

REPUBLIC OF NAMIBIA



NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-MOT-GEN-2022/00493

In the matter between:

JASON EMVULA

APPLICANT

and

NAMIBIA NATIONAL FARMERS UNION

RESPONDENT

Neutral citation: *Emvula v Namibia National Farmers Union* (HC-MD-CIV-MOT-GEN-2022/00493) [2023] NAHCMD 452 (28 July 2023)

Coram: CLAASEN J

Heard: 05 May 2023

Delivered: 28 July 2023

Flynote: Member of voluntary association seeks a declaratory order to set aside a preventative suspension pending a disciplinary hearing for alleged breach of fiduciary duties – Whether the decision suspended the applicant was lawful or ultra vires the associations' constitution – Whether authority to suspend member lies with National Council or Executive Committee.

Summary: The NNFU suspended its President pending investigations and disciplinary proceedings. Aggrieved by that, the suspended President approached the court to set aside the decision as null on void on the basis that it was done ultra vires the NNFU constitution. The respondent asserted that the decisions falls within the confines of the constitution. The respondent's case was that the Executive Committee was authorized for the management of the NNFU affairs and was not precluded from suspending the President.

Held that; in respect of voluntary associations the provisions of the constitution becomes part of the contract entered into by a member who joins the association and one must first and foremost find the powers and functions of an association's organs in its constitution.

Held that; where internal remedies exist normally the court will insist that parties adhere to it. In the present matter there are no internal remedies in the NNFU Constitution

Held that; the repository of power based on the NNFU constitution is the Congress and thereafter the National Council, which could convene Special National Council sessions for intermittent purposes which may arise.

Held that; the Executive Committee suspended the applicant whilst their functions, according to the constitution, were restricted to the day to day management and administrative affairs of the association. It was not clothed with the authority to suspend the applicant, nor has the case been that such was delegated. The Executive Committee, as a functionary, could investigate the matter and make recommendations, but the decision to suspend was that of the National Council.

ORDER

1. Prayers 1, 2 and 3 in the notice of motion is granted.
2. The matter is removed from the roll and regarded as finalized.

JUDGMENT

CLAASEN J

Background

[1] The applicant is the suspended President of the respondent. He also describes himself as a business person and farmer in the Oshikoto Region, in the Republic of Namibia.

[2] The respondent is a voluntary association, registered in terms of the company laws of the Republic of Namibia, as an association not for gain, with its office in Windhoek-West, Republic of Namibia. For the purposes of this judgment it will refer to the respondent as the NNFU and as the association, interchangeably. Its professional aims and objectives are:

- (a) To protect and advance the interest of communal as well as commercial land farmers;
- (b) To promote the development of a viable farming industry in order to improve the rural community's standard of living and enhance the rural farming industry's contribution to the national economy;
- (c) To liaise with international farmers' organisations and promote networking, cooperation and representation of farmers' interests at an international level.

[3] The applicant was elected as President on 11 June 2017, at a National Congress held in Opuwo in the Kunene region and was suspended on 24 August 2022 on account of alleged misconduct. This decision was communicated to him in a notice of suspension, which inter alia conveyed that the period of suspension was for the duration of the investigations and disciplinary proceedings until the outcome of the disciplinary proceedings. It was signed by Mr Kapi on behalf of the NNFU. Aggrieved by that the applicant approached the court for declaratory orders in the following terms:

'1 The respondent's meeting(s), if any, held during August 2022 (or any time prior thereto), whereat the respondent resolved to suspend, investigate and discipline the applicant is/are declared null and void of any and all legal consequences and set aside;

2 The respondent's decision of 24 August 2022 (or any time prior thereto), to suspending, investigate and discipline the applicant is declared null and void of any and all legal consequences and set aside.

3 The Respondent is ordered and directed to pay the costs of this application, being the costs of on instructing and one instructed legal practitioner.'

Applicant's Case

[4] At the outset of oral argument, counsel for the applicant, Mr Kasita abandoned the preliminary point that the deponent of the answering affidavit did not have the requisite authority to do so. He also informed the court that the applicant no longer persists with the issue that the respondent was supposed to afford the applicant a hearing before the suspension.

[5] In the applicant's founding affidavit he deposed that by virtue of his membership in the respondent, the relationship between the parties are contractual in nature and it is governed by the NNFU Constitution. He asserts that in terms of Article 6.2 of the Constitution, the National Council is the respondent's highest authority whenever Congress is not in session.

[6] As such, the decisions taken on 24 August 2022, to suspend him was taken unlawfully because it does not find support in the respondent's foundational instrument, the principles of natural justice and the trite principles of the law of meetings. According to the Constitution, the respondent's board of directors, interchangeably referred to as Executive Committee, is not empowered to make the decision to suspend the applicant and appoint an acting President.

[7] Counsel for the applicant contends that this court has authority to intervene and hear the matter. That is because the court has inherent jurisdiction to hear all disputes and also because the NNFU Constitution does not contain any clause to deal with internal remedies.

[8] Counsel for the applicant submitted that based on the Constitution the power to appoint or suspend lies with Congress or thereafter the National Council whereas the Executive Committee merely has the powers to appoint committees to investigate matters. He cited the case of *Masetla v President of RSA* CC¹ to bolster his argument that there is a presumption that the body that has the power to appoint has the implied power to dismiss.

¹ *Masetla v President of RSA* CC [2008] (1) SA p 566 (568).

[9] He furthermore contended that even though a Special National Council meeting was held, it was done only afterwards, thus it was the Executive Committee who effectively suspended the applicant, whilst it had no authority for such decision. He premised the argument upon the decision in *Shaik Abdool v Juma Masjid Trust*². In that case the Full Bench followed the principle stated in the decision in *Doe v Goldwin*³, as follows:

‘... notice to quit must be such that the tenant may safely act on it at the time of receiving it, and, therefore, a notice by an unauthorised agent cannot be made good by an adoption of it by the principal after the proper time for giving it.’

[10] Finally, he argued that the after the fact endorsement of the National Council does not ratify the act. What had happened at the time is that the National Council, as the body with the authority merely rubberstamped it at the end, but the decision remains unlawful as it was taken by an unauthorised functionary.

Respondent's case

[11] The treasurer and acting President of the respondent, Mr Amon Kapi deposed to the respondent's answering affidavit. In addition, confirmatory affidavits were filed by the persons he referred to in his affidavit. Mr Kapi asserts that he was authorized in a resolution⁴ passed by the NNFU to oppose this application and also explained that the Vice-President had resigned at the material time.

[12] He raised a preliminary point that the court does not have the jurisdiction to hear the matter because the applicant failed to exhaust the NNFU's internal procedures prior to coming to this court. Therefore this application is prematurely at court.

[13] The deponent summarised the circumstances that brought the parties to the impasse as that the applicant was investigated, suspended and issued with a notice of a disciplinary proceedings by the Executive Committee which is represented by him. He asserts that Executive Committee has the power to suspend the applicant by virtue of clause 6.3.5 of the Constitution which tasks them with the management of the respondent and the Secretariat. Furthermore that the Executive Committee is permitted

² *Shaik Abdool v Juma Masjid Trust* 1929 NPD 75.

³ *Doe v Goldwin* 114 E.R. 57.

⁴ Annexure "AMK1"

to appoint Sub-Committees on specific subjects when the need arise, in which premises they appointed a disciplinary committee to chair the disciplinary hearing.

[14] He asserts that the proceedings are necessary because the applicant has on numerous occasions between the year 2019 until 2022 made individual and personal decisions on behalf of the association without a quorum which violates clause 6.3.7.9(b) of the NNFU Constitution. These incidents were set out in several charges. It is also his case that the applicant has conducted himself in a manner that breaches the fiduciary duty as an office bearer, which brings into operation clause 6.3.4 of the constitution which provides that a director can be removed if he/she contravenes the NNFU constitution.

[15] The respondent contends that not only did it take a lawful decision to suspend the applicant but 'a Special National Council' was called on 22 September 2022, by the board of directors, inter alia to discuss the applicant's suspension. The Special National Council approved and endorsed the board of directors' decision to suspend and to discipline the applicant. The unanimous endorsement and approval of the decision by the board of directors to suspend the applicant by the Special National Council, clearly, indicates that the board of directors had acted within their powers.¹⁵ He amplifies that if the board acted *ultra vires*, the Special National Council would have reversed the board of director's decision.

[16] As regards the contention of failure to exhaust internal remedies, counsel for the respondent, Mr Shapumba contended that the applicant failed to appeal his suspension at any platform within the respondent's structures. He contended that the applicant specifically failed to appeal the decision of the Board of Directors before the Special National Council, held in Otjiwarongo by the respondent on 22 September 2022. Instead of doing that internally, the applicant decided to challenge his suspension in this court, therefore the matter ought not to even go the merits.

[17] Mr Shapumba agreed that the suspension in question was merely a preventative suspension and not a final suspension. The reason for that was because of a risk of interference into the ongoing investigations and possible risk of interference with witnesses as there was 19 charges, which allegations emanated from board members and members of the Secretariat.

⁵ Para 15 of the Answering affidavit.

[18] He argued that the relevant meetings (the one being on the 3 August 2023 and the other being on 24 August 2022) took place within the confines of the NNFU Constitution and the mandate of the Executive Committee. He explained that in terms of the instruments there are nine directors with a quorum of five or more. At the material time, the Vice-President resigned and because of the suspension of the President there were seven directors instead. All of the seven directors were present when the decisions were made. Furthermore that the National Counsel ratified and endorsed the decision of the board of directors, who lawfully suspended the applicant. Therefore, the applicant is not entitled to the relief he seeks.

[19] He also commented on the abandoning of the complaint about an alleged lack of procedural fairness and stated that since the applicant did not want to abide to the NNFU's decision, he abandoned his own right to *audi partem* and came to another forum. It is noted that the concession by counsel for the applicant about this point was well made because where the suspension is pre-cautionary and not punitive, there is no requirement to afford the employee the opportunity to make representations. That is because suspensions which are done as a precautionary measure is not the same as a disciplinary step⁶. Finally he petitioned the cost prayer, arguing that there is nothing extraordinary about the proceedings, nor was the opposition vexatious, and there is no need for a punitive cost order. -

Discussion

[20] I start with the question as to whether the respondent is correct about the exhaustion of internal remedies in this case. If the answer is yes, then the matter ends here. The principle of exhaustion of internal remedies is well established in our law and normally where internal remedies exist the court will insist that parties adhere to it. The basic position in respect of voluntary associations has been set out in *Namibian Premier League v Namibian Football Association*⁷:

'Where a voluntary association's constitution provides for an appeal to a domestic appellate or review tribunal, this is an avenue an aggrieved member of the association must generally utilise as it would normally be a cheaper and more expeditious route than a court of law and be presided over by persons with some background and knowledge as to the workings

⁶ *Smith v Desert Fruit Namibia (Pty) Ltd* (HC-MD-LAB-MOT-REV-2019/00271) [2020] NALCMD 13 (01 April 2021).

⁷ *Namibian Premier League v Namibian Football Association* (SA 71-2019) [2020] NASC 19 February 2020 at para 20.

of the association.⁸ Where the provision in the constitution of a voluntary association imposes an obligation on the part of members to exhaust all domestic remedies and further excludes the court's jurisdiction until domestic remedies have been exhausted the courts will be very loath to exercise jurisdiction prior to the contractually agreed remedies being exhausted.⁹ This is similar to the position where parties in a contractual context agree to an arbitration clause.¹⁰ Members of any voluntary association join such organisation on the basis that they agree to abide by such organisation's constitution and in this manner they and the organisation are contractually bound to each other.¹¹

[21] In looking at the NNFU Constitution, it contains no penal or disciplinary provisions that deals with disciplinary proceedings. It also does not spell out measures to appeal for an aggrieved party who finds himself in the shoes of the applicant. Hence there are no internal remedies in the NNFU Constitution. For that reason, I am unable to agree with the respondent that the application had internal remedies available to appeal the preventative suspension. Along these lines the matter will proceed to the merits.

[22] The decisive issue herein turns on a narrow compass, namely whether the suspension was constitutionally permissible and thus lawful. In respect of voluntary associations, the law is clear in that the provisions of the constitution becomes part of the contract entered into by a member who joins the association. In this regard in *Mineworkers Union of Namibia v Ndeutepo*¹² it has been stated that a constitution of a body such as the applicant's, is a voluntary contractual agreement between the subscribing members and the Union itself.

[23] In this case it appears from the Constitution that an individual person cannot affiliate directly to the NNFU. However, that is qualified that such a person does so through affiliation to a farmers' association and that is how I understand the applicant's assertion that he is a member. The applicant avowed that he was duly elected at a National Congress held for the members during June 2017 and that he is a member. It is also evident that the NNFU Constitution refers to the President as a member in clause 6.3.1 (a) (i) where it is stated that the Executive Committee shall consist of twelve members elected by Congress and it starts by listing the President as the first

⁸ *Strydom v Administrator of the OFS* 1953 (2) SA 133 (O) at 140 and *Jockey Club of South Africa v Feldman* 1942 AD 240 at 251-252.

⁹ *Strydom's* case above at 150G-H, *Jockey Club* case above at 362.

¹⁰ *Namibia Wildlife Resorts v Ingplan Consulting Engineers and Project Managers (Namibia) (Pty) Ltd & another* (SA 55-2017) [2019] NASC (12 July 2019) paras 27 to 29.

¹¹ *Nowases & others v ELCRN & another* 2016 (4) NR 985 (HC).

¹² *Mineworkers Union of Namibia v Ndeutepo* (261/2012)[2013] NAHCMD 182 (28 June 2013)

member. Furthermore it is difficult to conceive how the applicant was eligible and elected as President of the association if he is not a member. Thus I do not subscribe to the respondent's contention that the applicant is not a member.

[24] The key to the determination of this dispute lies in the NNFU Constitution and the power structures of the association. That is where I turn to. The clauses relating to its decision making structures commenced with those relating to Congress. In this regard clause 6.1 headed 'The Congress' provides:

'(a) The Congress shall be the Supreme Authority;

(b) The Congress shall vest some of its duties and powers to the National Council when not in session.'

[25] The frequency of Congress sessions is dictated to be once every three years, which takes us to the next layer of authority. Clause 6.2 is headed 'The National Council' and it provides that the Council shall be the highest authority when Congress is not in session. Clause 6.2.1 circumscribes the powers and duties of the National Council to:

a) Express opinions on various issues and set guidelines for the Executive Committee;

b) Receive, review, approve or reject reports from the Executive Committee;

c) Approve NNFU annual program budget and plan;

d) Receive reports from affiliate members and advise them;

e) Delegate all or part of its powers to any constituent elements of NNFU for certain periods and to revoke such powers;

(f) Appoint sub-committees and task forces on specific subjects when the need arise;

(g) Authorize the financial liability levels required by the NNFU and;

(h) Have the special right to fill, by election and for the remainder of he officer term, the vacancies occurring in the Executive Committee when the total number of members elected by Congress decreased beyond four.

[26] In respect of the frequency of meetings clause 6.2.2 provides that the National Council shall meet once a year, when Congress is not in session, but that Special National Council meetings shall be held from time to time upon written application for such meeting by the Executive Committee of at least two thirds of the affiliate members and when the Executive Committee sees the need for it.

[27] The NNFU Constitution also provides for an Executive Committee and its powers is circumscribed in clause 6.3.5 which states that:

'The Executive Committee shall, subject to any limitations imposed by the Congress/National Council, be responsible for the Management of the NNFU...' It also sets out further functions such as the day to day administrative running of the office of the Secretariat, functions related to programming, monitoring and reporting, preparation for Congress or National Council meetings, conduct public relations and manage the finances.'

[28] It is clear that the repository of power is the Congress and thereafter the National Council, which could convene Special National Council sessions for intermittent purposes which may arise. Evidently, it was the Executive Committee that decided to suspend the applicant, which functionary according to the constitution was restricted to the day to day management and administrative affairs of the association. There is nothing in the founding contract that confers the authority to appoint or suspend on the Executive Committee nor has the case been that such was delegated. In view of that, in the situation at hand the Executive Committee, as a functionary, could investigate the matter and make recommendations, but the repository of the power has had to make the decision to suspend.

[29] Incidentally, a Special National Council meeting was held almost a month after the suspension of the applicant on 22 September 2022. During that session decisions were made that culminated in certain resolutions namely that:

(i) That the disciplinary proceedings against the President of NNFU should proceed as the board of directors lawfully suspended the President.

(ii) That the board of directors should oversee the process of disciplining the President as planned and the board of directors should make recommendations to the Special National Council and the Congress.

(iii) That board of directors should constitute a committee to oversee the disciplinary proceedings of the suspended president of NNFU.

(iv) That the appointment of the Chairperson of the disciplinary proceedings should be done through tender to ensure fairness and transparency...'

[30] The second resolution in the preceding paragraph makes reference to the 'board of directors that should make recommendations to the Special Council and the Congress' which is indicative thereof that the association was aware, alternatively it had dawned that the Executive Committee could only make recommendations to the Council or Congress about the suspension. At the end of the day it was the wrong functionary in terms of the Constitution's power structures that made the decision which aggrieved the applicant herein. The contention by the counsel for the respondent that the Special National Council endorsed and ratified the suspension afterwards, does not cure the problem. That is because the decision was null and void from the beginning as it was done in violation of its own Constitution and the basic principle in this regard is that one must first and foremost find the powers and functions of an association's organs in its Constitution.

[31] It thus follows that it has not been shown that the Executive Committee was empowered by the NNFU Constitution to suspend the applicant pending investigations and the disciplinary hearing. In the premises, the application stands to succeed. The decisions prayed for in the Notice of Motion cannot stand and it is declared null and void.

Costs

[32] The applicant in his replying affidavit declared that he reserves his right to seek a punitive cost order (personally) against the respondents who directed the opposition in an unreasonable, unjustifiable and oppressive manner. This punitive scale was not pressed for during the argument, but it must also be said it is not for the mere asking. Counsel for the respondent has cited the case of *Black Sash Trust v Minister of Social Development*¹³ which formulated the applicable principles for that as follows:

¹³ *Black Sash Trust v Minister of Social Development and Others (Freedom under the law NPC Intervening)* (CCT48/17); [2017] ZACC 20; 2017 (9) BLLR 1089 (CC) 15 June 2017).

'5 The common law rules for granting a personal costs order against persons acting in a representative capacity were based on what this court in Swartbooi described as conduct that was motivated by malice or amount[ed] to improper conduct...'

[33] Having considered the correspondence and the papers in the matter, the behaviour of the opponent does not struck me as a case wherein the opposition of the respondents were unreasonable, or done in a malicious or vexatious manner. There is thus no reason or justification for the notion by the applicant that he deserves a punitive cost order against the officials who opposed the application. As such the cost reverts back to what was prayed for in the Notice of Motion.

[34] In the premises I make the following order.

1. Prayers 1, 2 and 3 in the notice of motion is granted.
2. The matter is removed from the roll and regarded as finalised.

C CLAASEN
Judge

APPEARANCES

APPLICANT:

T. Kasita (with him K.Gaeb)

Instructed by Sisa Namandje & Co. Inc, Windhoek.

RESPONDENT:

A. Shapumba

Of Shapumba & Associates Incorporated, Windhoek.