CASE NO.: SA 4/2000

IN THE SUPREME COURT OF NAMIBIA

In the matter between

BUCKHARD KARL AUGUST OPPERMANN

APPELLANT

And

THE PRESIDENT OF THE PROFESSIONAL

HUNTING ASSOCIATION OF NAMIBIA

RESPONDENT

CORAM: Strydom, C.J.; Levy, A.J.A. *et* O'Linn, A.J.A.

HEARD ON: 2000/10/13

DELIVERED ON: 2000/11/28

APPEAL JUDGMENT

O'LINN, A.J.A..:

SECTION A: INTRODUCTION:

The appellant, Oppermann, was an extraordinary member of the Professional Hunting Association of Namibia known as NAPHA.

The respondent is the President of the Professional Hunting Association of Namibia (NAPHA).

NAPHA is a voluntary association registered with the Ministry of Environment and Tourism as the official body representing Namibia's hunting and safari operators and recognised as such.

Ostensibly, the Executive Committee of NAPHA decided to suspend appellant on 30th December 1996. Thereafter the Executive of NAPHA on 1 November 1997 decided to expel the appellant from the organisation and informed appellant of the decision by letter dated 12 November 1997.

The parties will hereafter be referred to respectively as appellant and respondent.

The appellant approached the Court *a quo* by means of a review application in terms of Rule 53 of the Rules of Court seeking *inter alia* the following relief:

> "1.1 Reviewing and correcting or setting aside the decision of the respondent's executive committee dated the 30th of December 1996 in terms of which the appellant was suspended or expelled as a member of the respondent;
>
> 1.2 1.2.1 Reviewing and correcting or setting aside the decision of the executive committee of the respondent communicated to the appellant in its

letter dated the 12th of November 1997 in terms of which the appellant was expelled as a member of the respondent;

1.2.2 Declaring the decision referred to paragraph 1.2 above null and void and of no force and effect;

1.2.3 Declaring that the appellant is still and extra-ordinary member of the respondent;

1.3 In the alternative to paragraph 1.2 above:

1.3.1 Reviewing and correcting or setting aside the decision of the respondent not to allow the appellant to appeal to the respondent's tribunal against the decision referred to in paragraph 1.2 above.

1.3.2 Authorising and directing the respondent's tribunal to entertain the aforesaid appeal and/or any application for condonation relating to the prosecution of such appeal.

1.4 Directing that the costs of the application be borne by the respondent on a scale as between counsel and client."

According to the judgment of Hannah, J. in the review "the respondent concedes that the Applicant is entitled to have the expulsion decision set aside and the only dispute between the parties relates to the conditional suspension."

Hannah, J. after hearing argument, made the following order:

"1. (a) That the decision of the respondent to expel the applicant from the

Namibian Professional Hunting Association communicated to him in a letter dated 12th November 1977, is set aside;

(b) That the said decision is declared void and of no force or effect.

(c) That the Applicant is declared to be still an extraordinary member of the Namibian Professional Hunting Association.

2. That the relief sought in prayer one of the Notice of Motion is refused.

3. That the respondent pays the Applicant's costs of drafting the Notice of Motion and the founding affidavit.

4. That saves for the costs referred to in 3, the Applicant pays the costs of this application."

The appellant noted an appeal against part of the judgment to the full bench of the High Court of Namibia. By agreement between the parties, this appeal was diverted to the Supreme Court in terms of section 18(2)(a)(ii)(aa) of the High Court Act 16 of 1990.

The notice of appeal reads as follows:

> "KINDLY TAKE NOTICE that the abovementioned appellant hereby notes an appeal to the Full Bench of the High Court of Namibia against the following parts of the judgment handed down by the Honourable Mr. Justice Hannah on the 14th of December 1999:
>
> 1. The ruling contained in paragraph 2 at page 12 of the judgment, i.e. that the relief sought in prayer 1 of the Notice of Motion is refused;
>
> 2. The ruling contained in paragraph 4 at page 12 of the judgment, i.e. that save for the costs of drafting the notice of motion and the founding affidavit, the Applicant pays the costs of the application.
>
> TAKE FURTHER NOTICE THAT the appeal is based on the following grounds of fact and/or law:
>
> 1. That the Honourable Court erred in law and/or on the facts by holding that the respondent acted in accordance with

its constitution and more particularly clause 5.8 thereof when it suspended the appellant.

2. That the Honourable Court erred in law and/or on the facts by finding that no machinery is provided in clause 5 of the respondent's constitution for charges to be formulated and communicated when it comes to the reprimanding, warning and/or suspension of one of its members.

3. That the Honourable Court erred in law and/or on the facts by failing to take into account the provisions of clause 5.8 of the respondent's constitution which expressly provides for disciplinary proceedings to be instituted when it comes to, *inter alia*, the suspension of one of the respondent's members.

4. That the Honourable Court erred in law and/or on the facts by failing to take into account that clause 5.8 of the respondent's constitution is the only clause which deals with the suspension of a member and although on a different footing from that of expulsion it clearly envisages and provides for disciplinary proceedings to be instituted against a member whenever the suspension of such a member is contemplated.

5. That the Honourable Court erred in law and/or on the facts by failing to hold that in the light of the present

constitutional dispensation the court should adopt a more expansive view of the scope of reviews of this nature and that it should be prepared to read into the respondent's constitution provisions of fairness and reasonableness especially in the light of the wording of clause 5.8 thereof.

6. That the Honourable Court erred in law and/or on the facts by taking into account that members of private organisations including the respondent's members often have little real choice over the terms of its constitution including those relating to penal and disciplinary provisions as a consequence of which the court should adopt a wider and more liberal approach to the judicial review of such organisations' decisions.

7. That the Honourable Court erred in law and/or on the facts when it held that in the light of the distinction to be drawn between expulsion on the one hand and reprimand, warning and suspension on the other hand in the respondent's constitution it hereby intended to exclude the adoption of the rules of natural justice when it comes to the latter.

8. That the Honourable Court erred in law and/or on the facts in finding that in the present constitutional dispensation and more in particular in the light of the provisions of Article 18 of the Namibian Constitution and its application

insofar as voluntary associations are concerned, a distinction should be drawn when it comes to the application of the rules of natural justice between such voluntary associations and administrative organs constituted by law.

9. The Honourable Court erred in law and/or on the facts by failing to take into account that the respondent, by providing for disciplinary proceedings in its constitution when the suspension of a member is concerned, thereby by necessary implication also incorporated the following:

9.1 The duty to act fairly;

9.2 The adoption of the rules of natural justice and more specifically at least the following:

(a) that it should formulate charges against members;

(b) that it should timeously notify such members of such charges;

(c) that it should give such members an opportunity to defend themselves against such charges;

(d) that it should give such members an opportunity to be heard when such charges are raised against them.

10. That the Honourable Court erred in law and/or on the facts by holding that the contract between the respondent and its members excludes the operation of the rules of natural justice and fairness in relation to disciplinary proceedings against its members."

The appeal was argued before us by Coetzee, assisted by Strydom for the appellant and Frank, S.C., for the respondent.

A question raised *mero motu* by the Court at the outset was whether the appeal by applicant against the suspension did not automatically fall away when the Court *a quo* ordered in par. 1 of its order that the decision of the respondent to expel the applicant was "set aside", that the decision was declared "null and void and of no force or effect" and that the applicant "is declared to be still an extraordinary member of the Namibian Professional Hunting Association".

Mr. Coetzee initially conceded that this may be the case but subsequently inclined to the view that the refusal of the Court *a quo* to hold that the suspension order was also null and void and to actually grant costs in favour of the respondent in this regard, made it necessary to proceed with the appeal against this part of the Court order.

In the circumstances the meaning and effect of the judgment is that not only has the appellant been saddled with an adverse cost order, but that the suspension order remained in force.

This was also how appellant and respondent as well as their counsel understood the judgment. Consequently this Court will have to decide whether or not the Court *a quo*'*s* order should be set aside in so far as it held that the decision to suspend the appellant was in order and that appellant had to pay the costs in this regard.

SECTION B: THE MERITS

B.1 ARTICLE 18 OF THE NAMIBIAN CONSTITUTION:

Mr. Coetzee *inter alia* relied on Art. 18 of the Namibian Constitution for his approach to the nature of the discretion vested in the respondent. This article reads as follows:

> "Administrative Justice
>
> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

The Court *a quo* had this to say on the point:

> "I will accept that the respondent is an administrative body for the purpose of Art. 18 and that it is therefore required to act

> fairly and reasonably but, in my view, its actions must be judged in the context of its rules."

Counsel for the respondent did not deal with the applicability of Art. 18 but relied on the common law principles as set out and developed in the case law relating to the discretion which private bodies such as voluntary associations and clubs must exercise when they decide on disciplinary proceedings and actions. Counsel for respondent clearly took the view that such associations and clubs must in the first place be guided by their own rules.

Mr. Coetzee also relied on Art. 5 of the Namibian Constitution for his submission that Art. 18 is applicable.

Art. 5 reads as follows:

> "Protection of fundamental Rights and Freedoms
>
> The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed." (My emphases added.)

When a member of this court asked Mr. Coetzee during argument whether Article 18 on a proper interpretation, is not restricted to administrative bodies and officials of government created by statute and does not extend to private association and clubs, he readily conceded that to be the case. He further conceded that if that is the case, the so-called vertical effect of Art. 5 does not extend to private associations and clubs because Article 5

clearly is only applicable to such associations and clubs in the case of those fundamental rights and freedoms which are applicable to such associations and clubs. As Art. 18 is not applicable to such associations and clubs, Art. 5 in itself does not provide for such inclusion. To the contrary - the words in Art. 5 emphasized above, namely - "where applicable to them", excluded "all natural and legal persons" where the particular fundamental right or freedom is not applicable to them.

In an apparent reference to the applicability of Art. 18, Mr. Frank submitted:

> "It must be borne in mind that respondent is not a public body but a private one and likewise its officials are not public officials. 'Administrative Justice' is thus strictly speaking not involved at all. No question of 'administrative bodies' or decisions by 'administrative officials' arise."

There is substance in this view. It is however, not necessary in this case to finally decide whether or not Art. 18 is applicable to private voluntary associations and clubs because the case can be decided without any reliance on Art. 18 of the Namibian Constitution.

B.2 THE BINDING NATURE OF THE CONSTITUTION AND RULES OF THE ASSOCIATION OR CLUB

Both counsel agreed that any private voluntary association or club and its members are bound by its rules.

These rules must of course in all cases be fairly and reasonably interpreted.

It is in this regard where the learned judge in the Court *a quo* erred in not correctly interpreting and applying the rules of the respondent relating to suspension.

B.3 MISDIRECTIONS BY THE COURT *A QUO*:

The Court *a quo* misdirected itself *inter alia* in the following respects:

1. After correctly pointing out several important differences in the rules providing for expulsions on the one hand and reprimand, warning and suspension on the other, the Court stated:

> "As I have already indicated, clause 5, by necessary implication, clearly excludes the formulation and communication of charges when it comes to reprimand, warning or suspension and no doubt this was decided upon by the founding members of the association for good reason.
>
> Presumably, it was considered that these particular sanctions could be imposed summarily because the member being disciplined would himself be in a position to remedy the complaint made against him. And when one turns to the facts of the present case one finds that to be precisely the situation. The Executive Committee first apprized the applicant of its concerns about the number

> of complaints being addressed to the association about the service it was providing to instances. At the request of applicant it provided details of the complaints. It also asked him to comment on the complaints before the end of November 1996 and to state whether they have been or are being resolved. The end of November came and went but no comments were received. The applicant was suspended from the association until the complaints were satisfactorily resolved. What is unreasonable about that? The applicant had the remedy in his own hands. All he had to do was to show that the complaints had been satisfactorily resolved and the suspension would then be lifted. If it was not, then in that case he could seek relief from this Court, but in my judgment, not by attacking the suspension itself as he has sought to do in this application..."

The two letters by the respondent relied on by the Court as constituting the "disciplinary proceedings" did not meet any of the requirements stated above.

The letter dated 18/09/1996 was written in German. The relevant part of the sworn translation reads as follows:

> "Dear Mr. Oppermann
>
> More and more complaints are lately being lodged to the Executive against your enterprise. The Executive does not want to wait for such a long time until Namibia has acquired the reputation that one has to 'wait until eternity

for your trophy, that they are damaged or that one never receives them'.

We should thus like to request you in all earnest to rectify these complaints which we are no longer prepared to excuse on account of structural alterations at your place and moving, otherwise we will be compelled to consider further measures.

Please regard this letter as a positive move by the Executive, to give you time to straighten things out, without having to resort to confrontation as a last request.

Yours sincerely

Signed illegibly
pp Johann Vaatz
Chairman"

The appellant replied in German in a letter dated 23/9/1996. The German translation of the relevant part reads as follows:

"Your letter dated 18.09.96

Kindly supply us with details about which complaints are concretely involved.

We unfortunately cannot react to sweeping (overall) attacks. I would also like to know where you got our alleged excuses regarding building projects from."

The respondent responded in a letter dated 23 October 1996, the relevant part of the German translation reads as follows:

"Dear Mr. Oppermann

Your letter dated 23.9.1996

The letter of Mr. Vaatz dealt with the accumulation of complaints which are resolved only very slowly or not at all. The complaints submitted to NAPHA are also known to you (this is evident from the distribution list of the documentation). For that reason it is surprising that you require details. The following complaints have been lodged to NAPHA:

Peter Helletzgruber, 11.3.96, trophies disappeared
Rothmeier, 26.3.96, found fault with warthog mounting
Len & Cindy Murphy, 14.5.96, trophy transport difficulties
Wofgang Dörr, 12.7.96, lost steenbok trophy
Oskar Wagner, 4.5.94, missing kudu mounting (very old case)
(Latest information: the trophies are still in Namibia)
Mrs. Lax, 19.8.96, defects in workmanship on trophies.

> We should like to request you to comment on these complaints before the end of November 1996 and to inform us, how these cases were or are to be solved. We must point out that NAPHA does not want to find the 'guilty party', but that problems (which are present everywhere) are being solved carefully and quickly so as not to cause damage to the whole Namibian hunting industry.
>
> In the meantime NAPHA has heard to its regret that you terminated your membership of the 'IGNP'. It would be very advisable if all taxidermists could belong to this interest group in order to solve their problems jointly.
>
> Yours sincerely
>
> Signed
> Frank Heger
> NAPHA Executive member"

It will be noticed that respondent never replied to appellants query in his letter of the 23.9.1996 which read:

> "I would also like to know where you got our alleged excuses regarding building projects from."

For the rest, details of most of the complaints referred to were extremely vague.

Clause 5.8 provides:

> "If the executive committee is of the opinion that a member is consciously violating the constitution, decisions or resolutions of the association, disciplinary proceedings may be initiated against such member. Taking into consideration all the evidence put before the Committee, the executive committee may discipline the accused by reprimanding or warning him, suspending his membership or expelling him from the Association (permanently or temporarily)."

The clause therefore provides that the following requirements be met before disciplinary proceedings is initiated to suspend a member:

(a) The Executive Committee is of the opinion

(b) that the member is consciously violating -

(i) the constitution; or

(ii) the decisions; or

(iii) the resolutions of the association;

(c) The Executive Committee has initiated disciplinary proceedings against the member.

(d) Has taken into consideration all the evidence put before the committee.

These requirements are applicable to suspensions as well as expulsions and even to reprimands and warnings given in order to discipline a member.

It follows that the power of the Committee to initiate disciplinary proceedings is limited to that specified in clause 5.8 of its constitution. Any disciplinary proceeding not complying with these requirements would be *ultra vires* its powers.

If the Executive Committee really intended to initiate disciplinary proceedings against appellant in terms of clause 5.8 of the respondent's constitution when it compiled the letter dated 18/9/96, it would have been a simple matter to do so. It certainly needed no legal expert to formulate such a letter.

The above requirements read in context in my respectful view, refute the finding of the Court that clause 5, "by necessary implication, clearly excludes the formulation and communication of charges when it comes to reprimand, warning or suspension".

To the contrary - the words setting out the requirements aforesaid would be meaningless if an arbitrary and/or summary procedure and decision was contemplated. "Disciplinary proceedings" means at least proceedings where an accused person is informed of a charge which is stated to be based on an opinion by the executive committee

of the respondent that the accused member has consciously violated a specified provision of the respondent's constitution or a specified decision or a specified resolution of the respondent. How else can the accused member defend himself or herself and produce evidence which forms part of "all the evidence" put before the Committee and which the Committee is bound to consider according to the rules of the respondent.

In this matter, the appellant was never informed that in the opinion of the executive, he has consciously violated the constitution, or decisions or resolutions of the association. (My emphasis.) There was no intimation before the suspension of the provision of the constitution which was allegedly violated, or the decision or resolution violated. Furthermore, there never was an indication of the "initiation of disciplinary proceedings" and/or the date thereof.

The first intimation to appellant that he had allegedly contravened a provision of NAPAH's constitution was in the letter dated 30/12/1996, in which appellant was informed of his suspension.

A letter of this nature may have gone some way in meeting the requirements of a notice to appellant of the initiation of disciplinary proceedings, but clearly could not serve such purpose when communicated to applicant only after the decision to suspend him had already been taken.

The letters written by the respondent dated 18/9/1996 and 23/10/96 could also serve as demonstrating unhappiness of members of the executive with the quality of service to be expected from members, but cannot serve as the initiation of disciplinary proceedings in terms of clause 5.8 of respondent's constitution.

The "disciplinary proceedings" relied on by the Court *a quo* was fatally flawed. The Executive Committee failed to apply its collective mind to the explicit, as well as the clearly implied provisions of respondent's constitution relating to the "initiation of disciplinary proceedings".

The order of suspension should be set aside on this ground alone.

2. The Court *a quo* also misdirected itself in its application of the approach set out in the decision of Theron, J. in the case of *Bekker v Western Province Sport Club Incorporated*[1].

In the aforesaid decision Theron, J. first set out the general rule relating to disciplinary proceedings against members of a club, or of a Trade Union or of a voluntary association of persons who have subscribed in one way or another to a constitution. The learned Judge summed up the position as follows:

> "As a general rule, however, it is incumbent upon the committee, while so sitting as a domestic tribunal, to give effect to certain elementary but fundamental principles of fairness which underlie our system of law - as they do also, for instance, the law of England. These principles

[1] 1972(3) SA 803 (C)

> are sometimes (compendiously but not very accurately) described as the principles of natural justice. For present purposes all that need be said about them is that they include the following:
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> (a) that the person charged or complained about must be afforded a hearing by the Committee; and
>
> (b) that he must have due and proper opportunity of producing his evidence and stating his contentions on all relevant points - cf *Marlin v Durban Turf Club & Ors, 1942 AD 112 at 126.*
>
> It is an obvious pre-requisite for the application of these two principles that timeous and proper notice of the charges of complaints which the committee concerned is proposing to investigate should be furnished to the person charged or complained about.
>
> Where a domestic tribunal is bound to observe the fundamental principles of justice to which I have just referred but fails to do so, the Supreme Court has power to intervene at the instance of the aggrieved party and set its proceedings aside on review."

Theron, J. then dealt with an exception to the general rule as follows:

> "But I should add now that the members of a society can contract in such a way as to make this general rule inapplicable. When forming or joining the society or amending its constitution, they can agree, (whether expressly or impliedly) that such domestic tribunal (if any) as may have been decided upon shall be at liberty to ignore the dictates of natural justice, in some or even all of the classes of case falling within its jurisdiction. Whether or not the members have done so, will usually be apparent from the rules of the society, by which they have agreed to be bound. In *Marlin v Durban Turf Club and Others, supra,* (where the appellant, a jockey licensed by the Jockey Club of South Africa, had complained about the procedure followed at a meeting of the stewards of the Durban turf club which had resulted in his being "warned off" for a period of six months), the late Mr. Justice Tindall, after formulating the principles of fairness to which I have already referred, remarked (at pp. 126-7 of his judgment):
>
> > 'The said test of fundamental fairness, however, must be applied with due regard to the nature of the tribunal of adjudicating body

> and the agreement, if any, which may exist between the persons affected. In the present case the tribunal's jurisdiction really depends on a contract between the appellant and the Jockey Club, and he is bound by the rules relating to enquiries.'

The learned Judge of Appeal then proceeded to quote with approval certain passages from the judgment of Maugham, J. in the English case of *Maclean v Workers Union,*98 L.J.Ch. 293: (1929) 1 Ch.D. 602, where it was held that no relief could be afforded to the plaintiff, who had been expelled by his trade union, as the Courts had only a limited jurisdiction over domestic tribunals and could not give relief to members of associations on whom hardship was worked by decisions given honestly and in good faith under the rules of such associations, even though the rules were unfair or unjust. The first of the passages so quoted by Tindall, J.A., appears to me to be particularly apposite to the matter presently before me:

> 'It seems to me reasonably clear that the rights of the plaintiff against the defendants must depend simply on the contract, and that the material terms of the contract must be found in the rules. It is true that Lord Esher in *Allison v General Council of Medical Education and Registration,* (1894) 1 Q.B. 758, appears to have invoked the principles of public policy. I need not consider whether the principle would be held at the present time to be properly applicable even in the case of a tribunal established by the Medical Act, 1958 (21 and 22 Vict.C.90). In the case I have before me - and I may add in such a case as a power of expulsion in a member's club - it seems to me reasonably clear that the matter can only depend on contract express or implied. If, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the Courts would interfere with such a rule on the ground of public policy."

The Court *a quo* apparently leaned heavily on the part of the judgment of Theron, J. where the learned judge dealt with the exception to the general rule and in turn relied on the *dictum* of

Tindall J.A. in *Marlin v Durban Turf Club & Ors,* 1942 A.D. It should be noted that Tindall, J.A. put the exception as follows:

> "In the case I have before me - and I may add in such a case as a power of expulsion in a members club - it seems to me reasonably clear that the matter can only depend on contract express or implied. If for instance, there was a clearly expressed rule stating that a member may be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the Courts will interfere with such a rule on the ground of public policy."
> (My emphasis added.)

It is not necessary to decide in this case whether or not the exception stated in *Bekker's* case and in the case of *Marlin v Durban Turf Club and Ors* quoted above, is still good law in the light of other decisions and authority and the provisions and spirit of the South African or Namibian national constitutions.[2]

What can however be said without hesitation, is that Courts will at least expect unequivocal language to find that the constitution and/or rules of an association or club, exclude the rules of natural justice.

Tindall, J.A., after quoting from the English case of *McLean v Workers Union,*98 L.J. Ch 293, made it clear that when decisions are given by the disciplinary tribunals of domestic associations, clubs or trade unions, and those decisions are given "honestly and in good faith under the rules of such associations, even though those rules were

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[2] Article 18 read with article 5 of the Namibian Constitution**; *Crisp v South African Council of the Amalgamated Engineering Union***, 1930 AD 225 at 328; ***Marlin v Durban Turf Club & Ors.,***1942 AD 112 at 128; ***Turner v Jockey Club of South Africa,***1974(3), SA 633 (A) at 634 H. ***Baxter, Administrative Law,*** 341; ***Wade and Forsythe, Administrative Law,*** 7th ed. at 499 - 500; ***LAWSA***, First reissue; Vol. 1, par. 60,fn 5.

unfair or unjust, the Court would not interfere". But in the instant case the point is that the Executive Committee did not act in terms of the rules and the procedure as well as the decision, were therefore *ultra vires* the rules. Furthermore, it is not the rules which are unfair or unjust, but the procedure followed and the decision taken.

Tindall, J.A., in the quoted passages made it clear *inter alia* that "if, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling on the member to explain his conduct" the Court will not interfere.

In the instant case, the constitution of the respondent contains no such "clearly expressed rule" and there is no justification for finding as the Court *a quo* did, that "clause 5, by necessary implication, clearly excludes the formulation and communication of charges".

3. The Court *a quo* misdirected itself by holding that the sanctions could be imposed summarily because the member being disciplined would himself be in a position to remedy the complaint made against him. (My emphases added.)

There appears, in my humble view, no justification for saying that sanctions can be imposed summarily, because the member could rectify the complaints himself. There also appears to be no rational connection between the point that the appellant could himself rectify the complaint and the conclusion that the sanctions could be imposed summarily.

Furthermore, if it is assumed for the sake of argument that the Executive Committee, properly convened, initiated the proceedings and took the decision to suspend, it had at least a duty to *bona fide* and honestly investigate the complaints and after considering all the evidence obtained in such investigation, including that produced by the accused, to decide in a *bona fide* and honest manner, whether the complaints against the accused were justified or not. The Executive Committee could not cede or transfer its function and duty to so decide to any other person and certainly not to the complainants. The respondent required the appellant, accused by complainants, "to rectify the complaints" as stated in the letter of 18/09/1996 and "to inform us how these cases were or are to be solved" and then in the letter of 30th December 1996 gave as one of the two reasons for suspending him:

> "... but also failed to resolve the complaints to the satisfaction of the customers".

The appellant correctly raised the point that respondents requirement as stated in its letter of suspension meant that even if there was no substance in a client's complaint, appellant would still be suspended if the client was not satisfied, even if the client acted unreasonably in not being satisfied.

Respondent at no stage made a finding that it found the complaints received justified.

The muddled thinking of the Committee on the issue also appears from its reply in its replying affidavit to a contention of the appellant in his founding affidavit:

The appellant contended in par. 31.7 of the said affidavit:

> "Moreover, it clearly appears from respondent's letter dated 30 December 1996, that I was also suspended or expelled because I had failed to comply with NAPHA's request to respond to the complaint of the customers before the end of November 1996. I must draw this honourable court's attention to the fact that I was never informed that NAPHA's Executive Committee was considering any disciplinary or expulsion proceedings or, for that matter, charges against me based on such failure. Yet it suspended or expelled me for that alleged omission. In doing so, I verily believe and respectfully submit that it also acted unfairly and with complete disregard of the principle of natural justice in that
>
> (a) it failed to give me any notice of an intended disciplinary action or expulsion proceedings;
>
> (b) it did not make any disclosure of any charges against me based thereon;

(c) it afforded me no opportunity to be heard on that ground."

The respondent explained in response:

"44. It is correct that it was not spelled out to the Applicant that the Respondent was considering disciplinary proceedings against the Applicant. That is precisely why the Respondent took the decision to suspend the Applicant, in order to persuade the Applicant that the Respondent viewed the complaints as serious and expected the Applicant to react thereto. The feeling of the Respondent was that if action was not taken, the Applicant would merely ignore the Respondent's requests. The remainder of the allegations have been dealt with. In as far as they have not been denied, I specifically deny them."

It appears from the above that respondent was suspended because the "respondent had not spelled out to the applicant that respondent was considering disciplinary proceedings against the applicant" and now wanted "to persuade the applicant that it viewed the complaints as serious and expected the applicant to respond thereto".

The obvious solution to respondent's problem was not to suspend appellant without any intimation that it was in fact busy with

"disciplinary proceedings" in terms of clause 5.8, but to commence disciplinary proceedings in the proper manner and in that manner to attempt "to persuade the applicant that it viewed the complaints as serious and expected the applicant to respond thereto".

The above-quoted response of the respondent also confirms that the respondent at no stage found the appellant guilty of having misconducted himself, but merely wanted to use the suspension to put pressure on the appellant to respond to the complaints. This again may have been a laudable motive, but to use it, as a reason for substituting a summary and arbitrary procedure and decision for the procedure and decision provided for in the respondent's constitution amount to a use of such power for an ulterior purpose and as such constitute in law a *mala fide* exercise of its power to institute disciplinary proceedings and to suspend the member.

It follows that the decision to suspend should also be set aside on this ground.

SECTION C: RESPONDENT'S SPECIAL DEFENCES

The respondent's counsel argued strenuously that appellant is not entitled to the relief claimed because he had either failed to exhaust his internal remedies and/or has acquiesced in it and/or has waived his right to review or appeal the decision. These points must now be dealt with.

Administrative Law by Wiechers, 1985, at 174 - 187
Administrative Law by Baxter, 101, p. 301, 340 - 342

1. Appellant failed to exhaust his internal remedies:

The only internal remedy allowed by the rules is the right of appeal against expulsion provided for in clause 5.7 of NAPHA's constitution. No internal appeal or review is provided for in the case of suspension and consequently there was no internal remedy available to appellant.

It should be noted that even when appellant attempted to appeal against the expulsion, the respondent refused to allow him to do so. This is conceded by respondent in its replying affidavit. The argument on behalf of respondent that the appellant should first have exhausted his internal remedies before approaching the court appears to be a spurious argument - at any event one without substance. Mr. Frank, when questioned by the Court in this regard, conceded that there was no merit in the point.

2. Acquiescence in the decision to suspend and waiver of his right to take the suspension order on review or appeal to a Court:

Counsel for respondent correctly stated that:

> " "It is trite law that, given the factual presumption that a person is not likely to be deemed to have waived his or her rights, the onus to prove the applicant's alleged waiver on a balance of probabilities rests on the respondent. (See *Hepner v Roodepoort-Maraisburg Town*

Council 1962(4) SA 772 (A); *Borstlap v Spangenberg en Andere* 1974(3) SA 695 (A).) I am also mindful that in deciding disputes of fact in application proceedings, those disputes

> '... "should be adjudicated on the basis of the facts averred in the applicant's founding affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant, unless a denial by the respondent is not such as to raise a real, genuine or *bona fide* dispute of fact or a statement in the respondent's affidavits is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers. ... This approach remains the same irrespective of the question which party bears the onus of proof in any particular case.' "

(*Kauesa v Minister of Home Affairs and Others* 1995(1) SA 51 (Nm) at 56 I - 57 C - (1994 NR 102 at 198 G - J) and the authorities referred to therein.) To succeed in such a defense the respondents had to allege and prove that, when the alleged waiver took place, the first applicant had full knowledge of the right which he decided to abandon; that the first applicant either expressly or by necessary implication abandoned that right and that he conveyed his

> decision to that effect to the first respondent. See *Netlon Ltd and Another v Pacnet (Pty) Ltd* 1977(3) SA 840(A) at 873; *Hepner v Roodepoort-Maraisburg Town Council (supra); Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983(3) SA 619(A) at 634."[3]

The only reference to wavier in respondent's replying affidavit was in par. 37 where respondent stated:

> "I state that it is self evident from the facts in this matter that Applicant and his lawyer at all times accepted his suspension and that he cannot in the circumstances now seek to set the suspension aside. I have also been advised that he has in any event unduly delayed the bringing of this application in this regard, as the act he complains of dates back to December 1996 and that he is also on this basis not entitled to attack his suspension."

The only two points taken in the affidavit was that appellant "had accepted his suspension" and that he "had unduly delayed the bringing of this application in this regard". It was not even contended that he had "waived" his rights.

The relevant facts not in dispute are:

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[3] ***Grobbellaar and Another v Walvis Bay Municipality*** 1998(3) SA 408 (NmHc) at 412 E - I."

(a) In appellant's first response to the letter of suspension dated 20/01/97, he *inter alia* said:

> "I herewith protest against the judgment unlawfully handed down by you. *Inter alia* you passed over in silence (ignored) the decisive par. 5.6... "

The letter shows strong rejection of the suspension decision.

(b) In the first letter of appellant's attorneys Weder, Kruger & Hartmann after appellant had sought legal representation, the said attorneys wrote:

> "At the outset we would like to record that we are acting on behalf of Mr. H Oppermann t/a Profi Taxidermist. He consulted us on his suspension as a member of the Namibia Professional Hunting Association (as communicated to him in your letter dated 30 December 1996) and mandated us to take such steps as may be necessary to have that suspension set aside.
>
> It is apparent from your aforesaid letter that the grounds on which our client were

suspended related directly to his alleged failure to respond prior to the end of November 1996 to the matters raised in your earlier letter dated 23 October 1996.

It seems to us that your decision to suspend him on those grounds was based on a misconception (i.e. that he did not respond before the end of November 1996) and is also void by reason of your failure to afford him an opportunity to answer to the charge (relating to such alleged failure) prior to your decision being taken.

Whereas our client is in law entitled to bring an application in the High Court of Namibia for the review and setting aside of your decision, he instructed us to explore on a without prejudice basis an amicable withdrawal of his suspension.

We are, without prejudice to our client's rights and to demonstrate his *bona fides*, willing to make representations to you concerning the withdrawal of his suspension. We are confident that once you have considered those representations you will be

> in agreement with us that the decision to suspend him should not have been taken, and/or was taken on the wrong assumption.
>
> Kindly advise us whether you are prepared to entertain such representations and reconsider your position as regards our client's suspension."

This letter of appellant's legal representatives is unequivocal. It expressly reserved the appellant's right to take the suspension on review if negotiations proved unsatisfactory.

(c) Respondent replied in a letter dated 7/4/1997.

(d) Thereupon followed a long period of correspondence and negotiation and attempts by appellant and his attorneys to satisfy customers who had complained.

(e) Whilst this process was continuing, respondent informed appellant by letter dated 12th November 1997 that the Executive Committee had decided unanimously on 1st November 1997 to expel the appellant.

(f) In a letter dated 24/11/97 appellant's attorneys stated that as far as their client Opperman is concerned "all

matters have been solved satisfactorily". The letter concluded:

> "Under the circumstances we submit that your association has not acted correctly and you are hereby notified that unless our clients' membership is reinstated within 14 days from date hereof, our instructions are to proceed to apply to the High Court of Namibia for the necessary relief which shall include a claim for damages should our client suffer same as a result of your purported expulsion and notifications to the Ministry.
>
> As we and our client are anxious to solve the apparent problems on a amicable basis and to avoid unnecessary legal actions, we request you to give this matter your serious consideration."

(g) In a letter dated 27/11/97 appellant's attorneys indicated that their client appeals to appellant's tribunal against the expulsion and set out the grounds of appeal.

In addition however, the letter again explicitly reserved applicant's right to proceed to Court for "the necessary relief".

(h) In a letter from respondent dated 19th December 1997, the respondent *inter alia* refused to consider the appeal.

(i) The appellant in the circumstances launched the review proceedings on 9th February 1998, wherein he asked for the review and setting aside of the decision to suspend; the decision to refuse the appeal to an appeal tribunal of respondent; the decision to expel the appellant.

After service of the review proceedings, respondent conceded that it had erred in not allowing the internal appeal and in expelling the appellant.

When the above facts are considered one must conclude that the respondent had failed to show on a balance of probabilities that the appellant had expressly or by necessary implication abandoned his right to seek relief in a Court of Law for declaring the decision to suspend him null and void and to claim costs also in this regard. There is also no proof whatever that he had conveyed a decision to that effect to the respondent.

The order of the Court *a quo* will therefore have to be set aside in so far as it differs from the above result.

In the result - the following order is substituted for that of the Court *a quo:*

1. The appeal succeeds.

2. (a) The decision of the respondent to expel the applicant from the Namibian Professional Hunting Association (NAPHA) communicated to him in a letter dated 12th November 1997 is set aside.

   (b) The said decision is declared to be null and void and of no force and effect.

   (c) The applicant is declared to remain an extraordinary member of the Namibian Professional Hunting Association.

3. In so far as it may be necessary, it is declared that the decision to suspend

   the applicant is also null and void and of no force and effect.

4. Respondent to pay appellant's costs of the application on review as well as the costs of this appeal.

(signed) **O'LINN, A.J.A.**

I agree.

(signed) **STRYDOM, C.J.**

I agree.

(signed) **LEVY, A.J.A.**

/mv

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Assisted by Adv. J.A.N. Strydom
(C. Brandt)

COUNSEL FOR THE RESPONDENT: Adv. T.J. Frank, S.C.
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