

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2016/00257

In the matter between:

ESTER NDATALA NGHIDIMBWA

APPLICANT

and

SWAPO PARTY OF NAMIBIA

FIRST RESPONDENT

HELAO NAFIDI TOWN COUNCIL

SECOND RESPONDENT

NANGOLO MBUMBA

THIRD RESPONDENT

ELIASER NGHIPANGELWA

FOURTH RESPONDENT

LUCIA NGHILILEWANGA

FIFTH RESPONDENT

ELECTORAL COMMISSION OF NAMIBIA

SIXTH RESPONDENT

Neutral Citation: *Nghidimbwa v SWAPO Party of Namibia* (HC-MD-CIV-MOT-REV-2016/00257) [2017] NAHCMD 298 (16 October 2017)

Coram: ANGULA DJP

Heard: 21 June 2017

Delivered: 16 October 2017

Flynote: Applications and Motion Proceedings – Application to set aside the decision of a political party withdrawing a member as councilor from the Council of a local authority – An order declaring the decision as unlawful – Relationship between a political party and its members is contractual – Section 13(1)(g) of the Local Authorities Act – Decision to withdraw a member of a political party without first affording her a hearing – Principles of natural justice, the *audi alteram partem* rule applied.

Summary: The applicant, a councillor for the Council of the town of Helao Nafidi and a member of the first respondent (Swapo Party) was withdrawn as a councillor on purportedly exercising its power in terms of section 13(1)(g) of the Local Authorities Act, 1992. The applicant filed an application to this court seeking an order setting aside the decision of the Swapo Party to withdraw her as councillor from the Council for the town of Helao Nafidi; and a further order declaring the said decision as unlawful, unconstitutional and invalid.

The applicant alleged that the relationship between her and the first respondent is based on a contract. The applicant alleged further that the first respondent misconstrued the extent of its powers; that the decision was made without a fair process being followed, in that the applicant was not afforded an opportunity to be heard before the decision was taken.

It was contended on behalf of the first respondent that even though the applicant alleged that her case was founded on a contract between her and the first respondent, she failed to refer to the relevant provisions of the first respondent's constitution or other documents of the first respondent; the first respondent further averred that by virtue of the provisions of section 13(1)(g) of the Local Authorities Act, it was entitled to withdraw the applicant as a member of the Council. The first respondent denied that there was any lawful basis for the applicant's contention that her withdrawal as councilor needed to be preceded by a hearing; and that the first respondent was entitled to withdraw her as councilor at any stage.

Court Held: The first respondent did not deny the contractual relationship between it and the applicant. It was common cause that the applicant was a member of the first respondent. Relying on the judgment in the matter of *Amupanda v Swapo Party of Namibia (A 215-2015) [2016] NAHCMD 126 (22 April 2016)* where the issue was an expulsion of members by the first respondent, and where it was held that the relationship between the members of a political party is contractual the court likewise concluded that the relationship between the applicant and the first respondent was contractual.

Court held further: There was no evidence to conclude that the replacement of the fifth respondent by the applicant was done un-procedurally and contrary to the internal procedure of the first respondent. Furthermore, the fact that the first respondent had to withdraw the applicant as a councillor in terms of section 13(1)(g) of the Local Authorities Act, confirmed that the first respondent had accepted the legal position that, for all intents and purposes, the applicant was a lawful member of the Council.

Court held further: In withdrawing the applicant the first respondent was obliged to act lawfully, procedurally and fairly; that in withdrawing the applicant the first respondent was not performing the power vested upon it by its constitution, but it was exercising statutory powers vested upon it by section 13 of the Local Authorities Act; that the applicant's right to be heard was not dependent on that right being inscribed in the first respondent's constitution or code of conduct, but it was based on the universally accepted principle of natural justice. Held further, that the first respondent violated the basic principles of natural justice by failing to grant the applicant a hearing before exercising its powers in terms of section 13(1)(g) of the Local Authorities Act, 1992 and that the first respondent's decision to withdraw the applicant without first affording her a hearing was unlawful and had to be set aside.

ORDER

1. The first respondent's decision to withdraw the applicant as a councillor on the Council for the town of Helao Nafidi is set aside.
2. The respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved.
3. The matter is considered finalised and is removed from the roll.

JUDGMENT

ANGULA DJP:

Introduction

[1] On 4 December 2015, the applicant was sworn in as a councillor for the Council of the town of Helao Nafidi. She held that office for about nine months. On 8 August 2016 she received a letter informing her that the first respondent has decided to withdraw her from the Council, acting in terms of section 13(1)(g) of the Local Authorities Act, Act No. 23 of 1992.

[2] The letter prompted her to launch this application in which she seeks the following orders:

'PART A

- (a) Condoning the applicants non-compliance with the rules of the court pertaining to time periods and service of the application, as well giving notice to parties as contemplated in terms of rule 73 of the rules of this court and directing the application to be heard on an urgent basis; and should there be one of the respondents that is

not served by the date of the hearing that such respondent be served with the interim order together with copies of the application.

- (b) An order interdicting the first, second, third and fourth respondents not to proceed in any way with the implementation of the decision of the second respondent dated the 4th August 2016 and communicated to applicant on the 8th August 2016 and with immediate effect allow the applicant full restoration as councillor of the third respondent, and to allow her full participation in all the activities of the third respondent as if the above decision was not made.
- (c) An order specifically interdicting the third and fourth respondent not to proceed in any way with the withdrawal or removal of the applicant and not to proceed in way with the swearing of the fifth Respondent.
- (d) An order that the order obtained under paragraph (b) above (c) above serves as an interim interdict with immediate effect pending finalisation of the application under Part B below.
- (e) Cost of suit jointly and severally in respect of the respondents that are opposing the application.
- (f) Further and/or alternative relief

PART B

- (g) Setting aside the decision of the second respondent taken by the second respondent on the 4th August 2016 and as communicated to the applicant on the 8th August 2016.
- (h) Declaring such decision as unlawful unconstitutional and invalid.
- (i) In the event of opposition directing that the respondents pay the costs of this application jointly and severally.

(j) Further and/or alternative relief.”

[3] Part A of the application in which the applicant sought an interim order was heard on 6 September 2016, after which I made the following order:

‘The matter is postponed to 12 September 2016 at 10h00 for hearing. In the meantime, the following is ordered:

1. The 1st respondent to file its answering affidavit by close of business today, 06 September 2016.
2. The applicant to file her replying affidavit on or before 7 September 2016.
3. Parties to file their heads of argument on or before Friday, 9 September 2016.
4. The 4th respondent is interdicted from swearing in the 5th respondent as Councilor pending the finalization of this matter.”

[4] The main application, which is contained in Part B of the Notice of Motion now stands for determination. As it appears above, in this part of the application, the applicant seeks an order setting aside the decision taken on 4 August 2016 to withdraw her as councilor from the Council for the town of Helao Nafidi; and a further order declaring the said decision as unlawful, unconstitutional and invalid.

The Parties

[5] The applicant is a major female residing at Helao Nafidi, Omafo, Ohangwena Region, Republic of Namibia who describes herself as a committed and dedicated member of the first respondent.

[6] The first respondent is the SWAPO Party of Namibia, a political party, registered in terms of section 135 of the Electoral Act, Act 5 of 2014, with its principal office situated at SWAPO Party Headquarters, Leonard Aula Street, Katutura, Windhoek. As a political party, the first respondent is a voluntary association, founded on the basis of mutual agreement with its members.

[7] The second respondent is the Secretary General of the first respondent, whose official address is that of the first respondent. The second respondent is cited herein in his capacity as the Secretary to the first respondent's Central Committee and Politburo, and the chief administrator of the first respondent. The second respondent is also responsible for coordinating disciplinary issues of members of the first respondent and administration of the first respondent's constitution and code of conduct and disciplinary procedures ('the code of conduct'). The alleged unlawful decision was communicated to the applicant by the second respondent on 8 August 2016.

[8] The third respondent is the Council of the town of Helao Nafidi, ('the Council') a local authority duly established in terms of the Local Authorities Act, 1992, (Act 23 of 1992), with its principal office situated at Ohangwena main Road, Helao Nafidi, Ohangwena, Republic of Namibia.

[9] The fourth respondent is the chairperson of the third respondent, with his principal place of business situated at the same address as that of the third respondent. The fourth respondent is responsible for the swearing in of the councilors in terms of the Local Authorities Act, Act of 1992.

[10] The fifth respondent is Lucia Nghililewanga who resides at Ohangwena Region, Namibia and in whose favour the alleged unlawful decision was taken.

[11] The sixth respondent is the Electoral Commission of Namibia, an electoral body established pursuant to the provisions of the Electoral Commission Act, 2014 (Act No 5 of 2014) with its principal office situated at ECN Headquarters, 67 – 71 Rhijn Street, Windhoek North, Windhoek, Republic of Namibia. The sixth respondent is cited in these proceedings for any interest it may have in the matter and no order is sought against it.

[12] The applicant, fourth and fifth respondents, are all members of the first respondent.

The applicant's case

[13] The local authority area of the Helao Nafidi consists of three constituencies, namely 1. Engela/Omafo; 2. Oshikango; 3. Ohangwena/Onhuno. At the preparation of candidates for the first respondent's regional and local authority elections in 2015, the applicant stood as a candidate for regional council for the Oshikango constituency as well as a local authority councillor at the local authority level for Helao Nafidi Town Council. It is the applicant's case that she was called by the acting regional coordinator of the first respondent, Mandume Pohamba for Ohangwena Region to attend a meeting at which meeting she was informed that the first respondent's head office has directed that she relinquish the candidature of the regional authority and that she only remain a candidate for the local authority elections. She complied with the directive.

[14] The applicant states that, as the district coordinator for Oshikango district, she was informed by Ms Serafine Shekunyenga, district coordinator of the Ohangwena district that she (Ms Shekunyenga) was informed by the Electoral Commission of Namibia that that the list of seven candidates that was sent to the Electoral Commission by the first respondent needed on additional five candidates. The acting regional coordinator then instructed Ms Shekunyenga to add the requested additional five names. The Oshikango district was also requested to submit names amongst the five requested names. The regional councillor of Oshikango constituency and the district mobilizer then proposed that applicant's name be one of the five additional names.

[15] On 2 December 2015, a meeting was held at the Helao Nafidi Business Expo Centre convened by the regional coordinator of Ohangwena Region, Mr Hafeni Hatutale, and it was attended by all district coordinators and district executive committee members and four delegates from each branch and secretaries of the wings within the boundaries of Helao Nafidi Town. At that meeting the applicant was informed that she would be sworn in as councillor of the Council of the town of Helao Nafidi on 4 December 2015, replacing Mr John Hitula. The applicant says that she was informed that the reason for doing so was due to the fact that Mr Hitula was placed on the list as a candidate to represent the

Oshikango district while his membership card of the Swapo Party showed that he was from Engela district.

[16] The applicant then accepted to be sworn in as a councillor despite the fact that she was not amongst the first seven candidates who were sent to the Electoral Commission nor did her name appear on the posters which were circulated in the Helao Nafidi local authority area. It is however the applicant's case that she accepted to be sworn as councillor on the basis that her name had been sent to the Electoral Commission and she understood further that in terms of the provisions of the Local Authorities Act, 1992, a political party has the right to replace a candidate on the list of its nominated candidates.

[17] In effort to put her position in perspective her as a councillor, the applicant went on to give a brief history of the elections held in the Helao Nafidi local authority area since it was proclaimed as a town in 2003 and held its first elections in 2004 when the first councilors were elected. According to the applicant the town falls under three constituencies, namely 1. Engela/Omafo, 2. Oshikango, 3. Ohangwena/Onhuno; that the Oshikango district is always represented by two people; Engela/Omafo is represented by two people and Ohangwena/Onhuno by three people on the Council. The applicant asserts that it was the practice, although not written anywhere in the Swapo Party rules, that should the first respondent win all seven seats, the Council would be constituted by two people from Engela/Omafo two people from Oshikango and by three from Ohangwena/Onhuno.

[18] During 2015, the Council held its third elections and the candidates for the first respondent were the following: Ohangwena/Onhuno: 1. Mr Paulus Haikali; 2. Ms Lucia Nghililewanga (fifth respondent herein); 3. Mr Panduleni Hainghumbi. Engela/Omafo: 1. Ms Lylie Hashoongo; 2. Mr Thomas Kandjebo. Oshikango: 1. Mr Jonas Hitula; 2. Mr Eliaser Nghipangelwa. These were the 7 candidates.

[19] The applicant states further that the normal practice has been that the person to represent the constituency or district should reside in that particular district he or she is

to represent and further that the person should have a membership card issued from that district or constituency, as the case may be, that he or she is to represent. In the 2015 elections, the first respondent's leadership of Oshikango district acknowledged that Mr Jonas Hitula ended up on the list nominated to represent Oshikango, however the leadership at the time did not know that his membership card was issued from Engela district. The applicant argues that Mr Hitula should have been listed as residing in Engela district instead of Oshikango. It was then agreed that Jonas Hitula could not represent Oshikango district on the Council as he was from the Engela district. The applicant then replaced Mr Hitula and the applicant's name was sent to the Electoral Commission as one of the additional five names requested.

[20] It however turned out that the first respondent in the year 2015 only won six seats out of the seven seats on the Council.

[21] On 1 July 2016, the councillors were telephonically informed by the Chief Executive officer of the Council that her office had received a letter from the first respondent's regional coordinator instructing that the sixth respondent, Ms Lucia Nghililewanga be reinstated on the Council. In a letter dated 30 June 2016 received from the first respondent Ohangwena regional coordinator, Mr Hafeni Hatutale addressed to the CEO of the Council, the CEO was informed that the first respondent's head office had ordered that the sixth respondent be 'reinstated' on the Council. It would appear that no action was taken following receipt of that letter. Thereafter the second respondent addressed a further letter to the regional coordinator on 15 June 2016, which reprimanded the regional coordinator for his failure to implement the decision of the first respondent in causing the sixth respondent to be 'reinstated' as a councillor. The letter stressed that since sixth respondent had been number two on the first respondent's election list, she should immediately be 'reinstated' and that whoever she was replacing on the Council must vacate the seat.

[22] The applicant went on to relate that the letter dated 27 July 2016 from the second respondent addressed to regional coordinator, Mr Hafeni Hatutale, instructed that

Mr Panduleni Haighumbi be withdrawn from the Council and be replaced by Ms Lucia Nghililewanga, the fifth respondent. These instructions were later communicated in a letter dated 2 August 2016, addressed to CEO of the Council. The applicant says that she was surprised to learn that in a letter dated 4 August 2016 from the second respondent addressed to the regional coordinator, it conveyed contradicting instructions to the earlier instructions when it conveyed the instruction that the applicant's name was to be withdrawn as a councillor and was to be replaced with Ms Lucia Nghililewanga.

[23] Thereafter, on 8 August 2016, the applicant received a letter from the regional coordinator in which he notified her of the decision of the first respondent that she be withdrawn as councillor from the Council and be replaced by the fifth respondent. The applicant says that she felt aggrieved by the decision and approached her legal representative and instructed him to address a letter to the second and fourth respondents. The applicant's legal practitioner then addressed a letter to the second and fourth respondents on 17 August 2016, in which it was pointed out that the decision to withdraw the applicant from the Council was unlawful and violated the principle of natural justice and fairness. The letter further demanded that the decision be withdrawn, failing which the applicant would approach this court on an urgent basis for appropriate relief.

[24] The respondents through their legal practitioners responded to the letter of the applicant's legal practitioner by a letter dated 19 August 2016 addressed to the applicant's legal practitioner. The letter pointed out that the decision to withdraw the applicant was due to the fact, amongst others, that the applicant had misrepresented that she was duly nominated and elected during the first respondent's internal election processes and that disciplinary steps would be taken against her. This incited the applicant to launch this application on an urgent basis on 23 August 2016.

[25] In her founding affidavit, the applicant advanced grounds why the decision to withdraw her as councillor was unlawful and should be set aside. The grounds are summarized as follows:

'To the extent that the decision was taken in terms of a law, the first respondent misconstrued the ambit of its powers; the decision was made without a fair process being followed, in that the applicant was not afforded an opportunity to be heard; the decision in so far as it purported to nullify and set aside earlier decisions offended the principle of finality. The respondent became **functus officio** after it took the first decision; in so far as the respondent intended to subject the applicant to disciplinary hearings it would be unreasonable and unfair given the fact that the respondents have already taken an adverse decision against her without a hearing; and that the applicant has not been provided with reasons in respect of the decision taken against her. The decision was motivated by ulterior motive; the decision is based on irrelevant considerations and/or on capricious grounds; and finally that the first respondent failed to apply or to properly apply its mind to the facts and the law.'

The respondent's case

[26] The second respondent deposed to the opposing affidavit filed on behalf of the first, second and fifth respondents. The second respondent takes the point that even though the applicant alleges that her case is founded on a contract between her and the first respondent, she failed to refer to the relevant provisions of the first respondent's constitution or other documents of the first respondent, which provide the applicant with the right to be heard before a decision to withdraw her in terms of section 13 of the Local Authorities Act could be made; that the applicant failed to plead the material terms of the contract and its breach. Furthermore the applicant failed to annex copies of the documents that inform the contract. The second respondent further asserts that by virtue of the provisions of section 13(1)(g) of the Local Authorities Act, it is entitled to withdraw the applicant as a member of the third respondent.

[27] It is the respondents' further contention that even though the applicant has been sworn in as councillor, she had not complied with the first respondent's internal procedure in that she was never elected nor nominated lawfully as a councillor.

[28] The second respondent further points out that the process followed to add the applicant's name to the additional five names was contrary to the first respondent's

internal procedure. He however acknowledges that it is correct that section 86 of the Electoral Act, entitles a political party or organization to add five more names to the list of names over and above the number required to fill the seats in the council of a local authority. The second respondent further agrees with the applicant that the first respondent submitted a list of five additional names of which the applicant's name was one; and that those names were published by the Electoral Commission in the Government Gazette.

[29] The second respondent contends further that the swearing in of the applicant was a violation of the first respondent's internal electoral process as well as section 86 of the Electoral Act in that the swearing in was not sanctioned by the first respondent. Furthermore the regional coordinator of the first respondent was not authorized to inform the applicant that she was to be sworn in as such instructions violated section 86(3) of the Electoral Act.

[30] As to the position of Mr Jona Hitula, the second respondent points out that Mr Hitula was number seven on the party list; that he was not elected as a councillor; that the applicant was number eight on the list. Since the first respondent only won six seats on the Council, Mr Hitula was not elected and therefore the applicant could not have replaced him. The second respondent concluded by saying that it remains a mystery how the applicant managed to replace the fifth respondent on the list.

[31] Finally the second respondent denies that there is any lawful basis for the applicant's contention that her withdrawal as councillor needed to be preceded by a hearing.

Applicable statutory provisions

[32] The Electoral Act and the Local Authorities Act are the two applicable statutes to the facts of this matter. I will briefly do a short synopsis of the relevant provisions of the

said statutes in taking into account the procedure followed from nomination of candidates to the swearing-in assumption of duties and finally the withdrawal of a councillor.

Nomination as candidates for local authority council elections

(a) Section 67 of the Electoral Act provides that a person shall not be nominated by a political party or organization as a candidate on a list of candidates for a local authority council election, unless he or she qualifies as a member of that local authority council and is a member of that political party

Submission of party list

(b) Section 85 of the Electoral Act as amended by Act 7 of 2003, provides that a political party that takes part in the election for members of the local authority council shall submit to the returning office for the local authority area in question a list of candidates in writing.

Publication of party lists

(c) Section 60 provides that the Electoral Commission shall publish in the Gazette a notice stating, in alphabetic order, the names of all the political parties setting out the list of candidates of such political party for the local authority election and declaring that the persons whose names appear on the list have been duly nominated as candidates of the political party in question for that election. Sub-section five provides that a notice so published shall on mere production of a copy of the Gazette in which it is published and in the absence of proof to the contrary, be conclusive evidence that the requirements of the Electoral Act, relating to the submission of lists of candidates by political parties have been complied.

Election

(d) Section 112 of the Electoral Act, provides that when in election of member of the local authority council, when the votes have been counted and the number of votes recorded for each political party taking part in the election has been determined, the returning officer concerned must determine the number of candidates of a political party or organisation to be declared duly elected as members of the local authority council concerned. Furthermore, the returning officer must announce the result of the election by declaring those candidates who appear on the list of the candidates of each political party or organisation in respect of which a number of seat has been determined and will have been nominated from the list by the political party as members of the council concerned to fill the seats.

Assuming duty

(e) Section 10 of the Local Authorities Act, provides that every member of the local authority council shall, before assuming his or her duties, take the prescribed oath before a magistrate.

Period of office of a member of the local authority council.

(f) Section 9 of the Local Authorities Act stipulates that a member of the local authority council shall hold office from the date on which he or she is elected as such member, until the date immediately before the date on which the next election is held in respect of that local authority council.

Withdrawal of a member of the Council

(g) Section 13(1)(g) of the Local Authorities Act provides that a member of the local authority council shall vacate his or her office if he or she is withdrawn by the political party which nominated him or her for election.

Question for determination

[33] The first issue for determination is whether the applicant has proved her contractual right with the first respondent. The second issue for determination is whether the applicant was entitled to a hearing before the first defendant took the decision to withdraw her as a councillor on the Council; and the third issue for determination is whether the applicant is entitled to an order setting aside such decision.

Submissions on behalf of the applicant

[34] Counsel for the applicant made it clear from the onset that the applicant's case was that she came to court in order to pursue her contractual rights under the Namibian Constitution; the principle of legality; the first respondent's constitution, as supplemented by its code of conduct and tenets and spirit of fairness. In support of this submission counsel referred the court to the matter of *Amupanda v Swapo Party of Namibia*¹, where the court held at para 13 that the first respondent's constitution as supplemented by its code of conduct constitute the contract between the members and the first respondent and that such contract, like other contracts was subject to the jurisdiction of the courts. Counsel further submitted that the contract between the applicant and the first respondent is subject to the jurisdiction of the courts. Furthermore that the applicant has the right under the first respondent's constitution and the code of conduct of the first respondent and that she was entitled to the implementation of those rules and procedures before any adverse decision was taken against her.

[35] Counsel submitted further that the decision to withdraw the applicant was taken without complying with the rules of natural justice, specifically the *audi alterma partem* rule; that the applicant should have been subjected to disciplinary proceedings in terms of the first respondent's code of conduct before the decision to withdraw her was taken. In support of this submission counsel referred the court to what was said by the court in

¹ (A 215-2015) [2016] NAHCMD 126 (22 April 2016)

*Administrator, Transvaal and Others v Zenzile and Others*² which concerned an errant employee and which counsel submitted should apply with equal force to an errant member of a political party. The court expressed itself in the following words:

'It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade Administrative Law 6th ed puts the matter thus at 533 - 4:

"Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.'

The learned author goes on to cite the well-known dictum of Megarry J in *John v Rees* [1970] Ch 345 at 402:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change." '

[36] On the basis of the above statement, counsel submitted that had the applicant been afforded an opportunity to be heard, the conduct attributed to her, *inter alia* that she interfered with internal election process and that she misrepresented that she was duly nominated, might have been explained and the decision taken by the first respondent might not have been taken.

[37] Counsel further referred to the letter from the first respondent's legal practitioner dated 19 August 2016 addressed to the applicant's legal representative advising *inter alia* of the first respondent's intention to take disciplinary steps against the applicant as a

² 1991 (1) SA 21 at 37C-E

result of her alleged gross dishonesty and disregard of the rules of the first respondent. In this context counsel submitted that the first respondent had put the cart before the horse by taking an adverse decision against the applicant and then later wanted to subject the applicant to a disciplinary hearing.

[38] Counsel further argued that the applicant was lawfully nominated as a candidate for the first respondent and was subsequently sworn in as member of the Council; and that the applicant had thereafter assumed her duties as Council's member.

[39] Counsel further submitted that the power of the first respondent to withdraw a Council must be preceded by a hearing before the decision to withdraw is arrived at or made, depending on the outcome of the hearing.

[40] Finally counsel submitted that the provisions of sections 9 and 10 of the Local Authorities Act must be read in such a way that the peremptory requirement of taking an oath before assuming duties by councillor takes precedence before a mere pronouncement that of a person has been elected as a member of a council.

Submissions on behalf of the respondents

[41] Mr Hinda for the respondents commenced his submissions by reiterating the second respondent's argument outlined in the opposing affidavit, namely that despite the applicant's assertion that her case was founded on contract with the first respondent she failed to refer the court to any specific provision on which she relied for her assertion that she has the right to be heard before the first respondent could take the decision to withdraw her as a counsellor in terms of section 13(1)(g) of the Local Authorities Act.

[42] Counsel submitted that the withdrawal as a councillor may be done at any stage when such person can be said to hold office as an elected member of a Council. In support of this submission, counsel referred to what was said by the court in the *Amushigambo* matter (*supra*) where the court said the following;

'In dealing with the aspect of the nomination of the replacement members, it must, be pointed out that the relevant legislation does not set out how this should be done. In my view it must be assumed, having regard to the nomination provisions for the party lists, that the nomination must at least be in writing and that the replacement must comply with the qualifying provisions required of candidates on a party list. However, this is as far as the applicant can take this aspect, as there are no indications whatsoever on the evidence before me that the basic requirements set by the legislation were not followed in the case of the forth to seventh respondents. I must therefore assume that the nominations in themselves were in order.'

[43] Counsel submitted further that six members of the first respondent had been elected including the fifth respondent but not the applicant; that the fifth respondent was not withdrawn by the first respondent under section 13(1)(g); therefore, so the argument went, the applicant was not nominated in accordance with section 13(4)(a) of the Act. Counsel submitted further that it is only after a casual vacancy has occurred that the first respondent would have been entitled to fill the casual vacancy in the third respondent's council within three months after it has occurred by nominating any person on the election list compiled by the first respondent in respect of the previous election. In this context counsel submitted, that the applicant was neither elected during the election nor nominated under section 13(4)(a) of the Act and therefore the applicant's purported assumption of duty as councillor fell short of the law and was a nullity.

Facts which are common cause

[44] The common cause facts to be extracted from the two versions are the following: It is common cause that: the applicant was nominated through the first respondent structures and was placed on the list of people eligible for election as candidates to represent the first respondent on the Council; that the applicant's name was on the list of the first respondent's nominated and declared candidates published by the Electoral Commission in the Government Gazette; that the applicant was not elected. It is further common cause that the applicant was sworn-in as a councillor representing the first

respondent on the Council; the applicant assumed her duties as a councillor and held office for about nine months from 4 December 2015 to 8 August 2016. It is also not in dispute that the applicant was withdrawn from the council by the first respondent purportedly exercising its power in terms of section 13(1)(g) of the Local Authorities Act. The parties are in agreement that the first respondent has the power by virtue of section 13(1)(g) to withdraw the applicant as member of the Council.

The parties' main areas of dispute

[45] There are three main areas of contention between the parties. The first area of dispute is the respondents' stance that the applicant alleges that her case is founded on a contract between her and the first respondent, however she failed to refer to the relevant provisions of the first respondents constitution or other documents of the first respondent which provide the applicant with the right to be heard before a decision to withdraw her in terms of section 13 of the Local Authorities Act could be made. The second issue between the parties is the manner and the procedure by which the applicant ended up being a councillor representing the first respondent on the Council. The respondents contend that manner in which the applicant became a councilor was un-procedural. The third issue is that the applicant contends that the first respondent acted unfairly in exercising its power to withdraw her from the Council by not observing the principle of natural justice – the *audi partem alteram* rule. In rebutting the applicant contention, the first respondent contends that the applicant was not entitled to be heard before a decision to withdraw her was made.

[46] In dealing with the first issue, the second respondent contends that the applicant relies on a contract between her and the first respondent in respect of which she failed to plead the material terms of the contract and its breach and further failed to attach the necessary documents to support her case.

[47] The court in *Amupanda and Others v Swapo Party of Namibia*³ found that the relationship between the members of a political party, (the first respondent in the present matter), “*is contractual; and that the Code clearly and unambiguously; provides in material part in section 1: ‘These rules and procedures basically constitute a contract between the institution (ie the 1st respondent) and its members’.*”

[48] The applicant’s case is that the relationship between her and the first respondent is contractual. Counsel for the respondents question the nature and source of the right on which the applicant’s claim is founded. It is correct that the applicant did not attach to her affidavit the first respondent’s constitution and Code of Conduct. The applicant has referred to the said documents in her affidavit by stating that the second respondent is responsible for the coordination of disciplinary issues of members of the party and the administration of the first respondent’s Constitution and Code of Conduct and Disciplinary Procedure.

[49] It is also clear that the respondents do not deny the fact that there is a contractual relationship between the first respondent and the applicant. The only issue they have is that such contract, supplemented by the code of conduct was not attached. The applicant states in her affidavit that she is ‘*a dedicated member of the 1st respondent*’. This fact is admitted by the second respondent when he says ‘*the Applicant is a Senior Office bearer of the Party’s regional structure*’. It is thus common cause that the applicant is a member of the first respondent. The court in *Amupanda* matter (*supra*) held that the relationship between the members of a political party is contractual. Under these circumstances it is rather pedantry in my view to demand documentary evidence to prove something which is not in dispute. The only issue related to the documents in question is whether the first respondent’s constitution and the code of conduct are the only source of the applicant upon which her claim that she has a right to be heard is anchored. The conclusion I have arrived is accordingly that the relationship between the applicant and the first respondent is contractual.

³ (A 215/2015) [2016] NAHCMD 126 (22 April 2016)

[50] I move next to consider the second issue that is whether the applicant was nominated as a candidate. The applicant gives an explanation how she ended up being a councillor. The applicant's case is that she was informed at a meeting held on 2 December 2015 convened by the regional coordinator of the first respondent of Ohangwena region, Mr Hafeni Hatutale, that she will be sworn as councillor for the Council on 4 December 2015 replacing Mr Jona Hitula. The applicant accepted the instructions because she was aware that her name had also been sent to the Electoral Commission and further that she understood that the political party has a right to replace a councillor on the local authority council.

[51] The second respondent does not dispute the applicant's version, instead he states that the regional coordinator Mr Hafeni Hatutale was not authorized to have informed the applicant that she was to be sworn-in; that the fifth respondent's name was un-procedurally replaced on the list as a councillor. As far as the position of Mr Jonas Hitula was concerned, the second respondent points out that he was number seven on the party list and was not elected as a councillor. The applicant could therefore not have replaced Mr Hitula as councillor. The second respondent concluded by saying that it remains a mystery how the applicant's name managed to replace the name of the fifth respondent on the list as an elected councillor.

[52] This court is not called upon to resolve the dispute as to whether in becoming a councillor the applicant had complied with the first respondent's internal nomination or election procedures. What is for determination is whether the nomination and declaration of the applicant as a candidate complied with the provisions of the Electoral Act. Section 60 of said Act provides that once the list setting out the names of the candidates have been published in the Government Gazette it shall constitute conclusive evidence that the requirement of the Electoral Act have been complied with. It is not in dispute that the applicants name was published in the Government Gazette. It follows therefore in my view that the applicant was duly nominated and declared as a candidate.

[53] As the court in the *Amushigambo* matter (*supra*) pointed out, the legislature does not set out how the nomination of the replacement member should be done. The court was however of the view that the nomination must at least be in writing and that the replacement must comply with the qualifying provisions required of candidates on a party list. The court in that matter found that there was no evidence before it that those requirements set by the legislation were not followed or complied with and concluded that the nominations were in order.

[54] Unlike in the *Amushigambo* matter where there was no evidence that the persons who were to replace the elected candidates had been properly nominated and the court had to assume that the nominations of those persons who replaced some of the elected candidates were in order, there is no dispute in the present matter that the applicant was nominated and that her name was placed on the first respondent's list of candidates and was sent to the Electoral Commission. The nomination of the applicant might have been un-procedural in terms of the first respondent's internal procedure in particular how the fifth respondent was replaced by the applicant.

[55] There is no evidence to show that the process through which the applicant was nominated for the councilor's position was done un-procedurally. According to the uncontested version of the applicant, the replacement was done at a meeting duly convened by the regional coordinator and duly attended by all relevant office-bearers of the first respondent's leadership in the Ohangwena region. The farthest the second respondent can take the matter is to say that '*it remains a mystery how the applicant managed to replace the fifth respondent*'. A mystery remains a mystery – it is not evidence. The regional coordinator who convened the meeting only filed a confirmatory affidavit. He ought to have filed a substantive affidavit to contradict the applicant's version so as to enlighten the court as to what happened. In the absence of a contrary version from the regional coordinator on this point the court is bound to accept the applicant's version.

[56] In my view, there is therefore no basis to conclude that the replacement of the fifth respondent by the applicant was done un-procedurally. What is clear is that the applicant was instructed to avail herself for the councillor's position which she accepted; she was sworn in and subsequently assumed her duties and held such position for about nine months before she was withdrawn. Counsel for the applicant submitted, correctly in my view, that the fact that the first respondent had to withdraw the applicant as a councillor in terms of section 13(1)(g) of the Local Authorities Act, confirmed the fact that the first respondent had accepted the legal position that, for all intents and purposes, the applicant was a lawful member of the Council.

[57] I have therefore arrived to a conclusion that the applicant was a lawfully nominated as member of the Council.

[58] I move next to consider the question whether the applicant was entitled to be heard before the decision to withdraw her was made.

[59] As indicated earlier in this judgment, the applicant does not dispute that the first respondent has the power by virtue of section 13(1)(g) to withdraw her as a member of the Council. What the applicant takes issue with is the manner in which or the procedure adopted by the first respondent when it exercised its power to withdraw the applicant which she contends adversely affected her right to be heard prior to the decision to withdraw her was taken.

[60] Initially there appeared to have been a slight dispute between the parties whether the decision to withdraw the applicant was made by the first respondent or whether it was made by the second respondent. However the intensity of that dispute appeared to have dissipated through the exchange of pleadings and during oral submissions. In so far as it might be necessary I will briefly deal with that issue below.

[61] The applicant states in her affidavit that the impugned decision was taken by the first, alternatively by the second respondent, but definitely communicated to her by the

second respondent. In his opposing affidavit the second respondent denies that he took the decision to withdraw the applicant and says that the decision was that of the first respondent. In my view this is not a real dispute because in terms of the provisions of section 13 of the Local Authorities Act, 1992, it is the political party which has the power to withdraw a councillor from the local authority's council. The second respondent is a mere office bearer of the first respondent. I think it is fair to assume, simply based on his position as a secretary-general of the first respondent, he has no independent power to make a decision on his own. There is no basis not to accept his version that the decision was that of the first respondent. I therefore hold that the decision was made by the first respondent.

[62] I move next to consider the remaining bone of contention between the parties, namely whether the applicant was entitled to be heard before the decision to withdraw her was taken.

[63] It is the applicant's case that the first respondent, in the exercise of its power to withdraw her was under a legal duty to act fairly and to comply with the rules of natural justice, especially the *audi alteram partem* rule. The first respondent on the other hand contends that as a political party the first respondent has the statutory power in terms of section 13(1)(g) of the Local Authorities Act, to withdraw the applicant from the Council.

[64] I agree with the submissions made on behalf of the applicant that in withdrawing the applicant the first respondent was obliged to act lawfully, procedurally and fairly. It is to be stressed that in withdrawing the applicant the first respondent was not performing the power vested upon it by its constitution. Instead the first respondent was exercising statutory power vested upon it by section 13 of the Local Authorities Act.

[65] The learned author Baxter⁴ points out that the requirement to act fairly is expressed in two principles in the form of two Latin maxims: *audi alteram partem* ('hear the other side'); and *nemo iudex in propria causa* ('no one may judge his own cause'). The court in

⁴ Administrative Law p 536.

Swaziland Federation of Trade Union v The President of Industrial Court of Swaziland and Others eloquently described the *audi alteram partem* principle as follow:

'The *audi alteram partem* principle ie that the other party-must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th century English judge to be a principle of divine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time (see De Smith: *Judicial Review of Administrative Action* p.156; Chief Constable. *Pietermaritzburg v Ishini* [1908] 29 NLR 338 at 341). Embraced in the principle is also the rule that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them. (See Wiechers: *Administratiefreg* 2nd edn. p. 237).'

[66] Our law reports are replete with judgments outlining the principle. It is unnecessary to provide citation for such judgments.

[67] It follows therefore in my view that the applicant's right to be heard is not dependent on that right being inscribed in the first respondent's constitution or code of conduct, it is rather based on the universally accepted principle of natural justice.

[68] Mr Hinda submitted that the first respondent has the right in terms of section 13 of the Local Authorities Act to withdraw a councillor at any stage. In my view the statutory power to withdraw a democratic nominated or elected person from a public body without in a democratic society without fair would be an antithesis of democracy. The legislature did not specify in which instances withdrawal should be resorted to. I am of the view that the power to withdraw must be exercised on strong grounds, with great caution and only in exceptional cases. It should be resorted to in deserving and isolated cases such as ill-health or mental incapacity on the part of the councillor. In the latter case, a medical certificate may even be necessary to guide the said decision. It should not be resorted to

for political expediency. It must be exercised fairly, sparingly and transparently. Fairly because it is assumed that a political party does not intend to treat its members and its voters unfairly. Sparingly because it interferes with a democratic process and is disruptive to the workings of a local authority council. Transparent because in a democratic society the voters have a right to know the reason why a councillor they have voted for, albeit through a party list, is proposed to be withdrawn by the party. It is common cause that the councillors are elected through a democratic process which entails the initial nomination through the first respondent's branches and thereafter elected by a district conference and later put on the first respondent's list of nominated candidates for the local authority council election. This much is confirmed by the second respondent in his affidavit when said that the first respondent submitted the list of names of seven candidates in accordance with the first respondent's electoral process for the purpose of election as well as five additional names of which the applicant was one.

[69] Parker AJ in the *Amupanda* matter issued, what I consider to be a cautionary statement, when he said the following with regard to the enormous power political parties wield and the potential danger of such power being abused:

[3] Political parties in Namibia (as elsewhere) exert considerable powers over its members and has great impact on its members in pursuit of their right 'to freedom of association, which shall include freedom to form and join associations ... including political parties', guaranteed to them by art 21(1)(e) of the Namibian Constitution.

[4] Like the powers of Government, these powers of political parties are capable of misuse or abuse.'

[70] It is therefore necessary that measures be put in place so as to ensure that the exercise of the power vested in the political parties and organisations by section 13 of the Local Authorities Act, to withdraw a councillor are be rationally connected to the purpose for which such power was given⁵. It must be not exercised for instance to punish or

⁵ *Minister of Defence and Military Veterans v Motau* 2014 SA (5) 69 (CC)

embarrass the councillors who may be perceived not to be toeing the political party's line. Furthermore the power should not be used for ulterior motives.

[71] In the *Amushigambo* matter the applicants' complaints were that, after they were nominated they were introduced to the residents of the town as candidates for the political party. The residents were urged to vote for the applicants and the applicants were urged to work hard so as to ensure that the political party won the seats on the local authority's council. The political party then won all seven seats on the council. Thereafter the applicants were withdrawn and replaced by other people. The applicants felt aggrieved and launched an urgent application to court to stop the swearing in of the new members nominated by the political party alleging, *inter alia* that it was unfair for the political party to have used them to campaign and after they helped to secure the seats, the political withdrew them.

[72] The applicants complained further that they were not provided with reasons why they were withdrawn; and that they felt humiliated and abused. The political party's attitude as expressed by its secretary general in his affidavit filed in opposition to the relief sought by the applicants, was that in terms of section 13 of the Local Authorities Act, the party has the 'prerogative' to withdraw the applicants. The court held that while it agreed that section 13 gave power to the political party the right to withdraw a candidate however if 'prerogative' was meant to convey the power to exercise such power without restriction then the court did not support such meaning. The court specifically declined to express an opinion on the manner in which the powers in terms of sub-section 13(1)(g) and 13(4)(a) were exercised as it took the view that it was not the issue for decision before it. In the light of what I have stated earlier in this matter, in my view, the *Amushigambo* matter is a perfect example where the power in terms of section 13(1)(g) was irrationally exercised because it was exercised for the purpose it was never intended and this amounted to a misuse or abuse of power vested in the political party by section 13(1)(g) of the Local Authorities Act. There is therefore a heavy obligation on the court to ensure that the interpretation of the provisions of section 13(1)(g) does not provide an avenue for

the misuse of the power vested in the political parties and organisations, to punish perceived recalcitrant members and to reward perceived friends.

[73] Mr Hinda argued that neither the first respondent's constitution, code of conduct nor any other documents of the first respondent create a right for the applicant to be heard before her withdrawal as a counsellor from the Council. That might be so. I might add that neither does section 13(1)(g) prescribe the procedure on how a councillor is to be withdrawn. I deal with that issue below.

[74] The rule of law enforces minimum standards of fairness both substantive and procedural. In the absence of stipulated procedure, the courts must imply procedural requirements necessary to ensure that the principles of natural justice are observed. The decided cases on this subject establish the principle that the courts will readily imply terms where necessary to ensure the fairness of the procedure⁶. Masuku J in the matter of *Skorpion Mining Company (Pty) Ltd v Road Fund Administration*⁷ aptly expressed the principle as follows:

[89] It must also be poignantly observed and repeated that it is assumed that Parliament presumed the application of the *audi alteram partem* principle in every legislative enactment unless provided otherwise and in clear and unambiguous language. In *Westair Aviation (Pty) Ltd v Namibia Airports Company*, Hannah J stated the following in this regard:

“One begins with the presumption that the kind of statute referred to impliedly enacts that the *audi alteram partem* is to be observed, and because there is a presumption of an implied enactment, the implication will stand unless the clear intention of Parliament negatives and excludes the implication.”⁷

[75] It is not difficult or farfetched to imply the principle of natural justice in section 13 of the Local Authorities Act. I say so for the reason that section 13(2) of the said Act gives the Minister, responsible for local authorities, the power to remove a member of the local

⁶ Tom Bingham: The Rule of Law page 62

⁷ (I2063/2015 [2016] NAHCMD 201 (12 July 2016)

authority from office on recommendation of the council of the local authority after having given such member an opportunity to be heard and the Minister is satisfied that such member is guilty of the contravention of any provision of the prescribed code of conduct of the members of the local authority councils⁸. In my view it would be illogical to argue that the legislature would have intended that different procedures would apply in the same section when a member is removed from the council. That is to say in the case of removal by a political party the legislature intended that there would be no obligation on the political party to afford the member to be removed a right to be heard. However in the case of removal by the Minister, the Minister is obliged to afford such member a right to be heard. If the legislature intended that different procedures would apply it would have stated so in a clear and unequivocal language.

[76] In the light of the fact that the legislature did not prescribe the process to be followed when a councillor is to be withdrawn in terms of section 13(1)(g), it is necessary for this court to imply the terms upon which a political party or an organisation is to exercise its power in terms of section 13(1)(g) in order to ensure fairness of the procedure to withdraw a councillor. Generally there are two fundamental requirements to which an affected individual is entitled: notice of the intended action; and a proper opportunity to be heard⁹.

[77] Applying those requirements to the process of withdrawing a member from a council, it follows therefore that in the first instance the political party or organisation must give adequate notice to the affected councillor of its intention to withdraw such councillor. What constitutes adequate notice will depend on the circumstances of each case. The notice must contain all the details necessary to enable the councillor in his or her preparation for the hearing. It should be a minimum requirement that the notice must

⁸ 2(a) The Minister may remove by notice in writing any member of a local authority council from office, if, on recommendation of the local authority council concerned and after having given such member an opportunity to be heard, the Minister is satisfied that such member is guilty of a contravention of any provision of a code of conduct prescribed under section 10(3), and a member may be so removed from office notwithstanding any sanction prescribed by the code of conduct under section 10(4) or the fact that such a sanction may in the particular case have been applied by the local authority council against the member for such contravention.

⁹ *Baxter* at pages 543-544

indicate the reasons why the political party or organisation intends to withdraw the affected councillor¹⁰.

[78] Secondly, following upon adequate notice been given to the affected councillor, of the intended withdrawal, the councillor must be afforded a fair opportunity to be heard and to present his or her case against the intended withdrawal. Again what constitutes a reasonable opportunity to be heard will differ from one case to another. In some cases it may be unnecessary for the councillor to appear personally, as written submissions might suffice. In other instances personal appearance and an oral hearing might be necessary. The political party or organisation should decide what format the hearing should take, subject to the proviso that the hearing should not amount to a sham or a mere 'going through the motions'¹¹.

[79] Taking everything into account, I am satisfied that the applicant has made out a case that the first respondent misconstrued the ambit of its powers and that the decision to withdraw the applicant was made without a fair procedure being followed. I have therefore arrived at the conclusion that the applicant's contractual right was violated when she was withdrawn as a councillor without being afforded a right to be heard before the decision to withdraw her was made.

[80] I have also arrived at the conclusion that the first respondent violated the basic principles of natural justice by failing to grant the applicant a hearing before exercising its power in terms of section 13(1)(g) of the Local Authorities Act, 1992.

[81] It follows therefore that the first respondent's decision to withdraw the applicant without first affording her a hearing was unlawful and stands to be set aside.

[82] In the result I make the following order:

¹⁰ Burns & Beukes: Administrative Law 3rd Edition page225- 226

¹¹ Burns & Beukes page 227.

1. The first respondent's decision to withdraw the applicant as a councillor on the Council for the town of Helao Nafidi is set aside.
2. The respondents are ordered to pay the applicants cost jointly and severally, the one paying the other to be absolved.
3. The matter is considered finalised and is removed from the roll.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT: H SHIMUTWIKENI
Of Henry Shimutwikeneni & Co. Inc., Windhoek

RESPONDENTS: G HINDA SC
Instructed by Conradie & Damaseb, Windhoek