was any response to this letter. It is now history that the applicant did in fact lodge an application before this court on an urgent basis. It is the applicant's case that it has a clear right to participate in the YSL as a result of its acceptance by the respondents. The applicant further contends that its exclusion from the YSL and the basis thereof are not contemplated in the rule of the YSL.

[21] It is the applicant's further case that the decision to oust it from the YSL was done without due process, just cause or basis. The applicant contends in that connection that it enjoys good prospects of success in challenging the decision in question in an action that it will institute in due course. It is the applicant's further contention that it is unlawfully locked out of the YSL and the respondents are not willing to correct the error they made.

[22] The applicant further states that the balance of convenience favours the grant of the interim relief because a number of its young players who were duly registered stand to be prejudiced if an interim order is not granted. The applicant accordingly reiterates that it was granted a right of participation in the YSL and that such right cannot be withdrawn willy-nilly without any lawful basis, due process or just cause.

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[1] Page 61 of the book of pleadings, Annexure LK 13.

[23] Finally, it is the applicant's case that it has complied with all the respondents' requirements to participate in the YSL and remains desirous of so participating. There is no other suitable remedy, further contends the applicant, that would meet the demands of justice in this case than to grant the relief prayed for. This would serve to protect its rights and those of the young players, pending the action to be instituted.

[24] Regarding urgency, the applicant states in its founding affidavit that it approached the court with the requisite promptitude and it has not been culpably remiss in its approach to the court. It is the applicant's further case that the matter is rendered urgent by continued harm, namely, the illegal exclusion of its teams from participating in the YSL. The applicant further contends that it is unable to institute this application in the normal course as it would take a period of six months to finalise the matter by which time the harm it seeks to forestall would have eventuated to its eternal prejudice, so to speak.

[25] The applicant further alleged that it could not afford any further wastage of time and further being locked out as the tournament proceeds in earnest. No substantial redress would in the circumstances, be afforded to it in due course. It accordingly requested the court to exercise its discretion in terms of rule 73 and grant the applicant the relief sought on an urgent basis.

The respondents' case

[26] What is the respondents' take on the application? The respondents filed an affidavit opposing the application. It is deposed to by the 1st respondent, who indicates that he deposes to the affidavit on behalf of the co-respondents, namely, the 2nd and 3rd respondents.

[27] The respondents first raised the question of non-joinder of the NFA and also the issue of jurisdiction. They allege that the NFA has an interest in this matter such that it ought to have been joined as a party in the proceedings. Regarding jurisdiction, it is the respondents' case that this court does not have jurisdiction to entertain this matter in view of the provisions of Article 64(1) of the NFA Constitution.

[28] Another issue raised on the respondents' behalf was that the applicant failed to exhaust internal remedies by approaching the NFA prior to launching this application. The respondents further took issue with the question of urgency, claiming that the urgency that is alleged to exist is created by the applicant in that it waited for more than a month before launching this application. On the basis of the foregoing, the respondents urged the court to non-suit the applicant.

[29] I am of the view that it is necessary, in the circumstances, to deal in the first instance, with the points of law *in limine* raised by the respondents. This will enable the court at the end, to decide whether the application should proceed on the merits or that *cadit quaestio* has been reached, alternatively, that the matter should be struck from the roll.

[30] Because the alleged lack of jurisdiction is potentially dispositive of the matter, it is imperative that the court should deal with it in the first instance. There are other reasons that require that the court approaches the matter from that perspective. It is that the court may only be able to grant relief or refuse it, if it has jurisdiction to do so. For that reason, it appears to me that the court may not properly deal even with the question of urgency where its jurisdiction is placed in issue. I accordingly proceed to deal with the question of jurisdiction.

<u>Jurisdiction</u>

[31] It is plain in this regard that the mainstay of the respondents' argument is predicated on Article 64(1) of the NFA Constitution. It has the following rendering:

> 'The NFA, its members, Players, Officials and match and player's agents (*sic*) will not take any dispute to Ordinary Courts unless specially provided for in these Statutes and FIFA regulations. Any disagreement shall be submitted to the jurisdiction of NFA, the Arbitration Tribunal recognised by the NFA or the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. Disputes arising from association football conducted under the auspices of FIFA are of a special character: They require speedy resolution and ordinary courts of law are ill suited for the purpose. It is for that reason that FIFA and the NFA place resolution of such disputes outside the jurisdiction of the ordinary court of the land. Every member, affiliate,

club, official and individual who voluntarily accepts to participate in association football in Namibia under the auspices of FIFA and the NFA, does so with the full knowledge, recognition and acceptance of that underlying premise and covenants to be bound by it.'

[32] The court was referred by the respondents to the Supreme Court judgment in *Namibia Premier League v Namibia Football Association*[2]. They argued, on the basis of that authority, that this court does not have jurisdiction to hear and determine this matter. Mr. Karsten, for the respondents, cited quite liberally from the said judgment and implored the court to show the applicant the door, as it were.

[33] In essence, he argued that all football formations in Namibia, fall under the auspices of the NFA and that if there is any dispute that arises, it must be settled within the confines of the internal remedies provided by the NFA Constitution. A party, it was argued, would not be allowed by virtue of the voluntary association with the NFA and its binding articles, to resort to the jurisdiction of this court. That would be impermissible. The body recognised to deal with the dispute in that event, would have to be the CAS in Switzerland, argued the respondents.

[34] I do not intend to closely interrogate the reasoning of the Supreme Court in this judgment, given the time pressures associated with urgent applications and the stringent time limits available for delivery of judgments or rulings. What I do understand from the judgment though is that it is not correct to state, as Mr. Karsten submitted, that parties who are members of the NFA can never approach the ordinary courts of the land for relief, whatever the circumstances.

[35] At paragraph 23, the Supreme Court reasoned as follows:

'I mention the two irregularities mentioned above (i.e.) where a body exceeds powers granted to it or exercises powers outside its constitution see para 22) which may lead to courts intervening and setting the decision aside because the same principles apply when it comes to administrative decisions. It is however important to distinguish between decisions by or on behalf of voluntary associations which are tested against their constitutions and rules on the basis that members voluntarily subscribe thereto which generally falls squarely within the domain of the private law of and acts by administrative officials which fall within

[2] *Namibia Premier League v Namibia Football Association* (SA 71-2019) [2020] NASC (19 February 2020).

domain of public law and relate to the actions of officials in the exercise of their public powers. One must thus be careful to simply transpose the law as developed as part of the administrative law which relates to the exercise of public duties to the law in respect of voluntary and private associations which is based on consensus.'

[36] At para 25, the Supreme Court proceeded and pertinently said:

'It follows from what is stated above that the fact of internal remedies do not oust the jurisdiction of the court. Where such remedies exist, the court normally insists that parties adhere to such remedies. The courts thus decline (*sic*) to exercise its jurisdiction where appropriate remedies exist and, as mentioned, the courts will exercise jurisdiction where just cause is shown in any particular instance. In the present matter, the internal remedies are provided for in the NFA Constitution and whether one approaches the matter from the private law perspective or an administrative law perspective would make no difference. Either those internal remedies are adequate in the circumstances or they are not. It was for the NPL to show they were not, it was not for the NPL to persuade a court to exercise its jurisdiction in the matter'.

[37] It is thus plain from the immediately preceding quotation that the respondents' submission that courts of the land do not have jurisdiction at all to adjudicate this matter, is not correct. Rather, the court may decline to exercise its jurisdiction because of the availability of internal remedies within the NFA structures, and beyond, if that becomes necessary.

[38] The judgment of the Supreme Court, in my view, underscores one important issue, namely, that whether the court will exercise its jurisdiction, will depend on the peculiar circumstances attendant to the matter at hand. This will depend to a large extent, on the question whether there are adequate 'internal' remedies provided in part.

[39] The question that confronts the court in this case is whether the allegation of absence of jurisdiction is well taken. In answering the question, what has been stated above, must not be allowed to sink into oblivion. One critical feature of this case, in my view, is the fact that the applicant is a member of the NPL, whose membership to

the NFA was ended by expulsion from the NFA. It would appear that this issue is pending before the CAS.

[40] In this connection, one then is confronted by the question whether in the circumstances, there is that voluntary association between the applicant and the NFA that would compel the applicant to seek redress within the confines of the NFA and constitution and rules? It appears to me that that particular connection is not present *in casu*, especially considering the type of proceedings the court is seized with at this juncture, namely an interim interdict, which is temporary in nature and effect.

[41] It is accordingly not clear, regard to the applicant's status *vis – a vis* the NFA how the applicant would be bound, as the respondents appear to insist, to follow the prescripts of the NFA Constitution in the circumstances. This must also be considered in the light of the fact that the YSL is privately run[3] and this is what the applicant was made to believe when it applied for registration.

[42] It appears to me that on the facts alluded to above, the argument that the applicant is bound by the provisions of Art 64, does not have the effect of excluding this court's jurisdiction for the purpose of the granting of an interim interdict. The connection between the applicant and the NFA that would require the applicant to exhaust domestic remedies, does not appear to be in force. This, in my view, is a good reason for the applicant, in the peculiar circumstances, to approach this court for urgent interdictory relief, pending the main action alluded to by the applicant earlier.

[43] This fact, in my view, allows the applicant not to exhaust the remedies of a body of which it is not a party. This results in the stern warning by the Supreme Court to parties to carefully choose whether to bring the matter in terms of the private law, namely the law of contract, or public law particularly important. In this case, because of the lack of the contractual consensus, so to speak, between the applicant and the NFA, this is a matter that in my considered view, properly resorts under public law, namely, administrative law and which the court is at large to consider and determine.

[3] Para 18. 2 of the answering affidavit.

[44] In the instant case, it should be recalled that the applicant complains that it was admitted to participate in the YSL and that there were no impediments in its way. Having been so admitted, the respondents, without having granted the applicant any hearing, removed the applicant from participation, placing in the applicant's way, impediments that were not stated in the regulations that govern the tournament that the applicant applied to join and was accepted as participants.

[45] In the absence of the contractual terms between the applicant and the NFA, as alluded to above, it would appear to me that the matter, as characterised by the Supreme Court, would appear to fall within the realms of public law, namely administrative law. It is clear that a decision was taken by the respondents that affected the applicant's rights but the latter was not, that notorious fact notwithstanding, granted a hearing before the decision was taken.

[46] I accordingly hold that this court is, in the peculiar circumstances, and governed by reasoning of the Supreme Court in the *NPL* case, empowered by law to exercise its jurisdiction in this matter. The point of law *in limine* regarding lack of jurisdiction is accordingly bad and must be dismissed.

<u>Non-joinder</u>

[47] The respondents, as earlier intimated also raised the point that the NFA, is a necessary party and has not been joined. The respondents alleged that NFA should have been joined to the proceedings. In amplification of the imperative to join the NFA, the respondents rely on Article 10 of the NFA Constitution which deals with admission of NFA members and their identity.

[48] The law is replete with judgments dealing with the need to join a party to proceedings when that party has a direct and substantial interest in the outcome of the matter, or whose interests would be affected by the carrying out of the order in question.[4] These are allegations that must be stated clearly in the papers, with the interest and the prejudice likely to be visited upon the party alleged not to have been

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[4] *Ondonga Traditional Authority v Oukwanyama Traditional Authority* (A 44/2013) [2015] NAHCMD 170 (27 July 2015).

joined. It is not automatic that once one raises non-joinder and no more, that party is an interested party. In this matter, the case was not made out with the necessary clarity and precision.

[49] These are not issues that may be obliquely pleaded with the hope that the flesh will be added to the bare and dry bones in argument. The discipline in motion proceedings requires that all the relevant considerations and allegations of fact are pleaded in order to leave the court and the other party in no doubt as to the nature and basis of the complaint advanced. In the absence of the nature and basis of the interest by the NFA, I am of the view that the point taken by the respondents is not meritorious. The court and the other party must not be left ruminating incessantly, spending sleepless nights in nocturnal surmise as to the nature and basis of the interest of the party alleged to exist.

[50] To drive this point home powerfully, the court was pertinently referred to the Supreme Court judgment in *Nelumbu v Shikumwah*[5], which Mr. Muhongo submitted, deals with the 'discipline in motion proceedings'. The court stated the following in para 41:

> 'Since affidavits constitute both the pleadings and evidence in motion proceedings, a party must make sure that all the evidence necessary that supports its case is included in the affidavit . . . In other words, the affidavits must contain all the averments necessary to sustain a cause of action or a defence. As was stated in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa:*
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> > "It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits."'

[51] I must also mention, while still on this issue, that the respondents were, in my judgment, and as submitted by Mr. Muhongo, guilty of referring to documents in their answering affidavit, including the NFA Constitution, without attaching same to the affidavit. At para 42, the Supreme Court in *Nelumbu* instructively said:

[5] *Nelumbu v Shikumwah* (SA 27-2015) [2017] NASC (13 April 2017), para 41 and 42.

'When reliance is placed on material contained in annexures, the affidavits must clearly state what portions in the accompanying annexures the deponent relies on. It is not sufficient to attach supporting documents and to expect the opponent and the court to draw conclusions from them.'

[52] In light of the fact that the documents referred to were not attached, to the respondents' affidavit, which is a worse evil than what *Nelumbu* dealt with, namely attaching documents without identifying the portions relied on, what is one to make of the respondent's case? Is the court entitled at all to have regard to documents subsequently filed and to which oblique reference is made in the affidavits? I think not.

[53] Mr. Muhongo submitted, in any event, that the NFA had been emailed the application on 27 April 2021, that is two days before the hearing of the matter. That notwithstanding, they did not file any papers or indicate an intention to join the proceedings. I am of the considered view that this point is wholly without merit in the circumstances. The NFA is aware of the application but did not take steps to secure the interests not sufficiently alleged by the respondents.

Urgency

[54] The requirements of the rules pertaining to urgency, are by now trite and need not burden this judgment. Rule 73(4) requires a party alleging a matter to be urgent, to state explicitly the reasons why he or she claims that the matter is urgent and to also state explicitly the reasons why the applicant claims he or she cannot be afforded substantial redress at a hearing in due course. See *Mumvuma v The Chairperson of the Board of Directors*.[6]

[55] It is common cause that this matter involves an issue, which appertains to the rights of minors to participate in a football tournament. The applicant claims that the children registered with it are missing out as a result of the decision taken by the respondents. Once an issue involves children's rights, the court's machinery

[6] *Mumvuma v The Chairperson of the Board of Directors* (HC-MD-CIV-MOT-REV-2017/00094) [2017] NAHCMD 125 (25 April 2017).

appertaining to urgency, is relaxed somewhat and their interests are allowed the greatest chance to be adjudicated with minimal formality and more speed.

[56] Should any authority be required for this approach, it is to be found in *EH v D*[7] where the court expressed itself in the following compelling terms:

> '. . . the rights of children involved are *sui generis* and invoke a special jurisdiction bestowed on the court to look after the interests of children and for that purpose "a pedantic approach requiring an applicant seeking urgent relief to meticulously explain the reason for every delayed action in coming to court is inappropriate in most cases, unless the circumstances and facts of such delay are palpably so unreasonable and so oppressive that the court would refuse to come to the assistance of such an applicant on an urgent basis.'

[57] There is no catalogue or list of what types of matters involving children must be regarded and treated as inherently urgent. In this regard, we cannot say the above excerpt applies solely to issues of custody, education, health or kindred matters. The importance of sport in the lives of children, not only from the viewpoint of health derivatives that come with participation in sport, but it is increasingly becoming a means of livelihood for many children all over the world and Namibia should not be an exception in this regard.

[58] I accordingly find that the application, despite what may ordinarily be regarded as shortcomings in relation to other categories of applicants or beneficiaries, should be countenanced in this matter. This is stated with full and proper regard being had to the intended beneficiaries of the relief ultimately sought, i.e. Namibian children. It would generally be unconscionable to visit the sins and iniquities, if there be, of the parents and grandparents and other previous generations on the current generation of children.

[59] In sum, I am of the considered opinion that the points of law raised by the respondents in this matter do not meet muster. The application must, in the circumstances, be considered on its merits as I proceed to do straightway.

<u>The merits</u>

[7] *EH v D* 2012 (2) NR 451 (HC) at 455.

[60] The case, as will have been apparent by now, deals with the propriety of granting an interim interdict in favour of the children, pending an action to be instituted in due course. The requirements that an applicant has to meet in such cases, are trite.

[61] In *Nakanyala v Inspector-General of Namibia and Others*[8] the requirements for the granting of an interim interdict were reaffirmed as the following:

(a) a *prima facie* right;
(b) a well-grounded apprehension of harm if the interim relief is not granted;
(c) that the balance of convenience favours the granting of an interim interdict; and
(d) that the applicant has no other satisfactory remedy.

[62] I will deal with the requirements of the interim interdict sought *seriatim*. First, it is clear that the applicant was invited to apply for the registration for its youth teams to participate in the YSL. It did so and its application succeeded in that it was invited to meetings preceding the commencement of the tournament. Then, suddenly, and without further ceremony, the applicant was excluded by the respondents without being afforded any opportunity to make any representations.

[63] I am of the considered view that the decision of the respondents to accept the participation of the applicants' youth teams in the tournament created a *prima facie* right. There is no gainsaying that in the aftermath of the acceptance and confirmation of their junior teams participating, an expectation and thus a *prima facie* right was created for the applicant's youth teams to participate in the tournament. The first requirement is in my considered view met.

[64] It stands to reason that in the aftermath of the repudiation by the respondents, the applicant's legitimately fear that they will be excluded from the tournament. This notorious fact, in my considered view, generates no dispute whatsoever. In this regard, Mr. Karsten, during argument, suggested that this is a proper case in which to

[8] *Nakanyala v Inspector-General of Namibia and Others* [2011] NAHC 190 para 38.

sacrifice the applicant's youth teams than risk the whole tournament, involving more participants that those of the applicant, not proceeding.

[65] It is accordingly clear that there is a well-grounded apprehension of harm as the tournament is now meant to proceed without the applicant, which had been accepted as one of the participants. The harm to be suffered by the applicant is accordingly irreparable, should the court not issue an interim interdict in this matter, and there is no gainsaying that fact.

[66] I am also of the considered view that it cannot be said that the balance of convenience favours the respondents in this matter. This is so considering that the respondents acted out of step regarding the rules of natural justice. It is clear that the applicant had made all the necessary preparations to have its teams participate in the tournament. The applicant had been considered as part of the YSL and there is accordingly no appreciable harm that would be suffered by the respondents if the applicant were allowed to participate in the tournament in the interim, pending the launching of the main relief.

[67] The converse, is in my view, ghastly to contemplate. Young boys would have geared themselves to participate in the tournament, only to be told suddenly, and for no fault of their own, that they have been excluded from the tournament. The harm and trauma that is likely to be suffered by the children, together with dreams that may be shattered and not capable of being repaired is not fanciful thinking. The balance of convenience accordingly favours the applicant in my considered view.

[68] I am also of the considered opinion that viewed as a whole, there is no other satisfactory remedy that may be issued to assuage the situation in the circumstances. An interim interdict that would enable the children to live their dreams in the interim, is the remedy open and one that is practicable.

[69] Should the court withhold this relief and send the applicant to litigate the main action, by the time the matter is determined, considering the length matters, whether instituted by action or application take, would render the applicant bereft of an effective remedy and entirely helpless. Its victory, if subsequently scored, would not only ring hollow, but it would not reverse the gains of the tournament to enable the

applicant's youth teams to participate meaningfully, as the prize for the current year would by then have been won.

Conclusion

[70] After a lengthy reflection, I am of the considered view that on the facts of the matter, the applicant has made out a case that would warrant the issuance of an interim interdict, pending the finalisation of the main proceedings intimated by the applicant in their notice of motion.

Costs

[71] The rule applicable to costs requires no elucidation. Ordinarily, the costs follow the event. I am not persuaded that there are any cogent reasons why the ordinary rule should not apply in the instant case. The applicant, being successful, is entitled to its costs. I am not convinced however, that there are sufficient grounds to justify a punitive costs order, as the applicant seeks.

[72] There are no allegations, for instance of malice, bad faith or such other dishonourable motive levelled against the respondents. The fact that they are considered to be on the wrong side of the law in this preliminary enquiry, does not justify the resort to costs on the attorney client scale. Costs on the ordinary scale would meet the justice of the case in my considered opinion.

Order

[73] Having due regard to the discussion above and the findings and conclusions recorded in this judgment, it appears that the proper order to issue in the circumstances is the following:

1. The Applicant's non-compliance with Rule 73(1), (3) and (4) of the Rules of this Honourable Court, in so far as it pertains to forms and service is condoned, and this application is heard as one of urgency.

2. Pending the final adjudication and determination of the action to be instituted by the applicant within thirty (30) court days of the order herein, amongst others, to declare invalid and set aside the first to the third respondents' ("respondents") decision of 24 March 2021 (repudiating, alternatively, revoking, alternatively, refusing, alternatively, barring, the applicant's under 15/17/19 teams participation in the MTC Hopsol Youth Soccer League for the year 2021), the respondents are restrained and interdicted from implementing their aforesaid decision and are ordered and directed to permit the participation of the applicant's under 15/17/19 teams in the MTC Hopsol Youth Soccer League, commencing the next round of fixtures after the order herein.

3. The first to the third respondents are directed to pay the costs of this application, jointly and severally, the one paying and the other being absolved such costs being the costs of one instructing and one instructed legal practitioner.

4. The matter is removed from the roll and is regarded as finalised.

T. S. Masuku

Judge

APPEARANCES:

APPLICANT:	T. Muhongo, (with him L. Ihalwa)
Instructed by:	ENSafrica | Namibia
RESPONDENTS:	L. Karsten
	Of Louis Karsten Legal Practitioners