REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 169/2015

In the matter between:

NAMIBIA NATIONAL STUDENTS ORGANIZATION	**APPLICANT**
And	
NATIONAL YOUTH COUNCIL OF NAMIBIA	**FIRST RESPONDENT**
REPRESENTATIVE COUNCIL OF THE YOUTH COUNCIL OF NAMIBIA	**SECOND RESPONDENT**
CHAIRPERSON OF THE NATIONAL YOUTH COUNCIL OF NAMIBIA	**THIRD RESPONDENT**
DIRECTOR OF THE NATIONAL YOUTH COUNCIL OF NAMIBIA	**FOURTH RESPONDENT**
SHARONICE BUSCH	**FIFTH RESPONDENT**

Neutral citation: *Namibia National Students Organization v National Youth Council of Namibia (A 169-2015) [2015] NAHCMD 201 (7 August 2015)*

Coram: UEITELE J

Heard: 17 July 2015

Delivered: 7 August 2015

Flynote: ***Practice*** - Applications and motions - Urgent application - Rule 73(4) places two requirements on an applicant regarding the allegations he or she must make in the affidavit filed in support of the urgent application - The first allegation the applicant must "explicitly" make in the affidavit relates to the circumstances alleged to render the matter urgent - The second allegation, the applicant must "explicitly" make in the affidavit relates to the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course.

Administrative Law - Applicability of *audi alteram partem* principle – Voluntary Association temporarily suspended from National Youth Council in terms of s 9(g) of the National Youth Council Act, 2003 (Act No. 3 of 2009) –Applicant not given opportunity to make representations - When a statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectations, he has the right to be heard before the decision is taken unless the statute expressly or impliedly indicates the contrary

Interdict — Interim interdict pending review — Prerequisites well established: *prima facie* right; apprehension of harm; balance of convenience favouring applicant; no other remedy —Applicant not given any opportunity to make representations — First respondent not complying with audi rule — Applicant establishing prima facie right to be heard Applicant having no other remedy — Court satisfied that applicant establishing prerequisites for interim interdict.

Summary: Applicant, the Namibia National Students Organization (NANSO), was suspended on 27 June 2015 from all activities of the first respondent for a period of 4 months pending the resolution of an alleged leadership impasse within NANSO. The

second respondent cited s 9 (f) & (g) of National Youth Council Act, 2003 as empowering it to suspend the applicant.

The applicant claimed that the main reason for the suspension was for second respondent to specifically exclude applicant from first respondent's activities and affairs in particular the deliberative and elective general assembly which was scheduled to take place during September 2015. Applicant on an urgent basis approached the court to interdict the respondents from carrying through their decision to suspend the applicant. Applicant alleging that the suspension was taken to its prejudice because it was not afforded a fair hearing before decision to suspend it was taken.

Respondent took a point *in limine* of urgency, arguing that the applicant failed to meet the mandatory requirements in terms of rule 73(4).

Held that the applicant has explicitly set out the circumstances which it alleges render the matter urgent – and that it also "explicitly" stated the reasons why it alleges that it cannot be granted substantial relief at a hearing in due course.

Held furthermore that when a statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectations, he has the right to be heard before the decision is taken unless the statute expressly or impliedly indicates the contrary.

Held furthermore that the National Youth Council Act, 2003 does not expressly or impliedly exclude the right to be heard before a decision to suspend an affiliate can be taken. The court accordingly found that the failure by the second respondent to have given the applicant an opportunity to be heard prior to the decision suspending it was fatal to the respondents' case.

ORDER

1. The applicant's non-compliance with the Rules of this Court pertaining to time periods and services of the application, as well as giving notice to parties, as contemplated in Rule 73 of the Rules of this Court is hereby condoned and this application is heard on urgent basis.

2 The first, second and third respondents must not, in any way, proceed with the implementation of the decision communicated to the applicant on the 3rd of July 2015 as set out in annexure DN1 to the applicant's supporting affidavit.

3 The first, second and third respondents must, allow the applicant to fully and meaningfully participate in the activities of the Council.

4. The orders granted under paragraphs 2 and 3 will operate as interim interdicts with immediate effect, pending the finalisation of the review under Part B of the applicant's application.

5 The first to the fourth respondents must, jointly and severally the one paying the others to be absolved, pay the applicant's cost.

6 The matter is postponed to **2 September 2015** at **8h30** for a case planning conference.

JUDGMENT

UEITELE, J

Introduction and background

[1] The applicant (the Namibia National Students Organization) approached this court on 17 July 2015 on an urgent basis for an order, amongst others, in the following terms:

> **'PART A**
>
> '1. Condoning the applicant's non-compliance with the Rules of this 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 Honourable, 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.
>
> 2 An order interdicting the first, second, and third respondents not to proceed in any way with the implementation of its decision communicated to the applicant on the 03 July 2015 as set out in Annexure DN 1 and to with immediate effect allow the applicant full participation in all the activities of the first respondent as if the above decision was not made and to ensure that the applicant fully and meaningfully participate in the regional forum restructuring and the upcoming general assembly.
>
> 3 Ordering that the order obtained under paragraph 2 above serves as interim interdict with immediate effect pending finalisation of the review application under Part B.
>
> 4 Cost of suit jointly and severally in respect of the respondents that is opposing the relief.'

[2] The background to this application is briefly as follows, the applicant is a voluntary association. Its professed aims and objectives are amongst others to: organize, mobilize and unite all students of Namibia so as to enable them to participate fully in the social, cultural, economic and political life of our society, defend the rights and interest of students to free quality education without any discrimination on the basis of sex, colour, religion, creed, economic status or political affiliation, to strive for

research based reform and democratization of education in order to respond positively to the developmental needs of our society and to establish links of cooperation, mutual understanding, solidarity and friendship among the student of Namibia and the progressive world over.

[3] During the year 2009 the Government of the Republic of Namibia enacted the National Youth Council Act[1]. That Act (I will in this judgment refer to the National Youth Council Act, 2009 as 'the Act') came into operation on 15 November 2011. The long title of the Act sets its objectives as to amongst others, establish the National Youth Council and Youth Development Fund; establish youth forums; provide for the registration of youth organizations and associations as affiliates to the Council. Section 2 of the Act establishes the National Youth Council (the first respondent, I will in this judgment refer to it as the Council) and s 3 of the Act sets out the composition of the Council. The Council consists of a General Assembly, (which is the highest consultative, policy and decision making body of the Council and it meets once in four years), a Representative Council (the second respondent, which is the second highest consultative, policy and decision making body when the General Assembly is not in session) and the Board of the Council (the third respondent, which is the executive organ of the Council and reports to the Representative Council). The powers and functions of all these organs are spelt out in the Act. The applicant is, pursuant to the provisions of the Act, an affiliate of the Council.

[4] On 9 June 2015 the Council, through its Director invited all the affiliates of the Council to an Extra Ordinary Representative Council meeting. The meeting was scheduled for the weekend of 26-28 June 2015, at Nkurenkuru, Kavango West Region. The letter of invitation indicated that only two items were up for deliberation at the meeting. The items indicated as agenda points were:

(a) The adoption of the Report of the Bridgehead, and

(b) The adoption of the Regional Youth Forum and Constituency Youth Forum Constitutions.

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[1] Act No. 3 of 2009.

[5] During the weekend of 26-28 June 2015, the planned Extra Ordinary Representative Council meeting took place. The applicant was, at that meeting, represented by a certain Dimbulukeni Shipandeni Hafenih Nauyoma (he is also the person who deposed to the supporting affidavit on behalf of the applicant and I will, in this judgment, refer to him by his last name), who alleges that he is the duly elected Secretary General of the applicant and that he was nominated by the applicant to attend the meeting on its behalf. At the meeting the Director of the Council (the fourth respondent) informed Mr. Nauyoma that there were two members from applicant present at the meeting and that only one member was allowed to participate. The other person who was alleged to be representing the applicant at the meeting is a certain Ms. Sharonice Busch (the fifth respondent, I will, in this judgment, refer to her as Ms. Busch). After they were so informed they were both asked to leave the meeting. Mr. Nauyoma alleges that he was not afforded an opportunity to be heard before he was asked to leave the meeting.

[6] On 29 June 2015 (the press statement erroneously refers to the date as 29 June 2016) the Council issued a press statement in which it, amongst others, stated the following:

> '…A Representative Council (RC) meeting was held in Nkurenkuru, Kavango West Region on the 27th June 2015…
>
> 4 **Following are the outcomes of the Extra –ordinary RC**:
>
> 4.1 …
>
> 6 **Other Matters**:
>
> 6.1 The meeting observed with concern that two representatives had represented NANSO. Unlike other platforms where this has happened in the last few months, the situation had to be addressed because the RC is a statutory meeting of the NYC and the Act requires that one person/representative per organization should attend the RC.

6.2 The matter of NANSO's dual representation was raised from the floor, and members of the RC deliberated on the issue. The outcomes of the deliberations are as follows:

(a) That NYC without involving in the internal matters of NANSO must help resolve the leadership impasse and stagnation.

(b) That none of the two factions of the NANSO be allowed to represent the organization at statutory meetings of the NYC.

(c) That a committee consisting of the NYC board, representatives from Regional Youth Forums and representatives from national affiliates be constituted to help the factions unify, investigating the cause of the and recommend ways and means to alleviate the impasse. The committee is composed of the following representatives:

i **John Kantana** – Member of the Board and Chairperson of the committee.
ii **Shuudeni Muafangeyo** - Acting Chairperson of the Erongo RYF;
iii **Ephraim Nekongo** - Chairperson of the Oshana RYF;
iv **Janeth Ketji** - Secretary General of SWANU Youth League;
v **Benson Katjirijora –** DTA Youth league**.**'

[7] On 3 July 2015 the Director of the National Youth Council addressed a letter to the applicant in which letter the applicant was amongst others informed that, (I quote verbatim the relevant portion):

'The Representative Council has expressed concern over the deep division within the NANSO leadership that emerged during the congress. In this regard the Representative Council is of the view that the National Youth Council should play an active role in uniting the two groups.

In terms of section 11 (3) of the National Youth Council Act (Act No.3 of 2009) I am hereby formally informing you that at its meeting held in Nkurenkuru, Kavango West Region, the Representative Council made the following resolutions:

1. The Representative Council suspends NANSO from all activities of the National Youth Council for a period of four (4) months pending the resolution of the impasse.
2. Further, the Representative Council appointed a Committee (in terms of section 9 (f) of the National Youth Council Act, (Act No. 3 of 2009) to investigate the cause of the division and recommend to the Representative Council ways and means to help alleviate the impasses…'

[8] Following its summary suspension, the applicant approached its legal practitioner who addressed a letter to the Chairperson of the second respondent on 1 July 2015 and raised the second defendant's failure to comply with the principles of legality prior to the decision to suspend it from Council, as basis for it to reconsider its decision. The applicant also sought an undertaking that the suspension will not be proceeded with, failing which an urgent application would be brought. The applicant also sought to be provided with a record of the proceedings where the decision to suspend the applicant was taken. In response to this letter, the respondents' legal practitioners of record on 03 July 2015 responded that the decision to suspend the applicant was taken in terms of s 9(f) & (g) of the Act and that any litigation against the respondents will be defended. No undertaking was however given. The applicant's legal practitioner addressed another letter on 6 July 2015 to the respondents' legal practitioners pointing out to those legal practitioners that s 9(g) of the Act can only be invoked after the applicants have been found guilty of breaching the procedures, rules and regulations governing the conduct of affiliates and reiterating the request for an undertaking.

[9] The applicant is aggrieved by the decision to suspend it for the period of four months and when the undertaking requested on 1 July 2015 and 6 July 2015 was not given it approached this court on an urgent basis to interdict the respondents from executing the decision to suspend the applicant pending an application to review and set aside the decision to suspend it. The applicant alleges that the reason why it was suspended was to sideline it from activities and affairs of the first respondent in particular the deliberative and elective General Assembly of first respondent which is scheduled to take place during September 2015. It further claims that the *audi alterm*

partem rule was not observed as the suspension was decided without the applicant's side being heard at the meeting held at Nkurenkuru, Kavango West Region. It also alleged that there was nothing illustrating a breach of procedures, rules and regulations governing the first respondent by the applicant or showing how, when and which procedures, rules and regulations where breached as claimed.

[10] The application was launched on the 9th of July 2015 and served on the respondents on the following day. It was set down for and heard on 17 July 2015. The first to fourth respondents (I will in this judgment refer to them collectively as the respondents) opposed the application and an answering affidavit was served on 14 July 2015 and a reply thereto a day before the hearing.

[11] In their opposition to the application the respondents raised certain points *in limine*. These included challenging the urgency of the application. They submit that the factors that applicant relies on do not disclose any urgency. The respondents argued that the applicant and all other stakeholders of the National Youth Council were informed that the restructuring of the regional youth forums were postponed due to shortcomings detected in the National Youth Council Act, 2009 and that the restructuring will only resume once those shortcomings have been addressed. The respondents further argued that applicant is not an affiliate at regional level, but only at national level and as such does not participate in the restructuring of youth forums.

[12] The respondents further argued that, because of the postponement of the restructuring of the regional youth forums, no delegates can come from the Regional Youth Forum as is required in s 7(1)(a). As a consequence of that postponement of the restructuring process the General Assembly will not take place in September 2015. The applicant can therefore not hold out the holding of the General Assembly (in September 2015) as a ground for urgency so the argument went. The respondents furthermore denied that they acted improperly or beyond their powers when they suspended the applicant.

[13] I first deal with the preliminary points and then turn to the requisites for interim relief (if necessary) and examine whether those were met by the applicant.

Urgency

[14] The requirements for determining whether a matter can be heard on an urgent basis have been stated by this court many a times. The relevant rule governing urgent application is Rule 73[2]. Rule 73 (1) & (4) provides the following:

> '(1) An urgent application is allocated to and must be heard by the duty judge at 09h00 on a court day, unless a legal practitioner certifies in a certificate of urgency that the matter is so urgent that it should be heard at any time or on any other day.
>
> (2) …
>
> (4) In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –
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> (a) the circumstances which he or she avers render the matter urgent; and
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> (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.'

[15] It is worthy to note that Rule 73(4) uses the word *'must'* in setting out what a litigant who wishes to approach the court on urgent basis must do. The rule places two requirements on an applicant regarding the allegations he or she must make in the affidavit filed in support of the urgent application. It stands to reason that failure to comply with the mandatory nature of the burden cast on a litigant may result in the

[2]Rules of the High Court of Namibia: High Court Act, 1990 promulgated by the Judge President in the Government Gazette No. No. 5392 of 17 January 2014 but which came into operation on 16 April 2014.

application for the matter to be enrolled on an urgent basis being refused.[3] In the matter of *Nghiimbwasha v Minister of Justice*[4] this court said:

> '[12] The first allegation the applicant must "explicitly" make in the affidavit relates to the circumstances alleged to render the matter urgent. Second, the applicant must "explicitly" state the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course. The use of the word "explicitly", it is my view is not idle nor an inconsequential addition to the text. It has certainly not been included for decorative purposes. It serves to set out and underscore the level of disclosure that must be made by an applicant in such cases.
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> [13] In the English dictionary, the word "explicit" connotes something "stated clearly and in detail, leaving no room for confusion or doubt." This therefore means that a deponent to an affidavit in which urgency is claimed or alleged, must state the reasons alleged for the urgency "clearly and in detail, leaving no room for confusion or doubt". This, to my mind, denotes a very high, honest and comprehensive standard of disclosure, which in a sense results in the deponent taking the court fully in his or her confidence; neither hiding nor hoarding any relevant and necessary information relevant to the issue of urgency.'

[16] In the affidavit filed in support of the application, the applicant deals with the matters which it alleges render the matter as urgent as follows; (I quote verbatim from the affidavit):

> '59 Firstly the illegality committed by the respondents is in itself a basis for urgency. Legal submissions would be made in this respect.
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> 60 The applicant has taken all reasonable steps meant to avoid this urgent litigation, to no avail. In any event if the applicant were not to bring this urgent application it will not obtain substantial redress in due course for the following reasons:

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[3]See the matter of *Salt and Another v Smith* 1990 NR 87 (HC), *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC).

[4]An unreported judgment of this Court Case No.*(A 38/2015) [2015] NAHCMD 67 (20 March 2015)* per Masuku AJ.

60.1 The first respondent has commenced with the restructuring process of its regional youth forums. Applicant, as an affiliate is entitled to participate in the restructuring process but is however barred from doing so because of the suspension. To my best knowledge, one region has already been restructured and applicant could not send any representative because of the suspension. … The first respondent appears to be moving with speed to exclude the applicant.

60.2 The first respondent is set to have its General Assembly meeting in terms of section 5 of the Act during September 2015. Applicant will be barred from participating in this General Assembly meeting due to its suspension. Should this matter be heard in due course, the applicant would not have been able to participate in the General Assembly meeting. The applicant cannot asses its rights through any other action to fully and properly obtain recourse for damage done.

61 I have further been advised that if this application were to be brought in the normal course it shall be a matter of many months before it is heard given this honourable court's congested roll.

62 I fear that if the second respondent's decision is not reversed, the applicant will not be able to participate in the activities of first respondent and would be denied and opportunity to attend the General Assembly meeting which is the highest consultative, policy and decision making body of first respondent, the applicant in being denied this opportunity would therefore suffer irreparable harm hence the need to hear this application on an urgent basis.

63 I have further been advised that the balance of convenience favor the applicant in view of the obvious illegality that has been committed by second respondent. However applicant has also written letters to demand that its suspension be uplifted and that an undertaking be provided that no prejudicial steps will be taken pending the launching of this application. None of these demands were met by the respondent.'

[17] I have, above in the introduction part, set out the grounds on which the respondents are claiming that the matter is not urgent. The main thrust of the respondents' argument on urgency is that the applicant will suffer no prejudice if the application is heard in the normal cause. Mr. Namandje who appeared for the applicant urged me to reject the respondents' arguments. He argued that the effect of debarring the applicant from participating in the activities of the Council must be viewed in a very serious light. He further argued that, the outright denial of applicant's fundamental right to participate in the activities of the first respondent without a hearing would amount to a grave illegality of the nature sufficient on its own to be a basis of urgency. He referred me to case of *Sheehama v Inspector-General, Namibian Police*[5] where Silungwe AJ said:

> 'On the basis of the papers before me and the ensuing argument thereon, it is quite clear that the applicant is firmly of the view that he had a right to a hearing in terms of s 23(3) of the Act; that he was denied such right; that such denial was a violation of his fundamental right, with the result that his suspension from duty was/is invalid; that, as such, it is unnecessary for him to invoke the provisions of s 24 of the Act, as amended; that his case is a good one; and that he is entitled to approach this Court for relief on a semi-urgent basis.
>
> It seems to me that the principal ground relied upon by the applicant on the question of urgency is the alleged violation of his fundamental and common-law right to be heard, which purportedly renders his suspension invalid. In my view, a claim that a fundamental right or freedom has been infringed or threatened may justify the invocation of Rule 6(12) of the Rules of Court. I am satisfied that there is present, in casu, a sufficient degree of urgency to warrant the application (which was brought without delay) being heard on a semi-urgent basis. Accordingly, I hold that the case for urgency has been made.'

[18] In the matter of *Nakanyala v Inspector-General Namibia and Others*[6] this court held that an officer who was transferred from one division to another and who challenged the transfer would not be afforded redress in the normal course if the

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5 2006 (1) NR 106 (HC).
6 2012 (1) NR 200 (HC).

application for interim relief were to be brought in that way. In this matter it is also clear that the applicant acted with all due speed in bringing this application and has not unduly delayed in bringing application or created his own urgency.

[19] On the basis of the authorities that I have considered in this matter, and the facts on which the applicant relies to claim that the matter is urgent, I am satisfied that the applicant has stated the reasons alleged for the urgency "*clearly and in detail",* and he has left no room for confusion or doubt. The applicant has *explicitly* set out the reasons why it will not obtain substantial redress in due course as required by Rule 73 (4). I am thus of the view that this Court should hear this matter as one of urgency, and I exercise my discretion accordingly.

[20] I say so for the following reasons. It is not disputed that the applicant will, during the period of suspension, not participate in the activities of the Council. The right to participate in the activities of the Council cannot be compensated for with any award of damages. The letter of suspension has in my view some fundamental contradictions or is deliberately vaguely couched. It states that the suspension of the applicant is 'valid for period of four months pending the resolution of the impasse of the applicant's leadership'. The letter of suspension does not state what will happen if the 'impasse' is not resolved within four months. I am thus satisfied that if the application is heard in the normal cause the hearing may be academic.

[21] It is also not disputed that the applicant was not afforded an opportunity to be heard prior to the decision to suspend it having been taken. I have no doubt that the applicant stands to lose the ***right*** to participate in the activities of the Council during the period of suspension. In the *Sheehama* matter Silungwe AJ opined[7] that urgency does not only relate to a threat to life or to liberty but also to commercial interests and other interests, such as an infringement or threatened infringement of a fundamental right. In this matter the applicant is firmly of the view that it had a right to a hearing in terms of s 9(g) of the Act; that it was denied such right; that such denial was a violation of its fundamental right, with the result that its suspension from Council is invalid; that its case is a good one; and that it is entitled to approach this court for relief on an-urgent basis. I echo the views of Silungwe AJ that a claim that a fundamental right or freedom has been infringed or threatened may in certain circumstances (and the circumstances of this matter are such), justify the invocation of Rule 73(4) of the Rules of Court.

Interim relief

[22] I turn to the requisites for interim relief. These are well settled and were neatly summarized in the matter of *Hix Networking Technologies v System Publishers (Pty)*[8] *Ltd* as follows:

> 'The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are:
>
> (a) a prima facie right,
>
> (b) a well-grounded apprehension of irreparable harm if the relief is not granted,
>
> (c) that the balance of convenience favours the granting of an interim interdict; and

[7]Basing his opinion on the South African authorities of *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G; *Bandle Investments (Pty) Ltd v Registrar of Deeds and Others* 2001 (2) SA 203 (SE) at 213D-F).

[8]1997 (1) SA 391 (A) ([1996] 4 All SA 675) at 398 – 399., which was approved by this court in the matter of *Sheehama*.

(d) that the applicant has no other satisfactory remedy.'

[23] In the *Nakanyala* matter Smuts J (as he then was) stated that to these must 'be added the fact that the remedy is a discretionary remedy and that the court has a wide discretion and that it is well established that the grant of interim relief can be utilized in review proceedings'.

[24] In order to establish a *prima facie* right, the applicant must to do so with reference to the review of the decision to suspend it from the Council. The applicant challenges the decision to suspend it from Council on various review grounds set out in the founding affidavit. The grounds on which the decision is challenged include the allegations that the decision was based on ulterior motives, the failure by the second respondent to apply its mind to the issues at hand, that the fourth respondent acted arbitrarily and also failed to afford the applicant the opportunity to be heard prior to taking of the decision.

[25] The degree of proof to establish a *prima facie* right is well established. It has been consistently applied by the courts. Smuts J[9] (as he then was) with approval quoted the test laid down by Justice Harms as follows:

> 'The degree of proof required has been formulated as follows: The right can *be prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient but a weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate *onus*, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case the latter cannot succeed…'

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[9] In the *Nakanyala* matter *supra*.

[26] The facts set out by the applicant and which are not denied by the respondents are that the applicant was not afforded an opportunity to be heard before the decision to suspend it was taken. Mr. Rukoro who appeared for the respondents, however, submitted that s 9(g) of the Act empowers the second respondent to suspend an affiliate pending the investigation in the conduct of the applicant and that the applicant could make representations at the investigation stage. Mr. Rukoro argued without referring me to any authority that, there was no reason to hear the applicant on the merits of the accusations; the investigation proceedings would provide it with a full opportunity to be heard in that regard. He furthermore argued that the, suspension was not a penalty but a necessary measure, aimed at helping the applicant to resolve the 'chaos' and disputes affecting the applicant and to resolve its alleged leadership impasse.

[27] I am aware of the decision of the Supreme Court in the matter of *Mostert v Minister of Justice*[10] where the court found that the making of representations subsequent to a provisional decision to transfer may (and in that matter did) meet the requirements of *audi alterm partem* rule. Strydom CJ said the following:

> 'In the case of *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 750C - E, Corbett CJ stated the following in regard to the rule, namely:
>
> > "Generally speaking, in my view, the *audi* principle requires the hearing to be given before the decision is taken by the official or body concerned, that is, while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken (see *Blom's* case supra at 668C - E; *Omar's* case supra at 906F; *Momoniat v Minister of Law and Order and Others;* Naidoo and Others v *Minister of Law and Order and Others* 1986 (2) SA 264 (W) at 274B - D). Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken (see *Omar's* case supra at 906F - H; *Chikane's* case supra at 379G and *Momoniat's* case supra at 274E - 275C). This may be so, for instance, in cases where the party making the decision is necessarily required to

[10]2003 NR 11 at p23 also see he South African cases of *Swart and Others v Minister of Education and Culture, House of Representatives, and Another* 1986 (3) SA 331 (C).

> act with expedition, or if for some other reason it is not feasible to give a hearing before the decision is taken."

The fact that in their application the principles of natural justice are flexible was recognized in the judgment of Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 where the following was stated, namely:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth".

See further *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646 and Baxter *Administrative Law* at 541ff. In cases such as *S v Shangase* 1962 (1) SA 543 (N), *Sachs v Minister of Justice*; *Diamond v Minister of Justice* 1934 AD 11 at 22 and *Cape Town Municipality v Abdulla* 1974 (4) SA 428 (C), it was stated that where an official made an *ex parte* order which did not take immediate effect and left enough time to the affected party to make representations, that would have constituted compliance with the rule, provided that due consideration was given to the representations. (See also the confirmation of this statement in the appeal of the *Shangase* case *supra* reported in 1963 (1) SA 132 (A) at 148A - D.) *In each instance it of course depends on the circumstances of the particular case and the legislation in terms whereof the official takes his decision.'* (My Emphasis)

[28] In the present matter the second respondent purports to have exercised the decision to suspend the applicant in terms of s 9 (f) and (g) of the Act. That section provides as follows:

> '**9 Powers and functions of Representative Council**
>
> The powers and functions of the Representative Council are-
> (a) …
>
> (f) to help resolve complaints, grievances and disputes affecting affiliates;

(g) to reprimand, even suspend for a period not exceeding six months, or discharge *affiliates found to be in breach of procedures*, rules and regulations governing the conduct of affiliates;..'

[29] I do not agree with Mr. Rukoro that this is a case where the right to be heard can be granted after the decision has been taken. I say so for the following reasons. In the matter of *Muller and Others v Chairman, Ministers' Council, House of Representatives, and Others*[11] the court articulated the approach to the question whether the *audi* rule applies in a statutory context as follows:

'When the statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectations, he has the right to be heard before the decision is taken unless the statute expressly or impliedly indicates the contrary: *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 748G and the *Zenzile* case supra at 34J-35B and 35J-36A. The question referred to therefore has two components - (a) has there been a decision causing prejudice here and (b) has a hearing been excluded by the Legislature?'

[30] Professor Wade[12] has the following to say about a hearing prior to suspension:

'Suspension from office as opposed to dismissal may be nearly as serious a matter for the employee, but the Courts have wavered between two different views. One is that the employer needs a summary power to suspend without hearing or other formality as a holding operation, pending inquiries into suspicions or allegations. The other is that suspension is merely expulsion *pro tanto*. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Taking the former view in a controversial decision, a majority of the Privy Council held that a schoolteacher in New Zealand need not be given a hearing before being suspended without pay pending the determination of a disciplinary charge against him on which he would be fully heard in accordance with statutory regulations. Although it was recognized that suspension without pay might involve hardship and also a temporary slur on the teacher, it was held

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11 1992 (2) SA 508 (C).

12 In his book *Administrative Law* 6th ed at 565-6.

> that he had accepted this possibility in the terms of his employment and that the disciplinary procedure as a whole was fair.
>
> Favouring the opposite view, the Court of Appeal of New Zealand has rejected the distinction between suspension and expulsion and has held that natural justice is required equally in both cases; and there are similarly clear Australian decisions. Suspension without pay, in particular, may be a severe penalty, and even suspension with pay may gravely injure reputation. In principle the arguments for a fair hearing are unanswerable; and if for reasons of urgency it cannot be given before action is taken, there is no reason why it should not be given as soon as possible afterwards.'

[31] The questions to be asked therefore are whether there is a decision which will prejudice the applicant and whether s 9 (f) & (g) of the Act excludes the right to a hearing before the decision to suspend is taken. I have no doubt that the suspension of the applicant does entail prejudice to it. Secondly s 9 (f) of the Act in unambiguous language confers the power to reprimand, suspend for a period not exceeding six months, or discharge (all these are punitive actions and not necessary measures, aimed at helping the applicant to resolve the ‘chaos’ in its leadership as contended by Mr. Rukoro) an affiliate who is found to be in breach of the procedures, rules and regulations governing the conduct of affiliates of the Council. Common sense dictates that a finding that an affiliate has breached the procedures, rules and regulations governing the conduct of affiliates can only be made after hearing the affiliate. The Act does therefore not expressly or impliedly exclude the right to be heard before a decision to suspend an affiliate can be taken. I am accordingly of the view that the failure by the second respondent to have given the applicant an opportunity to be heard prior to the decision suspending it is in my view fatal to the respondents’ case. This was unequivocally stated in the *Mostert matter* where the Supreme Court said:

> 'Non-compliance with *the audi* rule, where the rule applied, invariably leads to the setting aside of the administrative action.'

It would follow that the applicant has in my view established a *prima facie* right to the review relief claimed.

[33] The second requisite which the applicant must satisfy is an act of interference with the rights of the applicant on the part of the respondent or a reasonable apprehension that an interference with the right will be committed. This requirement is merged with the requirement that the interference with the applicant's rights will cause the applicant irreparable harm. It is clear from the facts of his case that the applicant as a member of the Council has the right and is entitled to participate in the activities of the Council and that suspending it without a fair procedure interferes with its rights to so participate in the activities of the Council. I am therefore of the view that the applicant has established these requisites for interim relief. As to the requisite of an alternative remedy, it is clear to me on the facts of this matter that the applicant does not have an adequate alternative remedy As to the requisite of an alternative remedy, it is clear to me on the facts that the applicant does not have an adequate alternative remedy to the interim relief sought by it.

[34] I accordingly make the following order.

1 The applicant's non-compliance with the Rules of this Court pertaining to time periods and services of the application, as well as giving notice to parties, as contemplated in Rule 73 of the Rules of this Court is hereby condoned and this application is heard on urgent basis.

2 The first, second and third respondents must not, in any way, proceed with the implementation of the decision communicated to the applicant on the 03rd of July 2015 as set out in annexure DN1 to the applicant's supporting affidavit.

3 The first, second and third respondents must, allow the applicant to fully and meaningfully participate in the activities of the Council.

4 The orders granted under paragraphs 2 and 3 will operate as interim interdicts with immediate effect, pending the finalisation of the review under Part B of the applicant's application.

5 The first to the fourth respondents must, jointly and severally the one paying the others to be absolved, pay the applicant's cost.

6 The matter is postponed to 2 September 2015 at 8h30 for a case planning conference.

SFI Ueitele
Judge

APPEARANCES:

APPLICANT:	Mr S Namandje (Assisted By Mr Amoomo) of Sisa Namandje & Co Inc
FIRST TO FOURTH RESPONDENTS:	Mr S Rukoro Instructed by JR Kaumbi Inc