

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2023/00589

In the matter between:

BLACK AFRICA SPORTS CLUB

APPLICANT

and

THOMAS ADAMS

1ST RESPONDENT

SYLVESTER GORASEB

2ND RESPONDENT

DRALLI TITUS

3RD RESPONDENT

WILLIE ANTON VAN WYK

4TH RESPONDENT

HELMUTH HOCHOBEB

5TH RESPONDENT

SAKARIA MULUMBA

6TH RESPONDENT

MICHAEL SAMI DAWEB

7TH RESPONDENT

SIMON NGHISHIKUSHITYA

8TH RESPONDENT

GLENTON SYLVESTO ENGELBRECHT

9TH RESPONDENT

MOSES EDUWARD GAINGOB

10TH RESPONDENT

SAREL GAWESEB

11TH RESPONDENT

RAYMOND JACQUES ISAAKS

12TH RESPONDENT

JOSEF JANTJIES

13TH RESPONDENT

OTTO MANSIE KHARI-HAB

14TH RESPONDENT

LISIAS LOUWRENS KHOESEB

15TH RESPONDENT

MARIUS KOOPER	16 TH RESPONDENT
ERALDO ARESEB	17 TH RESPONDENT
ROBERTO TJIJANDJEUA G MAPANKA	18 TH RESPONDENT
BRENDY MATALI MAREKA	19 TH RESPONDENT
DUDU DEWALDO MOLADI	20 TH RESPONDENT
JACOB TONATENI NAKAMBALE	21 ST RESPONDENT
LAFRENZ C NAKAMBALE	22 ND RESPONDENT
MBEYA S SHAMAYUKO	23 RD RESPONDENT
RICHARD J SHIDUTE	24 TH RESPONDENT
JOSEF R TJIIPITUA	25 TH RESPONDENT
MARC-JEAN TSUOP	26 TH RESPONDENT
JAMAL R VAN WYK JAMAL R VAN WYK	27 TH RESPONDENT
TREASURE V ZAONGARA	28 TH RESPONDENT

Neutral Citation: *Black Africa Sports Club v Adams* (HC-MD-CIV-MOT-GEN-2023/00589) [2024] NAHCMD 158 (5 April 2024)

Coram: OOSTHUIZEN J
Heard: 1 February 2024
Delivered: 5 April 2024

Flynote: Urgent application for interdictory relief — Sport club — Old versus new constitution.

Summary: During October/November 2020 the applicant came into existence as a voluntary association distinct from its members and supporters by way of a written constitution. During May, June and July 2023 a new constitution was adopted and a new leadership was elected and appointed. The parties are at loggerheads in respect of which constitution should be the valid constitution. Factual issues abound. The court applied the Plascon - Evans rule and find that the facts alleged by the applicants and admitted by respondents together with the facts alleged by the first respondent, shall form the basis upon which the court decide the validity of the competing constitutions and resultantly which faction of members/supporters validly control and manage the affairs and assets of the applicant.

Held that: the October/November 2020 constitution of the applicant is the current and valid constitution.

ORDER

IT IS ORDERED THAT:

1. The application is dismissed.
2. The applicant shall pay the costs of the first four respondents.
3. The matter is regarded as finalised and removed from the roll.

JUDGMENT

OOSTHUIZEN J:

[1] The applicant is a sports club with a written constitution and is a voluntary association distinct from its members.

[2] The deponent for the applicant is a certain Okeri Mbingeneeko, an adult male allegedly appointed as the Chairperson of the Executive Committee of the applicant by an alleged newly elected Board of Directors of the applicant.

[3] The first respondent, Adam Thomas, an adult male claim to be the acting chairman of the applicant.

The relief claimed

[4] On 14 December 2023 the applicant made the following application and gave notice that the motion will be moved on 12 January 2024 at 09h00:

1. Condoning the applicant's non-compliance with rules of the High Court of Namibia relating to forms and service as contemplated in Rule 73(3) of the aforesaid rules and ordering that the application be heard as a matter of urgency.

2 Interdicting and restraining the respondents from interfering in the affairs of the applicant, and using the assets, name, logo and brand of the applicant.

3 Ordering the respondents to hand over to the applicant the following assets: 1 x Nissan Sentra (registration number: N139-177W), 1 x Trailmaster trailer (registration number: N188-055W), 1 x laptop, and 1 x printer.

4 Ordering the first to sixth respondents pay the costs of the application, jointly and severally, the one paying the other to be absolved, together with such further respondents electing to oppose any relief sought herein.

5 Further and alternative relief.

and the affidavit(s) of Okeri Mbingeneeko and Boni Kantori Paulino and the annexures thereto will be used in support of this application.'

Short summary of historical facts

[5] The entity of the applicant is an old well known and previously very successful sports club which main sports actively is and was football (soccer) and netball.

[6] Due to a restructuring of the applicant's football affairs from October 2019 onward and the applicant's expulsion by the national football authorities, an Interim Committee was tasked to arrange applicants' affairs.

[7] During 2020 the Namibian Football Association (the "NFA") established the Namibia Premier Football League (the "NPFL").

[8] The NFA invited the football clubs (including the applicant) to affiliate with the new Namibia Premier Football League (“NPFL”).

[9] On 24 October 2019 the previous owner of Black Africa Football Club transferred the ownership in Black Africa Football Club back to the community and signed a separation agreement with one Boni Paulino (on behalf of Black Africa Sport Club).

[10] One faction of Black Africa Sport Club was not in favour of affiliation with NFPL and the other faction (inter alia the present 2nd to 4th respondents) was.

[11] During October/November 2020 the applicant came into existence as a legal entity distinct from its members with a constitution and subsequent affiliation to the NFPL and relegation thereafter to the Southern Stream First Division.

[12] During May, June and July 2023 the present leadership of the applicant organised, arranged and adopted a new constitution for the applicant without following the provisions of the November 2020 constitution, which existence they now deny.

[13] From July 2023 it should have been clear to the leadership of supporters and members of both factions of the applicant that any attempt to resolve the issues between the parties would most likely be plagued with factual and legal issues.

From 12 January 2024

[14] When the newly elected leadership of the applicant brought the matter to court by way of notice of motion procedure (application) and alleged urgency, the first to the fourth respondents concurred with the applicant that the disputes need urgent resolution.¹

¹ Vide sub-para 5.2, Answering Affidavit, Manual Index, at page 80 of 300.

[15] The court at the time (12 January 2024) shared the view of the parties and accepted to adjudicate the issues on an expedited basis. Applicant was afforded the opportunity to reply and the matter was postponed to 16 January 2024.

[16] On 16 January 2024, the following order was made:

'Having heard **NORMAN TJOMBE**, on behalf of the Applicant and **LOGINO GORASEB** for the first four respondents and having read HC-MD-CIV-MOT-GEN-2023/00589:

IT IS HEREBY ORDERED THAT:

1 The case is postponed to 17/01/2024 at 12:00 for Case Management Conference hearing (Reason: Parties to file a rule 71 case management conference report).

2 The parties shall file their joint case management conference report on or before 17/01/2024 at 08h00.

3 Applicant shall file notes on argument on or before 19/01/2024.

4 Respondents shall file their notes on argument on or before 24/01/2024.

5 Arguments/submissions will be heard on 29/01/2024 @ 09h00 at SADC.'

[17] On 17 January 2024, and in chambers after hearing counsel the following orders were made:

'Having heard **NORMAN TJOMBE**, on behalf of the Applicant and **LOGINO GORASEB** for the first four respondents in chambers on 17 January 2024 at 12:03 PM in HC-MD-CIV-MOT-GEN-2023/00589:

IT IS HEREBY ORDERED THAT:

1. The case is postponed to 18/01/2024 at 14h15 for Case Management Conference (Reason: Parties to file a rule 71 case management conference report; Agreement By Parties).

2. The parties shall file their joint case management conference report on or before 18/01/2024 at 09h00.
3. Applicant shall file notes on argument on or before 19/01/2024.
4. Respondents shall file their notes on argument on or before 24/01/2024.
5. Arguments/submissions will be heard on 29/01/2024 at 09h00 at SADC.'

[18] In the meantime and on 15 January 2024, the replying affidavit of Mr Mbingeneeko was filed. Applicant did not file any additional affidavits before 28 January 2024 and did so without the consent of the court and without applying for condonation.

[19] The parties filed their joint case management report in terms of rule 71 of the High Court Rules on 18 January 2024 and the court adopted it and ordered paragraphs 1 to 3 of the report. The following case management order was issued:

'Having read and considered the joint case management report on **18th day of January 2024 at 11:11 AM.**

IT IS ORDERED THAT:

- 1 The case is postponed to 29/01/2024 at 09:00 for Opposed Motion hearing (Reason: Argument(s)/Submission(s)).
- 2 Paragraphs 1, 2 and 3 of the parties' case management report filed on 18/01/2024 are adopted and ordered.
- 3 Applicant shall file notes on argument on or before 19/01/2024.
- 4 Respondents shall file their notes on argument on or before 24/01/2024.
- 5 Arguments/submissions will be heard on 29/01/2024 at 09h00 at SADC.'

[20] Paragraphs 1 to 3 of the parties' case management report read as follows:

1. Rule 71(3)(a) the matters they have discussed and agreed on:

The parties' legal practitioners have discussed and agreed on the following matters:

(a) After the relegation of the football club from the Namibia Premier Football League First Division, the Respondents' Executive Committee issued a mandate to Mr Jason Gurirab, a member of the Executive Committee to approach and consult Mr. Boni Paulino, the former Chairperson of the Interim Committee on possible avenues to achieve peace and unity within the facilities of the Applicant;

(b) It was agreed between the two parties, Jason Gurirab and Boni Paulino that a Transitional Committee is to be composed;

2. Rule 72(3)(b) the matters they have discussed and not agreed on:

The parties' legal practitioners have discussed but could not agree on the following matters:

(a) Whether or not the Deponents to the Application and Founding Affidavit had locus standi to launch such application in the name of the Applicant before this Honourable Court;

(b) Whether or not the Applicant's Constitution (annexure "B" to the founding affidavit), adopted at an annual general meeting of 8 July 2023 at Windhoek, is the valid constitution for the Applicant;

(c) Whether or not the constitution (annexure "A" to the answering affidavit), adopted at a meeting of 7 November 2020 at Rehoboth, is the valid constitution for the Applicant;

(d) Whether or not the meeting of 8 July 2023 at Windhoek was a meeting that could validly transact on behalf of the Applicant;

(e) Whether or not the meeting of 7 November 2020 at Rehoboth was a meeting that could validly transact on behalf of the Applicant;

3. Rule 71(3)(c) the issues referred to in subrule (2);

The parties' legal practitioners considered the issues required under Rule 71(3)(c), and recorded as follows:

The nature and basis of the respective claims and defenses:

The Applicant

The basis and nature of the applicant's application is to interdict the respondents from interfering in the business of the applicant. The applicant's premise for the application is that the constitution adopted on 8 July 2023 at Windhoek is the legitimate constitution of the applicant, and therefore the structures and officials elected and or appointed in terms of that constitution, are the lawful structures and officials.

The Respondents

The basis and nature of the respondents' opposition to the application is that the Applicant's inter alia the Deponents of the Founding Affidavit and Confirmatory Affidavit had and has no locus standi / legal standing / authority to bring this urgent application before the Honourable Court as they do not form part of the Executive Committee and therefore have no mandate nor authority to launch such application. The opposition to the application is that the constitution adopted on 7 November 2020 at Rehoboth is the legitimate constitution of the Applicant and has been in force ever since and to date which includes the tenure of the existing and still current Executive Committee under the leadership of the First Respondent and therefore the structures and officials elected and or appointed in terms of that constitution, are the lawful structures and officials. That the alleged Constitution adopted on the 8th of July 2023 was drafted and adopted ultra vires, was unprocedural and illegal. The Applicant have further failed to exhaust all avenues before approaching this Honourable Court in that they have not successfully appealed to the governing body under which the Applicant from part of for a decision which would grant them legal basis to bring such application before the Court.'

Applicable Law

[21] Unless motion proceedings (application) are concerned with interim relief, motion proceedings are about the resolution of legal issues on facts common to the

parties. Motion proceedings cannot normally be used to resolve factual issues because they are not designed to determine probabilities.²

[22] When disputes of fact arise in the affidavits in motion proceedings, relief may be granted if those facts averred in the applicant's affidavit(s) which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.³

[23] It is trite law that an applicant must make his/its case in the founding affidavit and that in motion proceedings only three sets of affidavits are allowed (founding, answering and replying) unless the court allow more sets of affidavits. It is also trite that in order to be granted final interdictory relief the applicant must prove a clear right.

Discussion

[24] Applicant elected to pursue its requested relief by way of notice of motion proceedings and on grounds of urgency.

[25] Despite this the applicant came to court on 12 January 2024 without a replying affidavit; then file a replying affidavit; partake in case management proceedings; fail to file note on argument as undertaken and ordered on 19 January 2024; fail to index the e-justice file within 3 days of the date being allocated for the hearing of the application as undertaken by its legal practitioner in paragraph 8 of the case management report; the applicant file two additional affidavits together with its notes on argument late, without consent or condonation of on 28 January 2024.

[26] On 8 March 2024, the following court order was given in court:

'1. Judgment not completed. No Index on e-justice. No compliance with Rule 131(7) and (8). Two affidavits by applicant filed out of time and subsequent to the case

² *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) at para 26.

³ *Plascon - Evans Paints Ltd v Van Riebeck Paints Ltd* 1984(3) SA 623 (A) at 634; confirmed and applied by the *Namibian Supreme Court in Koopman v Acting Chief Executive Officer NSFAF*, (SA 63/2021) [2023] NASC (7 December 2023), para 62.

management order following the joint case management report of the parties. Represented respondents will be afforded opportunity to respond.

2. The Respondents shall file their supplementary affidavits, if any, on or before 12 March 2024.

3. The case is postponed to 28/03/2024 at 10:00 for Delivery of Judgment hearing (Reason: Documents Additional Filing).'

[27] First respondent objected against the admissibility of the two additional affidavits of the applicant.

[28] I shall disallow the additional affidavits and its contents as well as the contents of the supplementary affidavit of Mr Adams save for his objections.

Conclusion and order

[29] On the evidence before me after applying *Plascon - Evans*⁴ I find that neither Mssrs Mbingeneeko nor Paulino had *locus standi* to launch the current application in the name of the applicant.

[30] Likewise the valid and current constitution of the applicant is the November 2020 constitution.

[31] The purported July 2023 constitution of the applicant is invalid and no executive committee or committee member, neither the elected Board of Directors could validly transact on behalf of the applicant.

[32] Consequently the following orders are made:

1. The application is dismissed.
2. The applicant shall pay the costs of the first four respondents.

⁴ Footnote 3.

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

G H OOSTHUIZEN
JUDGE

APPEARANCE

APPLICANT: N Tjombe
Tjombe–Elago Inc, Windhoek

RESPONDENTS: L Goraseb
Ileni Velikoshi Incorporated, Windhoek