

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
RULING ON THE SPECIAL



NAMIBIA, MAIN DIVISION,
PLEA OF *LOCUS STANDI*

Case No: HC-MD-CIV-ACT-OTH-2021/02269

In the matter between:

NAMIBIAN GYMNASTICS

PLAINTIFF

and

THE NAMIBIA SPORTS COMMISSION

1ST DEFENDANT

NAMIBIA NATIONAL OLYMPIC COMMITTEE

& COMMONWEALTH GAMES ASSOCIATION

2ND DEFENDANT

ABNER AXEL XOAGUB

3RD DEFENDANT

JOAN SMIT

4TH DEFENDANT

THE MINISTER OF SPORTS, YOUTH AND

NATIONAL SERVICES

5TH DEFENDANT

Neutral Citation: *Namibian Gymnastics v The Namibia Sports Commission and Others* (HC-MD-CIV-ACT-OTH-2021/02269) [2022] NAHCMD 373 (28 July 2022)

CORAM: SIBEYA J

Heard: 27 April 2022

Delivered: 28 July 2022

Flynote: Special plea – Lack of *locus standi* – Defendants challenged *locus standi in judicio* of the plaintiff to institute these proceedings – Defendants allege that the

plaintiff was not established by a meeting which formed a quorum – First and second defendants have no contractual relationship with the plaintiff – Having regard to the Constitution of the Namibia Gymnastics Federation, no quorum was formed – The special plea is upheld.

Summary: The plaintiff avers that it is a national sports body in terms of the Namibia Sports Act 12 of 2003 (“the Sports Act”) and it is registered as a member of the first defendant. Its objective is to promote, organize and control gymnastics in Namibia. The plaintiff further alleges that it is a national federation and member of the second defendant as the sole national governing body for gymnastics in Namibia.

The plaintiff further avers that on 19 June 2020 the first and second defendants purported to place the Executive of the Namibia Gymnastics Federation (NGF) under sequential administration until the elective Extra Ordinary General Assembly is held. This decision meant that the executive would just handle the day to day administrative matters of the NGF in consultation with other stakeholders.

An appeal was lodged to the Appeal Committee against the above decision, which was upheld but the first defendant still did not allow the plaintiff to conduct its affairs and business in terms of the NGF Constitution. The plaintiff, then, instituted these review proceedings against the defendants where it contends that the decisions of the first and second defendants were illegal, with no basis in law.

The defendants defended the action and raised the special plea of *locus standi in judicio*. The defendants pleaded that the entity that was suspended is the NGF and not the plaintiff. The defendants contended further that the plaintiff is not a registered member of the first and second defendants, nor is the plaintiff recognized by the second defendant as the sole national governing body for gymnastics in Namibia and have no contractual relationship with the plaintiff. In reply, the plaintiff stated that a properly constituted Special General Assembly held on 28 November 2020 amended the plaintiff’s Constitution to provide for the name change to the plaintiff. In attempt rebut the special plea, Ms Olivier, The Executive President of the plaintiff testified for the

plaintiff.

Held that – Ms. Olivier’s reduction in the number of members of the NGF from 38 to 19 between August and November 2020 due to alleged effective resignation of members was not supported by documentary evidence. Ms. Olivier further appeared to adjust her evidence whenever her documentary and orally evidence did not tally.

Held further that – The Special General Assembly of 28 November 2020 is governed by the 2013 NGF Constitution and should have been conducted within the confines of the provisions of the said Constitution.

Held further that - The additional vetting requirements are not part of the NGF Constitution where the eligibility of membership is outlined but appear to exclude certain members. Furthermore, the said vetting requirements were not sanctioned by the Executive Council as required, therefore, they are of no force of effect.

Held further that - From 11 August 2020 to 28 November 2020, no members were disqualified by the Executive Council, which Council in any event never convened. Therefore, the assertion by Ms Olivier that other members effectively resigned lacks merit and is contradicted by established facts.

Held further that – Considering that a quorum consists of one half plus one of all possible votes of paid-up members and Council members of the NGF Constitution,¹ it follows that had the members present at the SGA of 28 November 2020 been 19 out of 38, they would not have formed a quorum. The additional vetting outside the NGF Constitution and without authorisation by the Executive Council, together with a concession by Ms. Olivier that had any of the eight paid up members disqualified been counted it would have tilted the scale against the quorum, points to no quorum having been formed at the meeting of 28 November 2020.

ORDER

¹ Article 10.5.

[1] The defendants' special plea that the plaintiff lacks the necessary *locus standi in judicio* to institute these proceedings is upheld.

[2] The plaintiff's claim is dismissed.

[3] The plaintiff shall pay the costs of the first defendant limited to one Counsel and the costs of the second, third and fourth defendants' consequent upon the employment of one instructing and two instructed Counsel.

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

JUDGMENT

SIBEYA J:

Introduction

[1] This court is seized with a special plea raised by the first, second, third and fourth defendants that the plaintiff lacks the necessary *locus standi in judicio* to institute these proceedings against them. In the main action the plaintiff seeks several reliefs, including reviewing and setting aside certain resolutions and declaratory orders made by the first and second defendants. The first to the fourth defendants defended the action and raised the said special plea.

The parties

[2] The plaintiff is cited as NAMIBIAN GYMNASTICS, a voluntary association with legal personality and whose business address is situated at 12 Tanzanite Street, Swakopmund. The plaintiff shall be referred to as such.

[3] The first defendant is the NAMIBIA SPORTS COMMISSION, a statutory body

with legal personality provided for in section 2 of the Namibia Sports Act 12 of 2003 (“the Sports Act”) with its address situated at Erf 2 c/o General Murtala Muhammed Avenue and Kahn Street, Eros, Windhoek.

[4] The second defendant is NAMIBIA NATIONAL OLYMPIC COMMITTEE & COMMONWEALTH GAMES ASSOCIATION, a voluntary association with its address situated at 31 Tacoma Street, Suiderhof, Windhoek.

[5] The third defendant is MR ABNER AXEL XOAGUB, an adult male and president of the second defendant with his address situated in Windhoek. No relief is sought against the third defendant.

[6] The fourth defendant is Ms JOAN SMIT, the Secretary General of the second defendant, with her address situated in Windhoek. No relief is sought against the fourth defendant.

[7] The fifth defendant is the MINISTER OF SPORTS, YOUTH AND NATIONAL SERVICES, cited in her official capacity, with her address of service at the Office of the Government Attorney, 2nd Floor, Independence Avenue, Windhoek. No relief is sought against the fifth defendant.

[8] The first, second, third and fourth defendants, being the only defendants who defended the plaintiff’s claim shall be jointly referred to as the defendants.

[9] Mr Olivier appeared for the plaintiff while Mr Ketjitere appeared for the first defendant and Mr Heathcote SC for the second, third and fourth defendants.

Background

[10] The plaintiff avers in its particulars of claim that it is a national sports body in terms of the Namibia Sports Act and is registered as a member of the first defendant with its principal objective being to promote, organize and control gymnastics in

Namibia. The plaintiff further alleges that it is a national federation and member of the second defendant recognized as the sole national governing body for gymnastics in Namibia.

[11] The plaintiff further claims that on 19 June 2020 the first and second defendants purported to jointly resolve:

'to place the Executive of the NGF under sequential administration until the elective Extra Ordinary General Assembly is held. This decision entails that the current executive will only handle the day to day administrative matters in consultation with the NNOC-CGA and NSC and the representatives of the NGF Exco will only assist in organizing the Special Elective Extra-Ordinary General Assembly that is now schedule (*sic*) for Saturday 16 August 2020.'

[12] An appeal was lodged to the Appeal Committee against the above decision. On 11 May 2020, the appeal was upheld. Despite the outcome of the appeal, the first defendant did not allow the plaintiff to conduct its affairs and business in terms of the Constitution. On 1 June 2021, the first defendant wrote to the plaintiff as follows:

'2. That the committee being made reference to, is the same Interim Committee referred to under the appeal as having been put in place to take over the administration of the NGF then; any decisions including any elections conducted by the said committee during the period that the NGF was under unlawful administration, must be set aside. The NGF was under unlawful administration, must be set aside. The NGF congress held on 23 February 2019 is null and void and has been set aside.

3. In view of the above, the NGF administration mandate is bestowed to the 2018 NGF leadership.'

[13] The plaintiff demanded the withdrawal of the above letter without success. The plaintiff, then, instituted these review proceedings against the defendants and further sought declarators as the plaintiff contended that the decision of the first and second defendants were illegal with no basis in law.

[14] The defendants defended the action and raised the special plea of lack of *locus standi in judicio*. The defendants pleaded that the entity that was suspended is the Namibia Gymnastic Federation (NGF) and not the plaintiff. The defendants contended further that the plaintiff is not a registered member of the first and second defendants, nor is the plaintiff recognized by the second defendant as the sole national governing body for gymnastics in Namibia. The defendants further allege that the first and second defendants have no contractual relationship with the plaintiff as the plaintiff was not a member of the first or second defendant. It is on these bases that the defendants pleaded that the plaintiff lacks *locus standi* to institute the present action.

[15] It was contended by the plaintiff in reply to the special plea of *locus standi* raised by the defendants that a properly constituted Special General Assembly of the plaintiff held on 28 November 2020 amended the plaintiff's Constitution to provide for a name change to Namibian Gymnastics. The defendants took issue with the plaintiff's assertion and countered by stating that no Special General Assembly properly constituted was convened which decided on the name change.

[16] The questions emanating from the defendants' special plea that form the centre stage of this matter are the following: Was the Special General Assembly (the SGA) of the Namibia Gymnastics Federation (the NGF) held on 28 November 2020 duly constituted? Was the number of paid up members correctly constituted? Was there a quorum of paid up members of the NGF present at the SGA? Literally, does the plaintiff exist?

[17] The answers to the above questions may determine the outcome of the special plea raised and they shall be addressed as the judgment unfolds. If it is established that there was a properly convened and constituted SGA of the NGF on 28 November 2020 and that the SGA resolved to change the federation's name to the plaintiff, then the special plea deserves dismissal for lack of merit.

[18] In the event that it is established that there was no properly convened and constituted SGA of the NGF on 28 November 2020 that resolved to change the name,

then the plaintiff lacks *locus standi* to institute these proceedings.

[19] The SGA is, in law, not capable of speaking unless it is properly constituted and a quorum is formed, failing which, any decision purported to have been made consequent upon an improperly constituted SGA is null and void.

[20] The Supreme Court, in *Swart v Brand*,² discussed the voidness of actions and quoted the following passage from *Macfoy v United Africa Company Ltd*:³

'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

[21] Mr Olivier argued that the court should not concern itself with whether or not the SGA of 28 November 2020 was properly constituted with the necessary quorum in accordance with the Constitution of the NGF. He argued further that even if there was no quorum, the name change and the amendment stand until set aside. Mr Olivier argued that the only issue that is ripe for determination is whether the plaintiff is the same entity as the NGF. It was further argued for the plaintiff, that the defendants attempted to have a review of the SGA of 28 November 2020 set aside, cannot be allowed.

[22] It was further argued by Mr Olivier, that non-adherence to quorum provisions necessary for valid resolutions to change a name does not cause an association to become a different entity. The entity remains the same, *albeit*, with a different name. No authority was cited by Mr Olivier for this proposition. The question that remains for determination, in my view, is mainly whether the plaintiff has the necessary *locus standi* to institute the present proceedings against the defendants.

² *Swart v Brand* NASC (SA 17/2002) 28 October 2003.

³ *Macfoy v United Africa Company Ltd* [1961] 3 All ER 1169.

[23] The defendants' approach is materially different. They contend that the matter is governed by contract law and not public law and further that the absence of a quorum renders whatever was decided null and void.

The NGF Constitution

[24] The SGA was governed by the 2013 Constitution of the NGF. Amongst the relevant provisions of the Constitution of the NGF are clauses 8 and 10 which provide as follows:

'Article 8 REPRESENTATIONS AT GENERAL ASSEMBLIES

- 8.1 Only paid up members, Honorary Life members and Council members may take part in the proceedings of the General Assembly.
- 8.2 Members shall only be represented by delegates.
- 8.3 Members must certify the name of their delegates in writing to the Secretary General prior to the commencement of the General Assembly meeting.
- 8.4 A member will have one delegate as representative of the member and one (1) additional delegate for every section it is registered for present at the General Assembly. Each delegate may not record more than one vote.
- 8.5 A delegate shall be a subscribed member of the member, which he represents and shall not have competed as a professional.
- 8.6 A delegation may only represent one Member.
- 8.7 A Council member may not represent a Member at the General Assembly.
- 8.8 Votes may only be given personally and not by proxy.
- 8.9 Quorum – see Article 10.5 to 10.7.

...

Article 10 VOTING PROCEDURES AT GENERAL ASSEMBLIES

...

- 10.3 Each Council member shall have one vote, which he may not assign to any other delegate or Council member. No Council member shall have the right to vote when the members for the Council are elected.

- 10.4 Each member shall have one vote for each delegate according to its affiliation.
- 10.5 A quorum shall consist of one half plus one of all possible votes of paid up Members and Council members.
- 10.6 If within half an hour after the official beginning of a General Assembly a quorum is not present, the General Assembly shall be adjourned to the same day of the following month. Delegates and at such General Assembly meeting shall form a quorum.
- 10.7 In the case of a Special General Assembly, which was convened at the request of Members, the Special General Assembly lapses if no quorum, is present. If no quorum is present within half an hour of the announced time on the circulated Agenda for the meeting, the meeting shall be adjourned to a date determined by the President or Deputy President, at which meeting the members present shall form a quorum.'

[25] It is apparent from the above provisions of the 2013 Constitution of the NGF that for an SGA to be convened and be properly constituted, there must be quorum failing which the SGA lapses. A quorum serves as a mouth piece of the NGF, without which it cannot speak. It becomes vital, therefore, to determine if the conception or at least the creation of the plaintiff (Namibian Gymnastics) was a decision of the NGF at the SGA of 28 November 2020.

Was the SGA of 28 November 2020 duly constituted?

[26] Ms. Sonya Olivier (Ms Olivier), the plaintiff's Executive President, took to the stand and testified under oath in attempt to repel the special plea raised by the defendants. It was her testimony, *inter alia*, that on 11 August 2020 (the date falling within the financial year of 1 April 2020 to 31 March 2021) she addressed an email to Mr Jurgen Kolb of the Federation Internationale de Gymnastique ("FIG") where she applied for the COVID-19 relief fund. In the said email, she stated that:

'Please accept my sincere apologies for the tardiness of my reply. I wanted to give all our members an opportunity to the very last to supply reliable and true information with which to support our application.

Unfortunately, it has not been as successful as I had so desperately hoped....

Nevertheless, I am attaching some supporting documents for you to peruse. These are:

1. Our complete members list of paid up members, and;
2. A filtered list of members, who are paid up and who have also completed gymnastic registrations for this current competitive year ...⁴

[27] Exhibit B2 which was annexed to the email addressed to FIG, reveals that there were 38 paid up members and that the NGF offered 48 gymnastics disciplines.⁵ Ms Olivier testified that Article 8.4 of the NGF Constitution was not in operation on account of a practice applied during the NGF election of 23 February 2019 after it was resolved by the NGF's Council on 16 July 2018 that each club shall only have one vote. No such resolution by Council was produced in evidence. In any event the NGF Constitution provides for one member as a delegate and one additional delegate for every section it is registered and should take precedence over a mere practice.

[28] The suggestion by Ms. Olivier that the NGF Constitution was amended by resolution in 2018 is further without merit as the plaintiff's Council has no authority to amend the Constitution. Article 22 of the NGF Constitution provides that only at a General Assembly or a Special General assembly convened for the purpose to amend, can the NGF Constitution be amended.

[29] It was Ms. Olivier's testimony that two members who were paid up were not approved, thus reducing the number of paid up members strictly speaking to 36.

[30] It was further her testimony that she treated all members equally, fairly and according to the Constitution. She further testified that between August 2020 and November 2020 when the SGA was held, something material occurred which affected the number of members of the NGF. At the SGA, she testified, all members were treated on the basis of compliance with the NGF Constitution. When calculating the quorum, eight clubs were found to be non-compliant, not present and, therefore, not recognised. One club was also not recognised, not present and not approved. Nine clubs were non-compliant, not present but recognised. The eight disqualified clubs were

⁴ Exhibit B1 (the email), exhibit B2 (paid up members' list NGF of 2020-2021 attached to the letter to FIG). See also: Record p 105 line 24-29.

⁵ See also: Article 8.4 of the NGF Constitution.

paid up members and if any one of them was counted towards the quorum then the SGA would not form a quorum.

[31] Ms Olivier admitted in cross-examination that on the face of Exhibit B1 and B2, the members of the Federation counted were 36 plus 9 Executive Council members totaling 45. In such instance, a quorum will constitute 23 members present.

[32] From her own notes received into evidence, Ms Olivier testified that she was under the impression that the calculation of the figure towards the quorum was 30⁶ and therefore she required 16 voting members present.⁷ Subsequent to counting and recounting the members present for more than an hour and a half, she wrote "19 present". Her explanation for the reduction in the number of club members to 19 was that some of the clubs had between August and November 2020 effectively resigned and provided clear indication to that effect.

[33] Ms Olivier struggled to explain the nature of what she referred to as effective resignation and failed to produce any supporting evidence to substantiate her assertion. She tried to get an explanation to every lacuna or mishap to the extent that she appeared to be adjusting her evidence as and when her documentary and oral evidence did not tally.

[34] Contrary to the Constitution only requiring that members be paid up, Ms Olivier testified that members needed to be paid-up, recognised, registered and later in her testimony further added another category requiring strong historical background. All the added requirements, over and above, being registered and paid-up, are foreign to the letter of the NGF Constitution.

[35] Notwithstanding her awareness that there were 38 paid-up registered members and 36 paid-up by August 2020 according to her, Ms Olivier engaged in an exercise at the SGA to ascertain if the members were who they said they were and whether they

⁶ 30 members constituted of Executive Council (9 votes), members (19 votes), plus 1, plus 1 = 30.

⁷ Exhibit A16 (p 265 and 268).

were present. By November 2020, according to Ms Olivier, only 19 members were paid-up and complied with the Constitution and the Council's request for compliance.⁸ Council's request for compliance is a further requirement that is foreign to the NGF Constitution.

[36] No documentary evidence was produced to demonstrate that any of the 38 paid-up members were suspended for any reason listed in the NGF Constitution. Ms Olivier further failed to inform FIG of any suspended member. This, in my view, flies in the face of the evidence adduced by Ms Olivier.

[37] Ms Olivier further referred to her letter of 5 November 2022⁹ wherein the vetting procedures of members and further requirements were set out. Non-compliance therewith would lead to automatic suspension of membership and loss of rights. She, however, conceded that the decision to remove a member from the list of members is that of the Executive Council.

[38] The letter of 5 November 2020 provides that it is the Executive Council that requested for further documents regarding the new vetting criteria but she could not refer to any Executive Council resolution authorizing same. In fact, when questioned in cross-examination about whether the Executive Council authorized her to issue the letter on the vetting criteria with new requirements set out, she responded that: "there is no specific resolution that I was granted permission."¹⁰ Ms Olivier was an unreliable witness in the absence of documentary evidence to corroborate her version.

[39] No evidence was tendered by Ms Olivier that an Executive Council meeting was held between 11 August 2020 and 28 November 2020, where any of the members of the NGF were removed from Exhibit B (the list of members forwarded to FIG). Ms Olivier confirmed that there was no Executive Council meeting on 28 November 2022, according to her what was convened was a Special General Assembly.¹¹ From her own

⁸ Record p 128 line 9-12.

⁹ Exhibit B4.

¹⁰ Record p 150 line 27-28.

¹¹ Record p 282 line 31 – 283 line 5.

version, it is apparent that no member was removed from Exhibit B between 11 August and 28 November 2020 as the Executive Council with the authority to do so never met to remove any member from the said list.

[40] Two clubs, Immanuel Ruiters Primary School and Tataleni High School, although paid-up and displayed to FIG as fully paid-up members, did not receive Ms Olivier's letter of 5 November 2020. They were thus disqualified without even having the vetting criteria been brought to their attention. When questioned whether all members were informed of the contents of the letter of 5 November 2020 or the notice of the meeting scheduled for 28 November 2020, Ms Olivier responded that it is impossible for her to determine if the information sent out reached all the members.¹²

[41] Ms Olivier testified that only 19 of the members complied with the request of 5 November 2020. It is clear as day that the vetting requirements or requirements set out in the letter of 5 November 2020 were used to disqualify certain members. This was the case, notwithstanding the evidence of Ms Olivier that disqualifying a member was the authority of the Executive Council which never met during the relevant period between 11 August and 28 November 2020.

[42] Another fact unknown to the members was that those who fail to comply with the vetting requirements of 5 November 2020 could show up on the day of the SGA and present the necessary documents and be counted towards a quorum. The following relevant exchange during cross-examination of Ms Olivier appears on record:

'MR HEATHCOTE: Is the payment of your yearly fee not an indication that you want to be a member?

SONJA OLIVIER: It is one indication, yes I would agree

MR HEATHCOTE: So what it boils down to is this, it is whether I am going to be recognised towards the quorum when I am already a member in my book and I have paid a fee, it is just the luck of the draw for me to be present at the day and to bring my document. ... So in my mind I do not know that I am may be disqualified as being counted towards the quorum on the 28th because you only take that decision on the 28th.

¹² Record p 193 line 21-28.

SONJA OLIVIER: Yes. ... There is no harm in picking up the phone and asking or writing an email [copying] in everyone.¹³

[43] As per Ms Olivier's evidence, nine clubs did not provide evidence of membership and payment of fees, although being recognised as paid-up members in August 2020 and formed part of the list of paid-up members. Eight further members were also disqualified for failing to meet other requirements beyond the circumference of the NGF Constitution. Ms Olivier conceded that any one of the eight clubs which she disqualified would have overturned her apple cart.¹⁴ This concession should be considered against the backdrop of her earlier testimony that she had no authority to disqualify a member as that authority lies within the powers of the Executive Council.

[44] Ms Olivier wrote 19 present on Exhibit A16 (p 265 and 268) as a record of the members present at the SGA of 28 November 2020. Considering that the list of members sent to FIG (Exhibit B2) provided that the list of paid-up members was 38, only 19 members present would not form a quorum and that would not constitute half plus one. Ms Olivier testified later that despite writing on Exhibit A16 that the members present were 19, the members present were actually 20. Her explanation for this alleged mishap was that: "Obviously I calculated incorrectly."¹⁵ When pressed further in cross-examination she stated that on the particular day she wrote 19 present, but when she went back to the attendance register and compiled the minutes she found that there were 20 people present.

[45] Her explanation for counting 19 and not 20 was that Ms Cynthia Murangi was not counted because she was quite late. Ms Olivier was then cross-examined as follows:

'MR HEATHCOTE: And she came quite late, Murangi. Did you wait for her or did you add her name later on?

SONJA OLIVIER: Not quite late I think 15 minutes after we started counting towards the quorum and we still had open discussion trying to establish...'

¹³ Record p 168-169.

¹⁴ Record p 196 line 17-22.

¹⁵ Record p 204 line 3-4.

[46] It was her testimony further that the meeting took about an hour and a half to sort out the members' list criteria. It follows from this version that Ms Murangi was not quite late and there is no cogent reason why she was not included in the 19 present. Again this goes to demonstrate the unreliability of the oral evidence of Ms Olivier.

Ms Helvi Ndjuluma

[47] Ms Helvi Ndjuluma, a teacher was counted on a handwritten document as part of the 19 present representing a public school GK Wahl while she taught at a different school, Ubasen Primary School situated in a different town. Ms Olivier stated that Ms Ndjuluma should have arrived at the meeting with a letter from the school that she represents and that is how her school ended up being recorded as such. The letter would, therefore, have provided that she represented Ubasen Primary School and not GK Wahl Combined School. This letter was not produced into evidence by Ms Olivier.

[48] After the meeting, Ms Ndjuluma again signed the new Namibian Gymnastics Constitution as a representative of GK Wahl Combined School. This is astonishing to say the least. The following related exchange appear on record:

MR HEATHCOTE: That is just terrible. She must have not a photogenic brain I think because you have just helped her right and ...

SONJA OLIVIER: No, may I correct Counsel?

MR HEATHCOTE: Yes?

SONJA OLIVIER: This is after the meeting.

MR HEATHCOTE: Yes.

SONJA OLIVIER: Two / three hours after the meeting.

MR HEATHCOTE: Yes.

SONJA OLIVIER: And initially before the meeting we set the record, we determined she was from Ubasen...

MR HEATHCOTE: Yes. So ...

SONJA OLIVIER: okay so, I am astonished as you are.

and

SONJA OLIVIER: It is also possible that Ms Helvi was confused again to, I cannot say that in any other way. ... I cannot say that in any other way. It is possible that she was confused at the end of the meeting as well. ... She signed off representing GK Wahl. I am quite astonished.

MR HEATHCOTE: She is a teacher.

SONJA OLIVIER: This is correct.

MR HEATHCOTE: And she does not know where she is coming from?

SONJA OLIVIER: There clearly, clearly she was confused. '

[49] Ms Helvi Ndjuluma appears to have signed the new Namibian Gymnastics Constitution and still signs as a representative of a wrong school. This is suspicious and I leave it at that.

[50] What remains, when all is said and done, is that the SGA of 28 November 2020 is governed by the 2013 Constitution and should have been conducted within the confines of the provisions of the said Constitution.

[51] Mr Heathcote urged the court to ignore Ms Olivier's vetting criteria and the lack of a historical background as exclusionary tactics and a ploy to reduce the votes towards a quorum by excluding members who did not favour her. He further called on the court to reject the reduction of members of the NGF from 38 to 36 (according to Ms Olivier) and then to 19.

[52] Mr Olivier argued contrariwise that, no finding on the quorum can have any impact on this matter and the plaintiff's claim does not depend on the validity of the name change. The plaintiff's claim may not depend on the name change but the plaintiff is required to demonstrate that it has the necessary *locus standi* in these proceedings.

[53] The plaintiff presents itself as a voluntary association, a national federation as set out in the Constitution of the second defendant and a member of the second defendant. The plaintiff further claims to be recognised by the second defendant as the sole national governing body for gymnastics in Namibia. The plaintiff further complains of the

decisions made by the first and second defendants against the NGF. It is incumbent on the plaintiff, therefore, to establish that it has the necessary *locus standi in judicio* in these proceedings where it is challenging the decisions taken by the first and second defendants.

[54] As stated hereinabove, Ms Olivier testified as the sole witness for the plaintiff while the defendants although recording witness statements for the defendants called no witness. It came out of the testimony of Ms Olivier that several requirements were meted out to the members of the NGF, not so much for the eligibility of membership as no new member joined during the relevant period, particularly the period between 11 August and 28 November 2020, but more to disqualify some of the existing members.

[55] The additional requirements are not part of the Constitution where the eligibility of membership is outlined. The vetting requirements were not set out by the Executive Council as required, per the testimony of Ms Olivier and, therefore, in my view, the additional requirements are of no force of effect. Ms Olivier, therefore, came up with additional vetting requirements for reasons better known to her but which requirements find no basis in law, for not being provided for in the NGF Constitution.

[56] Ms Olivier was adamant in her oral evidence about the relevancy of the additional vetting requirements. I find that Ms Olivier was poor as a witness. Her evidence was full of contradictions and not supported by the established facts and the probabilities in the case. She was quick to constantly make amends to her testimony when questioned in cross-examination on her earlier version. I find that she was not a credible witness at all.

[57] Evidence revealed that not all members received by the letter of 5 November 2020 regarding the vetting requirements. There was further no evidence that the notice of the SGA of 28 November 2020 was received by all the members. It was crucial for the plaintiff to establish that the meeting of the SGA of 28 November 2020 was lawfully convened.

[58] In a judgment of the Supreme Court of Appeal of South Africa of *National African Federated Chambers of Commerce and Industry and Others v Mkize*,¹⁶ it was remarked as follows:

[4] The central issue for determination is whether the December 2012 meeting was lawfully convened. If not, all resolutions emanating from it are invalid and of no force and effect. The main resolutions passed thereat are the election of a new President (purportedly to replace Mr Mavundla) and the removal of the 3rd to 8th appellants from the NAFCOG Exco for a variety of reasons which need not be repeated here. Mr Mavundla's position as NAFCOG President also requires determination since it has a direct bearing on the outcome of the case.'...

[37] To summarise and in conclusion: the December 2012 meeting was unlawfully convened since only the NAFCOG President Mr Mavundla or, in his absence, its Deputy President, Mr Skhosana, had the requisite constitutional power to convene a NAFCOG Council meeting. As a consequence, all the resolutions passed at the December 2012 meeting are invalid and of no force and effect....'

[59] I find that it is established that by 11 August 2020 the NGF had 38 members. This is supported by Ms Olivier and Exhibit B2. From 11 August 2020 to 28 November 2020, no members were disqualified by the Executive Council, which Council in any event never convened. I find that the assertion by Ms Olivier that other members effectively resigned appears to be self-serving in order to justify the reduction in the number of members present at the SGA of 28 November 2020 and which is contradicted by established facts.

[60] The handwriting inscription on Exhibit A16 by Ms Olivier and amendments thereto are, in my view, suggestive of an attempt to form a quorum by any means necessary – be they fair or foul.

[61] As I reach the stage of concluding this judgment, I consider myself duty-bound to make a few remarks. It is common-cause that Mr Olivier is the husband to Ms Olivier. He represented her throughout the proceedings in this matter.

¹⁶ *National African Federated Chambers of Commerce and Industry and Others v Mkize* [2015] 1 All SA 393 (SCA).

[62] Lawyers have been reminded time and again to distance themselves from their clients and maintain their duty as officers of the court.

[63] Masuku J in *Oosthuizen v Olivier*,¹⁷ had an occasion to consider a matter where the same Mr Olivier acted in person and further represented his wife, and he remarked as follows at para 36 to 39:

[36] Another unfortunate aspect to this imbroglio relates to the central role played by Mr. Olivier. He played a number of at times discordant and conflicted roles that would have required extreme circumspection and soundness of judgment to attune and bring to an acceptable state of equilibrium, if at all possible. He was, first of all, a debtor to the partnership, where his wife was a partner. Secondly, he acted in person in suing for the amount due to him, using the instrumentality of his law firm. Furthermore, he acted and continues to act for his wife in the proceedings related to the partnership.

[37] Firstly, it is in general, professionally uncomely for a medical practitioner to prescribe medicine to him or herself. This also applies to legal practitioners, particularly in respect of personal matters. Where a lawyer perceives that he or she is wronged in his or her personal capacity, it is generally frowned upon that he or she should issue the papers himself as it is often stated that the lawyer who acts in person has a fool for a client. This is so because in this profession, independence, detachedness and soundness of judgment play a critical role as lawyers are officers of the court. The duty to court often outweighs the duty to your client and where you are the client, it is quite obvious what the result will be in terms of where loyalty will lie. The duty to court will obviously play second fiddle.

[38] Where the lawyer acts in person, the association with the matter and the grievance he or she may legitimately feel in relation to the matter, often rob the subject of the much needed independence and professional detachment that would be brought to bear by an independent legal practitioner. In such matters, it would have been proper and indeed safe for Mr. Olivier to

¹⁷ *Oosthuizen v Olivier* (HC-MD-CIV-MOT-GEN-2018/00210) [2019] NAHCMD 440 (25 October 2019).

have given instructions to another colleague to deal both with his matter and that involving his wife.

[39] This is, in my view, also the case because when the interests or the rights of a spouse are concerned, it is natural for the other spouse not only to be vicariously injured, but sometimes directly so, if not even more than the spouse concerned. A filter, in the form of an independent legal representation brings independence and detachment that an officer of the court, far removed personally from the facts, brings the comfort that the court would require in such matters.'

[63] It is unfortunate, not only for Mr Olivier and the Court, but for the legal profession at large, that Mr Olivier did not heed the reverberating sound of the above warning expressed by Justice Masuku. Lawyers are officers of the court and form a pillar of the justice system. They stand in a sacred position towards the court with the objective of assisting the court in its quest to deliver justice. The independence and impartiality of the lawyers constitute the major ingredients to the lawyers' duty to the court and the faith that the court has towards lawyers. I cannot phantom a situation where the courts loose faith in the impartiality and independence of lawyers, as such event would be a recipe for failure of justice and anarchy to say the least.

[64] In *casu*, Ms Olivier was cross-examined for over a day and at the point of adjourning the proceedings to another day, the court was in a predicament as it had to order that Ms Olivier should not communicate with the lawyer of the plaintiff (Mr Olivier). The difficulty was restricting communication between a husband and wife while appreciating that it is communication between spouses that signals the existence of marriage. Even if it is said that the couple could communicate on anything else other than the merits of the case, in my view, it defeats the purpose as naturally, an injury to a spouse may injure the other spouse even more. It is inevitable that a wife who is subjected to a grueling cross-examination may find comfort in her husband and they may discuss the content of such discomfort and the manner in which to address it. It is fair to expect that a responsible husband's loyalty to his wife reigns supreme as compared to such husband (a lawyer's) loyalty to the court.

[65] If ever the message was not clear, out of choice or otherwise, lawyers must detach themselves from the cases of their clients. Lawyers must maintain independence and impartiality and remain professional with the court. It should be remembered that the duty of a lawyer towards the court outweighs the duty of such lawyer towards a client.

Conclusion

[66] Considering that a quorum consists of one half plus one of all possible votes of paid-up members and Council members of the NGF Constitution,¹⁸ it follows that had the members present at the SGA of 28 November 2020 be 19 out of 38, they would not have formed a quorum. Yet, Ms Olivier recorded in her own handwriting that the members present at the SGA were 19.

[67] The questionable and unreliable explanation of Ms Olivier regarding Ms Helvi Ndjuluma's late inclusion to make up the much needed quorum of 20 adds insult to injury. This is coupled with additional vetting requirements engineered by Ms Olivier outside the NGF Constitution and without authorisation by the Executive Council. In addition, the concession by Ms Olivier that, had any of the disqualified eight paid up members not being so disqualified, they would have tilted the scales against the quorum, it cannot, in my view, be said that a quorum was constituted at the meeting of 28 November 2020.

[68] In the premises, the special plea raised by the defendants stands to be upheld.

Costs

[69] The principle is well established in our law that costs follow the event. I have not been persuaded neither could I find convincing reasons from the record why this well-beaten principle should not be applied in this matter. Thus, the defendants will be

¹⁸ Article 10.5.

awarded costs.

Order

[70] In the result, it is ordered that:

[5] The defendants' special plea that the plaintiff lacks the necessary *locus standi in judicio* to institute these proceedings is upheld.

[6] The plaintiff's claim is dismissed.

[7] The plaintiff shall pay the costs of the first defendant limited to one Counsel and the costs of the second, third and fourth defendants' consequent upon the employment of one instructing and two instructed Counsel.

[8] The matter is removed from the roll and regarded as finalised.

O S SIBEYA

JUDGE

APPEARANCES:

PLAINTIFF:

J OLIVIER
Du Pisani Legal Practitioners,
Windhoek

1ST DEFENDANT:

R Ketjjere
Office of the Government Attorneys,
Windhoek

2ND, 3RD & 4TH DEFENDANTS:

R. HEATHCOTE SC (with G. Dicks)
Instructed by Koep & Partners
Windhoek