CASE NO.: A 36/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WILLEM ADRIAN VAN RHYN N.O. **Applicant**

and

NAMIBIA MOTOR SPORTS FEDERATION **1st**

Respondent

TONY RUST N.O. **2nd**

Respondent

WINDHOEK MOTOR CLUB **3rd**
Respondent

CORAM: **PARKER, A J**

Heard on: 2006 July 10

Delivered on: 2006 …….

JUDGMENT:

PARKER, A J.:

[1] In this matter, the applicant is represented by Mr. Namandje, while

the three respondents (the respondents) are represented by Mr. Dicks.

[2] On 4 February 2006, the applicant *qua* guardian to the minor child, B.R. (the child), having approached this Court on an urgent basis, obtained from this Court the issue of a rule nisi in the following terms:

1. That the Applicant is heard on an urgent basis as is envisaged by Rule 6 (12) of the Rules of the High Court and that non-compliance of this Honourable Court is condoned.
2. That a Rule *Nisi* is hereby issued calling upon the Respondents to show cause if any on the 13th March 2006 why an order in the following terms should not be made:

   2.1 Restraining and interdicting the Respondents from proceeding with the Namibian Motor Sports Federation's prize giving ceremony titled "NMSF President's Ball" set for 19h00 on the 4th of February 2005 at Hotel Pension Thulle and further restraining the Respondent from giving any prize and conferring any recognition to any person pending the determination of the protest and or complaint to be laid by the Applicant in terms of the First Respondent's relevant rules and regulations;

   2.2 That the relief sought in (2.1) above operate as an interim interdict with immediate effect;

   2.3 A copy of this Application together with a copy of a Court Order shall be served on the Respondents by not later than 17h00 on 4th of February 2006;

   2.4 First Respondent to pay the cost of this Application.

[3] It is important to note here that up to the date of the hearing of this matter on 10 July 2006 the applicant had not lodged any protest or complaint in terms of the first respondent's relevant rules and regulations. I will revert to this observation in due course. I must add also that on the face of the notice of motion it would appear the application was not brought *ex parte*. However, in essence and for all practical purposes the urgent application was heard leaving the respondents with no opportunity at all to file an answering affidavit, and so this Court heard the applicant's version only when it issued the rule nisi. The respondents opposed the application, and filed answering affidavits after the issuance of the rule *nisi*.

[4] At the commencement of the hearing of this matter on the extended return date on 10 July 2006, Mr. Namandje argued that there was no notice to defend filed by the respondents in terms of the Rules of Court. In addition, he argued that only Mr. Adrian (Tony) Rust (second respondent) had filed an answering affidavit and, therefore, to his mind, the first and third respondents were not opposing the application.

[5] I ruled that both preliminary objections were not well founded. On

the first objection, I found that the applicant did not raise this objection even in his replying affidavit; nor did he give notice to the respondents that he would raise these objections to enable them sufficient time to challenge it. Consequently, in my view, to allow the objection to stand would gravely prejudice the respondents. The second point is also without substance. Mr. Tony Rust is cited in his official capacity, and he indicates clearly in his answering affidavit that he is the President of the first respondent, and is authorized to depose to the affidavit, which he does, in my opinion, *officii nomine* of the first respondent. And in the confirmatory affidavit, Mr. Michel Rust indicates that he is the Chairman of the Third Respondent, so I take it that he deposed to the confirmatory affidavit on behalf of the third respondent. In any case, Mr. Namandje did not, advisedly, pursue his attack with any vigour; indeed, he appeared to have abandoned them.

[6] I now proceed to deal with the applicant's and respondents' applications to strike out certain portions of the parties' papers. In support of the respondents' application, Mr. Dicks referred me to a number of authorities, including the authoritative work *Herbstein and Van Winsen*,[1] where the learned authors set out succinctly the law. I cannot do better than to set out their proposition:

1 *The Civil Practice of the Supreme Court of South Africa*, 4th ed.

> As a general rule … hearsay evidence is not permitted in affidavits. It may accordingly be necessary to file affidavits of persons other than the applicant who can depose to the facts. Indeed, this is very often done. Alternatively, when a deponent includes in his affidavit facts in respect of which he does not have first-hand knowledge he may annex a verifying affidavit by a person who does have knowledge of those facts.[2]

I will apply these propositions of the law in determining the present applications to strike out on the grounds of inadmissible hearsay evidence.

[7] I will deal with the applicant's application first. Mr. Namandje submitted that paras. 19.14 and 19.17 of the first respondent's answering affidavit amounted to inadmissible hearsay evidence. I agree. With regard to para. 19.14, a verifying affidavit of the Motor Sport South Africa (MSA) was required to confirm the first respondent's conjecture. With regard to para. 19.17, the respondents themselves realised that they needed to file a confirmatory affidavit on the court file. This never happened. In the result, the two paragraphs are expunged from the first respondent's answering affidavit.

2 At p368-9 and the cases there cited.

[8] I pass to deal with the respondents' application to strike out certain portions of the applicant's founding affidavit on the grounds that they constitute inadmissible hearsay evidence. Having applied the principle of law set out above to the applicant's founding affidavit, I find that the respondents' application is well founded, and so the following are struck out from the applicant's founding affidavit: the last sentence of para. 7, together with Annex "B"; the last sentence of para. 8, together with Annexure "D"; and the whole of para. 21.

[9] I proceed to deal with the respondents' application to strike out certain paragraphs of the applicant's replying affidavit on the grounds that they constitute new matter or, alternatively, it is irrelevant to the issue at hand. On this point, the learned authors of *Herbstein and Van Winsen* wrote:

> The general rule which has been laid own repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts the respondent is called upon to either to affirm or deny.[3]

3 *Supra*, p 366.

[10] The principle was also stated tersely and crisply in *Director of Hospital Services v Mistry* thus: " When … the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is."[4] To these authorities must be added *Transnamib Ltd v Imcor Zinc (Pty) Ltd (Moly-Copper Mining and Exploration Corporation (SWA) Ltd and Another Intervening)* where this Court made the following pithy and succinct statement:

> It is trite law that, generally speaking, an applicant must make out his case in his founding papers and that such papers are a combination of pleadings and evidence. Furthermore an applicant cannot merely set out a skeleton case in the founding papers and then fortify this in reply.[5]

[11] I now proceed to determine the respondents' application to strike out certain parts of the applicant's replying affidavit, and in doing so, I shall apply the principles set out above, which I respectfully adopt for my present enterprise.

[12] The pith and marrow of Mr. Dicks' submission is this: the applicant's founding affidavit contains 24 paragraphs and covers about eight pages, but his replying affidavit contains 28 main paragraphs and

4 1979 (1) SA 626 at 635 H.
5 1994 NR 11 at 15I-16 A.

numerous subparagraphs and runs into about 52 pages, that is more than six times the number of pages of the founding affidavit. And so, according to him, what the applicant has made is to put flesh on the skeletal founding affidavit, which is not permissible in law. In support of his submission, Mr. Dicks referred me to the above-quoted passages from *Herbstein and Van Winsen* and *Transnamib Limited v Imcor Zinc* and other cases, including *Director of Hospital Services v Mistry*, *supra*.

[13] Mr. Namandje's reply was that in considering the respondents' application, the Court should have regard to the answering affidavit. As far as he was concerned, the matters complained of are not new, for 70% of the replying affidavit relate to the first respondent's rules, which the first respondent referred to in its answering affidavit. Therefore, he submitted, those matters are not new, and they are relevant.

[14] Having carefully considered submissions submissions, I come to the following conclusion. I agree with Mr. Namandje that certain parts of the applicant's replying affidavit are responses to matters introduced by the first respondent in its answering affidavit, relating to its rules and regulations. I think the applicant is entitled to respond to them. But, there are some parts of the

applicant's replying affidavit (included in the list in the respondents' application to strike out) which I find to be disquisitional, pleonastic and totally irrelevant in determining the issue at hand, as I will demonstrate in due course. These are the parts that must be struck off the applicant's replying affidavit: the whole of paras. 4.3, 4.4, 4.5, 13.20, 13.28, 13.29, 13.30, 13.31, 13.32, 15.6.3, 15.6.4, 15.6.5, 15.6.6, 15.6.7, 15.6.12, 15.13.3, 16.1, 16.2, and 28.4.

[15] I now turn to the main application, being the application for the confirmation of the temporary interdict obtained by the applicant.

[16] The authorities referred to me by Mr. Dicks[6] converge on the proposition that as a general rule an applicant must stand or fall by his founding affidavit and the facts alleged in it, for the allegations of fact stated in the founding affidavit are foundational and the mainstay of the application. Both counsel referred me also to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[7]

6 E.g. *Herbstein and Van Winsen*, *supra*, p 366; *Pountas' Trustees v Lahanas* 1924 WLD 67 at 68; *Director of Hospital Services v Mistry*, *supra*, at 635H-636A; *Transnamib Ltd v Imcor Zinc (Pty) Ltd (Moly-Copper Mining and Exploration Corporation (SWA) Ltd and Another Intervening*), *supra*, at 15I-16A.

7 1984 (3) SA 623 (A).

[17] With the greatest respect, I do not find *Plascon-Evans* of any real assistance on the consideration of the only issue in this matter, which is that the different contentions canvassed by the parties on their papers come down to this narrow point: did the child qualify to be crowned champion in the category Go-Karting (Snr) (the Category) in the Namibian National Championship Award for 2005 (the 2005 national championship)? And as I see it, the key to determining the question lies primarily in the interpretation and application of the applicable rules and regulations of the first respondent (the relevant ones are set out above) against the evidence presented by the parties in their papers. It is in considering such evidence that the proposition of the law in the first sentence of paragraph 15, above, of this judgment becomes pertinent and crucial. By a parity of reasoning, *Plascon-Evans* will not be of real assistance in the determination of the only issue in this matter, is mentioned above. The reason is that I do not see any real, genuine or *bona fide* dispute of fact on the papers respecting the evidence against which I must apply the applicable and relevant rules and regulations of the first respondent. That being so, there is no need to have recourse to *Plascon-Evans*. That is the manner in which I approach this matter.

[18] The application for interim interdict was prompted by the decision taken by the first respondent not to declare a champion in

the Category) in the 2005 national championship because, according to the first respondent, no person, including the child, qualified to be crowned national champion in the category for 2005. The applicant was aggrieved by that decision, and so he sought and obtained the temporary interdict mentioned above.

[19] The facts adumbrated in this and the next preceding paragraphs are not in dispute. The child on whose behalf the applicant brought the application started racing at the age of six years as a member of the third respondent, and has been winning various races in Namibia. The first respondent is Namibia Motor Sports Federation (NMSF), a voluntary association. The second respondent being the President of the first respondent is cited in the application in his official capacity. The third respondent is Windhoek Motor Club (WMC), also a voluntary association.

[20] The *Federation Internationale de l'Automobile* (FIA) is the sole international authority entitled to make and enforce regulations for the encouragement and control of automobile competitions and records through the FIA World Motorsport Council. The *La Commission Interntionale de Karting* (CIK) is a specialized commission of the FIA responsible for the autonomous organization details, running and

administration of, *inter alia*, international karting competitions. The first respondent, i.e. NMSF, is the *Autorité Sportive Nationale* (ASN) or National Sporting Authority recognized by FIA as the sole holder of sporting power in this country. The applicant who had served on the first respondent in previous years is actually acquainted with the first respondent's General Competition Rules (GCR) and the Standing Supplementary Regulations (SSR), without the deeming provision in GCR 122.

[21] The material part of GCR 122 reads:

> Every person, group of persons, etc. organizing a competition or taking part therein shall by doing so or by and upon applying for an organizing permit, or by and upon applying for a license from NMSF or by and upon entering for a competition, be deemed to have and recognize that they have:
>
> i) made themselves acquainted with these rules;
>
> ii) without reserve to the consequences resulting from these rules …

[22] It is also not in dispute that the child obtained an international license from MSA for 2001, and the license was renewed from 2002, 2003, 2004 and part of 2005. According to the first respondent the child was permitted to enter competitions in Namibia with the MSA license, but in so entering, he did so as a

South African national in terms of article 12 of the International Karting Regulations published for 2005 under FIA Sporting Code and GCR 24 of the first respondent. According to the first respondent, foreign competitors were permitted to participate in Namibian competitions because the practice conduced to the promotion of the sport in this country. However, such competitors from other countries compete for trophies of the day; their points do not count towards the Namibian National Championships Awards. According to the first respondent, this rule is well known to the applicant and the child. I have no good reason to disbelieve the first respondent in this regard. As I have found above, the applicant admitted in his evidence that he was well acquainted with the first respondent's rules and regulations.

[23] GCR 24 provides:

"NATIONALITY" means that nationality of a competitor, who, for the purpose of these rules shall be deemed a national of the country of the ASN or FMN (i.e. *Fédération International Motorcycliste Nationale*), which issued his licence. In the event, however, of a competitor participating in a world championship event organized under the auspices of the FIA, a competitor shall in these circumstances be deemed a national of the country who issued his passport and/or travel document.

And the relevant provision of International Karting Regulations published for 2005 under the FIA Sporting Code reads:

110 RIGHT OF ISSUING LICENCES

Each ASN shall be entitled to issue licences:

1) to its nationals;

2) to the nationals of other countries represented on the FIA, in compliance with the following statutory conditions:

a) that their parent ASN gives its prior agreement to the issuing which may only take place once a year and in special cases;

b) that they can produce for their parent ASN (the country of their passport) a permanent proof of residence in the other country;

c) that their parent ASN has recovered the licence originally issued.

No person authorised by their parent ASN to apply for a licence from some other ASN shall hold a licence from their parent ASN valid for the current year.

…….

If for very special reasons however a licence holder wishes to change the nationality of his

licence during the current year, he would only be able to do so after obtaining his parent ASN's consent and once his old licence has been taken back by the parent ASN.

111 A person having a licence from a different ASN from that of his parent ASN will be able to take part with this licence in national events taking place on the territory of the parent ASN, according to the conditions set by the parent ASN.

112 NATIONALITY OF AN ENTRANT OR DRIVER

As far as the application of this code is concerned, every Entrant or Driver who has obtained their licence from the ASN takes the nationality of that ASN for the period of validity of that licence…

(Underlining in the answering affidavit)

[24] Thus, as far as the first respondent is concerned, when the child competed in the Namibian competitions in 2001, 2002, 2003, 2004 and part of 2005 when he held a licence issued by MSA, he did so as a South African, and, therefore, any points he scored did not count towards the tally required to achieve the national championship award. This, according to the first respondent, is the condition that it has laid down in terms of Article 132 (iii) of the first respondent's GCR. There is no credible evidence to the contrary. The said Article 132 (iii) provides:

A person having a licence of different nationality to that of the country of their citizenship

will be able to take part with this licence in national events in the territory of their country of citizenship, subject to the conditions set by NMSF.

From the papers, I see that this Namibian provision differs from Article 132 (iii) of the MSA GCR, which the applicant relied on. I agree with the respondents that the Namibian rules and regulations are not subject to the South African rules and regulations, since the first respondent is independent from any other foreign national organization.

[25] In addition, on the matter of the conditions that the first respondent has laid down, the first respondent referred the Court to GCR 227 and GCR 228, which must be read together with the other rules and regulations. GCR 227 reads:

"ELIGIBILITY OF COMPETITORS: Championships will be open to competitors/drivers who are holders of the appropriate licence issued by NMSF."

And GCR 228 reads:

PARTICIPATION OF FOREIGN COMPETITORS

Foreign competitors/drivers eligible to participate in championships events but ineligible to score points will not, for the purpose of awards, feature in the championship results. Competitors/drivers eligible to score points will be scored on overall classification and in classes as though foreign competitors had not participated at all.

[26] I further find that it is not disputed that in 2001 to 2004 the child was resident in South Africa, and upon his return to Namibia he applied for a Namibian international licence. I shall not concern myself with matters that occurred in 2001 to 2004: they will not assist this Court in determining the present application. The third respondent issued the child with a national licence in May 2005.

[27] On discovering that the third respondent, without the first respondent's authority to do so, had issued licences, the first respondent recalled those licences - about 36 in number - and replaced most of them with licences issued by it. The applicant handed in the child's wrongly issued licence on 7 September 2005, and immediately applied for a Namibian international licence in order to compete in South Africa. The first respondent did not penalize the 36 or so members, including the child, and so the first respondent recognized the events they participated in with the wrongly issued licences as if they had participated in those events with licences issued by it.

[28] When the first respondent could not immediately issue the international licence to the applicant – the reason for not being

able to issue the licence is unimportant for my purposes – the applicant went to South Africa and obtained an international licence from that foreign country on 9 September 2005.

[29] It is common cause between the parties that nobody took part in the Category's Leg 1 event on 2 April 2005, and, therefore, nobody scored any points in respect of Leg 1. I think I must signalize my finding that in May to September 2005, as far as the sports codes under the first respondent's sponsorship were concerned, the child was considered as a Namibian, with the first respondent as his ASN, in terms of the applicable rules and regulations set out previously. Therefore, any competition the child participated in during that period must count towards the 2005 national championship; these were Leg 2 on 4 June 2005 (13.5 points), Leg 3 on 30 July 2005 (13.5 points) and Leg 4 on 3 September 2005 (13.5 points). The result is that, in my view, the points that the child scored in Leg 5 on 12 November 2005 and Leg 6 on 3 December 2005 cannot count towards the 2005 national championship in accordance with the applicable rules and regulations of the first respondent. And according to the applicant's founding affidavit and the facts alleged in it, the applicant gained 13.5 points in Leg 2, 13.5 points in Leg 3 and 13.5 points in Leg 4,

totalling 40.50 points.

[30] Having considered the papers filed by the parties and taking into account the relevant and applicable rules and regulations of the first respondent annexed to the papers, I find that it is common cause between the parties that for the child to attain the points required to be crowned the champion in the Category for the 2005 national championship, he must have obtained 50% of the required tally, being 81 points. Since I have found above that the child only obtained 40.50 points, the irrefragable conclusion is that the applicant's application must fail.

[31] But, that is not the end of the matter. Mr. Namandje made certain submissions, which, I think, I must address. He submitted that the applicant (and/or the child) was not given any reports of the competitions. In this connection, counsel argued strenuously and unceasingly that the reports, which the first respondent was obliged to give and which counsel characterized as the best evidence, would have shown one way or another conclusively whether the first respondent's decision that the child did not qualify to be crowned national champion in the Category for the 2005 national championship was a correct decision.

[32] Indeed, as I see it, this argument appears to be counsel's talisman in his attempt to persuade this Court to confirm the rule *nisi*. From the totality of the facts not in dispute and those I have found to exist, with the greatest respect, I fail to see the substance of counsel's argument. In my opinion, the basis of the first respondent's decision is based on the scores that the child obtained, subject to its applicable rules and regulations, which, from the applicant's own admission, he is acquainted with. Indeed, the applicant's contention that the child should have been crowned a Namibian national champion in the Category is also based only on the scores the applicant maintains the child obtained in the competitions. In this connection, if one may ask, for what purpose did the applicant want the reports?

[33] From the papers, there is not an iota of doubt in my mind that the applicant's case has never been that he could not say whether or not the child qualified to be crowned champion in the Category for the 2005 national championship because the competition reports have not been availed to him. Indeed, a reading of the applicant's papers leaves one in not a grain of doubt that, as far as the applicant is concerned, the scores which he annexed to his papers show conclusively that the applicant must be

crowned a champion. Paragraph 17 of his founding affidavit reads: "I submit that for all intents and purposes and beyond any doubt, the minor child (i.e. the child) should be crowned as 2005 Champion in the relevant category and any decision not to recognize him, as such, is unfair and also invalid." Then, in para. 16.3 of his replying affidavit, the applicant states: "He (i.e. the child) qualifies to be awarded the Namibian National Championship Award for the category." If the reports are still outstanding, as he maintains, upon what basis did the applicant come to this conclusion?

[34] The result, therefore, is that, in my view, counsel's religious reliance on the matter of the competition reports is with respect, misplaced, as it is inconsistent with, and diametrically opposed, to what the applicant states in his papers. The reason is that, as I have said above, as far as the applicant is concerned, the scores already show that the child is the 2005 champion in the Category for the 2005 national championship. The only inference that can reasonable be drawn in the circumstances is that the applicant and the first respondent are in common cause that the scores obtained by the child should determine whether the child qualified to be awarded the championship title in the 2005 national championship

for the Category. Consequently, Mr. Namandje's submission in relation to the competition reports is, with respect, seriously flawed, and, therefore, cannot assist the applicant.

[35] From the conclusion I have come to above, in my opinion, what the applicant disputes is rather that the International Karting Regulations of 2005 relied upon by the first respondent are not applicable to Namibia because (1) Namibia is not a member of the CIK, and (2) the regulations referred to have not been registered with the Namibian Sports Commission in terms of s. 26 (3) of the Namibian Sports Act 2003.[8] In my opinion, the only reasonable corollary of this contention is this: if this Court finds that the International Karting Regulations of 2005 are applicable in Namibia, then the applicant had no cause to complain, and, therefore, his application cannot succeed. I now proceed to deal with applicant's assertion.

[36] Having carefully considered all the papers filed of record, I have come to the inescapable conclusion that the applicant's assertion that the International Karting Regulations for 2005 are not applicable to Namibia because Namibia is not a member of CIK is, with respect, baseless. According to his own papers, the

8 Act No. 12 of 2003.

applicant does not dispute the first respondent's statement (to which Annexure "TR1" is annexed) that the CIK has delegated the sporting power for karting in Namibia to the first respondent and, therefore, the first respondent holds exclusive right to take all decisions concerning the organization, direction and management of motor sport in Namibia and, in this instance, particularly karting. The said Annexure "TR1" is entitled (quoting the English titles only):

FIA ASNs or DELEGATIONS

National Sporting Authorities or Clubs to which the Sporting Power for Karting has been delegated,

and the first respondent is named as one of such national sporting authorities and the only one in Namibia.

[37] In any case, upon the authority of *Pillay v Krishna and another*,[9] it is the burden of the applicant to prove his assertion; and that he has not done or he has failed to do. Accordingly, I find that the first respondent is a member of CIK. By a parity of reasoning, I also find to be groundless the applicant's assertion that the karting regulations have not been registered with the Namibian Sports Commission. He does not offer any

9 AD 1946 946.

proof for his assertion. It seems to me, therefore, quite idle for the applicant to contend that the International Karting Regulations published for 2005 under the FIA Sporting Code and GCR 24 of the first respondent and the other GCRs, particularly GCR 227 and 228, do not apply in Namibia. I, therefore, hold that these rules and regulations are applicable in Namibia to the Category under the first respondent's auspices.

[38] In a rearguard attempt to improve the applicant's case, Mr. Namandje submitted that the first respondent should be estopped from denying that the child qualified to be crowned champion, because, as he put it, the child was awarded points. The first respondent does not deny that the child was awarded points for Leg 2, Leg 3, Leg 4, Leg, 5 and Leg 6. But, as I have found, the points scored by the child in Leg 5 and Leg 6, when he competed with a foreign licence, did not count towards the Namibian national championship tally in terms of the applicable rules and regulations, which I have found below to be applicable in Namibia. So I do not see how the principle of estoppel applies to the facts of this case. In any case, the particulars of the respondents' conduct that are alleged to found estoppel ought to have been pleaded by the applicant.[10] The applicant has not done that. *A fortiori*, it has been held that the result

10 Hoffmann and Zeffert, *The South African Law of Evidence*, 4th ed : p 356.

of an estoppel must be legal, so that estoppel cannot avail in a case where its allowance would prevent a person from carrying out a duty that is pre-emptory and in the public interest.[11]

> [39] Thus, to uphold the plea of estoppel by Mr. Namandje would defeat the purpose of the first respondent's rules and regulations that partake of international rules and regulations of the international bodies of which the first respondent is a member. In other words, to ask this Court to uphold the plea of estoppel is tantamount to asking the Court to permit the first respondent to break its own rules and regulations and to act in a manner not sanctioned by the international bodies of which the first respondent is a member and in a way which is not in the interest of the sport that is under the first respondent's sponsorship in Namibia. In sum, such allowance would jeopardize Namibia's status with the first respondent's international confederates and international bodies of which it is a member. That being so, the plea of estoppel must also fail.

[40] It now remains to decide whether this Court should confirm the

11 Hoffman and Zeffert, *supra*, *loc. cit.*; *Durban City Council v Glemore Supermarket and Café* 1981 (1) SA 470 (D); *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* (1961) All ER 46 at 48G-I.

temporary interdict it issued on 4 February 20006, that is whether this Court should, on the papers, grant a final interdict. There are three requisites[12] for the grant of a final interdict, and all of them must be present. They are:

1) A clear right on the part of the applicant.
2) An injury actually committed or reasonably apprehended.
3) The absence of any other satisfactory remedy available to the applicant.

[41] It has been stated that whether the applicant has a right is a matter of substantive law, and whether that is clearly established is a matter of evidence.[13] It has been held that in order to establish a clear right the applicant must show on the papers that on a balance of probabilities he has a clear right. No onus rests on the respondents to establish any fact or facts in order to negative the applicant's right to a final interdict. And the court has discretion to grant or to refuse an interdict. In this connection, it has been held that the Court's discretion is bound up with the question whether any other ordinary remedy can protect the right of the

12 Erasmus, *Superior Court Practice*: E8-5 and the cases there cited; Prest, *the Law and Practice of Interdicts*: pp 42 – 48.

13 *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co. Ltd and another* 1961 (2) SA 505 at 524C-D.

applicant.[14] In my opinion, this qualification can only apply where the applicant has discharged his onus of showing that he has a clear right.

[42] Having applied these principles to the present case and having taken into account the findings I have made and the conclusions I have reached above, I have no doubt in my mind that on the papers the applicant has not shown that he has a clear right; not even a *prima facie* right. It has been held, "On that ground alone the Court would have to exercise its discretion against the applicant." I agree with this statement. Having decided that the applicant has not shown he has a clear right, it is otiose to examine the other requisites. All these reasons and considerations compel me to the inexorable conclusion that the applicant is not entitled to the relief.

[43] Besides, a part of the motivation in granting the rule *nisi* was that the applicant would lodge a protest or complaint with the first respondent. More than five months have passed since the granting of the rule nisi on 4 February 2006 and the applicant has not lodged any protest or complaint, which, in terms of the rule *nisi*, he was obliged to do. On this ground also the rule *nisi* falls to discharged.[15]

14 Prest, *supra*, and the cases there cited.
15 *Jantjies v Jantjies and others* 2001 NR 26 at 31I-32A.

[44] There remains the question of costs. The respondents have applied for costs on an attorney and own client scale. In the recent case of *South African Bureau of Standards v GGS/AU (Pty) Ltd*, Patel J, had the following to say concerning the matter of the Court's discretion to award costs on the attorney and own client scale:

> Clearly there must be grounds for the exercise of the Court's discretion to award costs on an attorney and client scale. Some of the factors which have been held to warrant such an order of costs are: that unnecessary litigation shows total disregard for the opponent's rights (*Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (II)* 1046 TPD 226 at 236); that the opponent has been put into unnecessary trouble and expense by the initiation of an abortive application (*In re Alluvial Creek Ltd* 1929 CPD 532 at 535; *Mahomed Adam (Pty) Ltd v Barrett* 1958 (4) SA 507 (T) at 509B-C; *Lemore v African Mutual Credit Association and another* 1961 (1) SA 195 (C) at 199; *Floridar Construction Co (SWA) (Pty) Ltd v Kries* (*supra* at 878); *ABSA Bank Ltd (Voklskas Bank Division) v S J Due Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 268D-E); that the application is foredoomed to failure since it is fatally defective (*Bodemer v Hechter (supra* at 245D-F)); or that the litigant's conduct is objectionable, unreasonable, unjustifiable or oppressive.[16]

[45] I respectfully agree with Patel, J's proposition; it is sound, and so I adopt them in this case. In this connection, I wish to refer to certain aspects of the applicant's conduct in this matter, which must be marked out. The first is that on 2 February 2006, the fist respondent's Council invited the applicant to attend a meeting. The

16 2003 (1) SA 592 B-D.

> title of the invitation letter reads: “MEETING REQUESTED : NMSF COUNCIL WITH MESSRS. WILLIE AND B.R.”. He was asked to attend the meeting because “some important matters need to be discussed.” The applicant admits he received the letter, but he arrogated to himself the decision that there was no dispute between him and the child on the one hand and the first respondent on the other. In my respectful view, that is the only reason why the applicant and the child decided not to attend the meeting. I do not for a moment accept any other explanation for his refusal to attend the meeting. The title of the invitation letter was enough to inform any reasonable person the subject of the meeting and the urgency of it in the circumstances.

[46] The second is this: the relief sought by the applicant is not only to interdict the first respondent from declaring any person as the champion in the Category to which the child belongs for the 2005 national championship, but also to interdict the first respondent’s entire prize-giving ceremony at which 32 deserving Namibian national champions for other sport codes under the auspices of the first respondent were to be crowned at the President’s Ball and which other guests and important personalities were to attend. If one may ask, what shade of right did the applicant have to interdict the 32 deserving champions, too, from

receiving their Awards? These persons have not even been cited as parties in these proceedings. In my opinion, with the greatest deference, the applicant's behaviour, in the circumstances, is so grossly unreasonable and unwarranted in law that it is inexplicable except upon the ground of *mala fides*, insufferableness and wickedness. The third is that in my view, the applicant's failure to lodge a protest or a complaint when he was obliged to do so in terms of the rule *nisi*, as aforesaid, shows *mala fides* on his part in applying for the interdict.

[47] Thus, the applicant's application was unnecessary, and the applicant showed total disregard for the rights of the respondents and those of other persons. In addition, the respondents have been put into unnecessary and immeasurable trouble and great expense by the initiation of the abortive application. For all these reasons, this Court must register its strong disapprobation of the applicant's behaviour and conduct by awarding costs on an attorney and own client scale.

[48] In the result, the Order of this Court is this:

1) The application to make the rule *nisi* issued on 4 February 2006 final is refused, and the said rule is discharged.

2) The applicant is ordered to pay the respondent's taxed costs on a scale as between attorney and own client.

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Parker, A J

CASE NO.: A 36/2006

ON BEHALF OF THE APPLICANT:	Mr. S. Namandje
Instructed by:	Sisa Namandje & Company
ON BEHALF OF THE RESPONDENTS:	Adv. G. Dicks
Instructed by:	Theunissen, Louw & Partners