

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case no: HC-MD-CIV-MOT-EXP-2017/00134

In the matter between:

ONDONGA TRADITIONAL AUTHORITY

APPLICANT

and

MEME SESILIA NDAPANDULA ELIFAS

1<sup>ST</sup> RESPONDENT

INSPECTOR-GENERAL OF THE NAMIBIAN POLICE

2<sup>ND</sup> RESPONDENT

**Neutral citation:** *Ondonga Traditional Authority v Elifas* (HC-MD-CIV-MOT-EXP-2017/00134) [2017] NAHCMD 142 (15 May 2017)

**Coram:** UEITELE, J

**Heard:** 24 & 28 April 2017

**Delivered:** 08 May 2017

**Reasons Released:** 15 May 2017

**Flynote:** *Practice - Applications and motions - Ex parte* applications - Applicant approaching Court on *ex parte* basis must act in good faith - Acting in good faith includes the duty to act fairly towards the affected person.

**Practice** — *Applications and motions* — Application by applicant that application be heard *in camera*. Section 13 of the High Court Act, 1990 provides that 'Save as is

otherwise provided in Article 12(1)(a) and (b) of the Namibian Constitution, all proceedings in the High Court shall be carried on in open court'- Court will only order *in camera* hearing if the jurisdictional facts have been proven to exist.

**Practice** — *Applications and motions Locus standi* — Minimum requirement for deponent of founding affidavit to state authority — Respondent, in challenging such authority, must adduce evidence to the effect that deponent has no such authority.

**Summary:** The applicant, being the Ondonga Traditional Authority, seemingly represented by eight traditional councilors of whom Mr. Walenga deposed to the affidavit on behalf of the applicant, initially sought relief on an *ex parte* basis in terms of Rule 72 (2) in the form of an interdict restraining the first respondent from interfering and refusing access of the Ondonga Traditional Authority to the Omukwaniilwa of Ondonga in matters relating to the affairs of the Ondonga Traditional Authority. The court refused the *ex parte* application and ordered the respondents to be served.

Upon being served with the application the first respondent entered notice to oppose the application and raised two points *in limine* in her opposing affidavit namely that the matter is not urgent and that Mr. Walenga had no authority to initiate proceedings on behalf of the Ondonga Traditional Authority.

*Held* that an *ex parte* is one where either the applicant only, and no one else is concerned, as, for instance, one by which the rights of others or of third parties cannot be affected; or where, in cases of emergency, no notice has been or can be given or is expedient to be given to the other party.

*Held* that it is incumbent upon the applicant, and the court, to ensure that the respondents had proper notice of the case they had to meet.

*Held further* that the jurisdictional facts which are necessary to enable the court to exercise its discretion in terms of Article 12(1)(a) of the Namibian Constitution to exclude the public from the Court's proceedings have not been established.

*Held further* that, if the authority of the applicant to institute the proceedings is challenged at the onset of the proceedings, it would not be competent for this Court to

determine anything else (including whether the matter must be heard on urgent basis) without first deciding the issue of the applicant's authority.

*Held further* that, regarding the question of *locus standi*, it was now settled that in order to invoke the principle that a party whose authority was challenged must provide proof of authority, the trigger-challenge had to be a strong one.

*Held further*, that it was now trite that the applicant need do no more in the founding papers than allege that authorisation had been duly granted. Where that was alleged, it was open to the respondent to challenge the averments regarding authorisation; when the challenge to the authority was a weak one, a minimum of evidence would suffice to establish such authority and that the respondent's point with respect to Mr. Walenga's authority to institute and prosecute the application on behalf of the Ondonga Traditional Authority is well taken.

*Held, further*, that an application to intervene or to be joined as a party to proceedings pending before court must, for it to be fair, come before the Court in the formal manner in which all matters should come before the Court - that is, on notice properly served on parties who are part of the proceedings before court.

*Held, further* that, in the absence of a formal application Mr Walenga was not properly before Court.

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## ORDER

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1. The application is struck from the roll.
2. The applicant must pay the first respondent's costs.

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## JUDGMENT

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**UEITELE, J**

Introduction

[1] Article 19 of the Namibian Constitution, amongst others things, provides that every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of the Constitution and further subject to the condition that the rights protected by Article 19 do not impinge upon the rights of others or the national interest.

[2] In order to add flesh to the constitutionally guaranteed right to enjoy, practice, profess, maintain and promote any culture or tradition, the Parliament of Namibia in 2000 enacted the Traditional Authorities, Act 2000<sup>1</sup>. The long title of that Act, states that the purpose of the Act, is to provide for the establishment of traditional authorities and the designation, election, appointment and recognition of traditional leaders, to define the powers, duties and functions of traditional authorities and traditional leaders.

[3] This case involves one of the traditional authorities established under the Traditional Authorities Act, 2000. On 24 April 2017 the Ondonga Traditional Authority, in terms of Rule 72 (2)<sup>2</sup>, commenced proceedings in terms of which it, amongst other reliefs, sought the following relief.

(a) An order in terms of which that application was to be heard in *camera*.

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<sup>1</sup> Act 25 of 2000.

<sup>2</sup> Rule 72 (2) reads as follows:

***‘Ex parte application***

72. (1) An application brought *ex parte* on notice to the registrar supported by an affidavit as stated in rule 65(1) must be filed with the registrar and set down in the motion court before 12h00 on the day but one before the day on which it is to be heard.

(2) An *ex parte* application brought on notice to the registrar must set out the form of the order sought, specify the affidavit filed in support thereof, request him or her to place the matter on the roll for hearing and the request must be on Form 18.

- (b) An order in terms of which its non-compliance with the Rules of the High Court in relation to forms and services is condoned and that the application be heard as an urgent application.
- (c) An order declaring that the Ondonga Traditional Authority has a right to enjoy unhindered and unrestricted access to the Omukwaniilwa of Ondonga in matters related to the powers, duties and functions of the Omukwaniilwa of Ondonga Traditional Authority and its members.
- (d) An order interdicting and restraining, Kuku Sesilia Ndapandula Elifas from interfering into, and refusing access to the Omukwaniilwa of Ondonga without interference from and in her absence or any other person acting under her instructions.
- (e) An order directing that Peter Shimweefeleni Kauluma and Filemon Shuumbwa Nangolo are granted immediate access to the Omukwaniilwa of Ondonga without interference from and in the absence of Kuku Sesilia Ndapandula Elifas, or any other person acting under her instructions.

The *ex parte* application

[4] On 24 April 2017, when the matter was called on the roll of urgent applications, I enquired from Ms. Angula, who at that hearing appeared on behalf of the applicant, why the matter was brought *ex parte* if there are persons who may be affected by the orders that the applicant is seeking. Despite the submissions by Ms. Angula, I refused to hear the application if Kuku Sesilia Ndapandula Elifas was not served with the Notice of Motion and the supporting documents. I accordingly ordered that:

- (a) The applicant must serve or cause the Notice of Motion and the Annexures thereto to be served on the respondents by no later than Tuesday, 25 April 2017.
- (b) The respondents must file their notice to oppose the application (if so minded) and the opposing affidavit on or before 16h00 on Thursday, 27 April 2017.
- (c) The applicants must (if so advised) file their replying affidavit on or before 10h00 on Friday 28 April 2017.

[5] I will now set out the reasons why I declined to hear the application on 24 April 2017. Rule 65 (1) and (4) of this Court's rules read as follows:

***'Requirements in respect of an application***

65. (1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.

(2) ...

(4) Every application, other than one brought *ex parte* in terms of rule 72, must be brought on notice of motion on Form 17 and true copies of the notice and all annexures thereto must be served, either before or after the application is issued by the registrar, on every party to whom notice of the application is to be given.'

[6] From the above it is clear that every application, except an application which is brought *ex parte* must be served on every person against whom relief is claimed. This thus requires us to first determine what an *ex parte* is or how an application can be brought *ex parte*. Van Zyl<sup>3</sup>, describes the phrase '*ex parte*' as follows:

*'An ex parte application should be by petition to the Court, and is one where either the petitioner only, and no one else is concerned, as, for instance, one by which the rights of others or of third parties cannot be affected; or where, in cases of emergency, no notice has been or can be given or is expedient to be given to the other party, till a temporary order for relief can be obtained'. (Italicized and underlined for emphasis).*

[7] In the Dictionary of Legal Words and Phrases<sup>4</sup>, the learned author gives the following meaning:

*'On behalf of; from one side. An application to the court *ex parte* is made by the applicant only, in the absence of the respondent. Such application would not be *ex parte* if the respondent had due notice and failed to appear at the time appointed for its hearing. Good faith is necessary.'* (Underlined for emphasis).

<sup>3</sup> The *Judicial Practice of South Africa*, vol. 1, 4<sup>th</sup> ed. at p. 388.

<sup>4</sup> By Claassen, vol. 2 at p. 38.

[8] In *Herbstein and Van Winsen: Civil Practice of the Superior Courts of South Africa*<sup>5</sup>, the learned authors deal with Rule 6 which is the equivalent of our Rules 65, 70, 72 and 73. They state that an *ex parte* application is an application brought without notice to anyone either because no relief of a final nature is sought against any person or because notice might defeat the object of the application or the matter is one of extreme urgency. They proceed and say that it has also been described as an application of which no notice has as a fact been given to the person against whom some relief is claimed in his absence.

[9] From the authorities that I have quoted above it is clear that the application which was before court on 24 April 2017 is one of which the person against whom an order is sought, was not notified and was not before court. This Court expressed itself as follows in respect of such applications (that is applications without notice to the person affected by the relief sought):

[18] This application was brought *ex parte*, i.e. without notice to the respondent(s). It is trite that a party who comes to court without notice to a person effected by the relief it seeks must act *bona fide* and must disclose all relevant facts to the court ... Acting *bona fide*, in my view, includes the duty to act fairly towards the affected person. Thus considered, Mr. Corbett's argument that all the applicant(s) was required to do was to serve the *rule nisi* only without the founding papers whose fruit the order is, presents fundamental problems. To require only service of a court order on a respondent against whom relief was obtained *ex parte* is, in my view, inherently unfair and unjust. It is the founding papers, not the court order, which contain the case the respondent(s) were required to meet. Article 12(1)(a) of the Namibian Constitution states:

"In the determination of their civil rights and obligations all persons shall be entitled to a fair hearing ...."

A fair hearing, it can hardly be disputed, includes the right to know what case you are required to meet.

[19] It was incumbent upon the applicant, and the court, to ensure that the respondent(s) had proper notice of the case he (they) had to meet ...<sup>16</sup> (Underlined for emphasis).

<sup>5</sup> By Cilliers, Loots and Nel. 5<sup>th</sup> ed vol 1 at p 421.

<sup>6</sup> In *Knouws NO v Josea and Another* 2007 (2) NR 792 (HC).

[10] In the matter of *LS v MB and Another*<sup>7</sup> the Court said:

[6] The fact that the Act says that an *ex parte* application may be brought on an *ex parte* basis does not mean that *ex parte* applications shall always be the order of the day.

[7] In any given case the applicant must set out reasons why it is not necessary to serve on the respondent. Good reasons must be provided. *Ex parte* orders cannot be had, simply for the asking. Good reasons I say, to the extent that the applicant must set out a basis why the service of the application on the respondent (before the order is obtained) will defeat the whole purpose of the application itself.

[8] I must send this warning to all magistrates, as well as practitioners: the *audi alteram partem* principle remains what it is. It is not to be flouted for flimsy reason. This case is in fact a very good example why the *audi alteram partem* principle must always be applied, unless compelling circumstances exist; and these must be fully explained and set out in the affidavit supporting an *ex parte* application.'

[11] After the application was served on Kuku Sesilia Ndapandula Elifas, she gave notice of her intention to oppose the application. In her opposing affidavit she raised two points *in limine*. The first point raised *in limine* relates to the authority of Mr Walenga to institute these proceedings on behalf of the Ondonga Traditional Authority and the second point *in limine* relates to the urgency of the matter. Before I deal with the points *in limine* raised by the first respondent I find it appropriate to first deal with relief seeking the matter to be heard in *camera*.

The application to hear the application in *camera*

[12] At the hearing on 28 April 2017, I pointed out to Mr. Coleman, who appeared for applicant, that s 13 of the High Court Act, 1990 provides that 'Save as is otherwise provided in Article 12(1)(a) and (b) of the Namibian Constitution, all proceedings in the High Court shall be carried on in open court.' And Article 12(1)(a) of the Constitution provides as follows:

'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may

<sup>7</sup> 2010 (2) NR 655 (HC).



exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order, or national security as is necessary in a democratic society.’

[13] I accordingly enquired from Mr. Coleman whether the applicant has demonstrated the existence of the jurisdictional facts which must exist for the Court to exercise its discretion and exclude the public and the press from the proceedings in this matter. Mr. Coleman, correctly, in my view, conceded that the applicant has not established the required jurisdictional facts.

[14] I say that Mr. Coleman’s concession was correctly made because of the following reasons. In the matter of *Botha v Minister van Wet en Orde en Andere*<sup>8</sup> Kriegler J quoting with approval from the Supreme Court of the United States of America, in the matter of *Richmond Newspapers Inc v Commonwealth of Virginia*<sup>9</sup> said:

‘The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioural scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sense from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from the public acceptance of both the process and its results....

Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society’s responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and they manifest themselves in some form of vengeful "self-help", as indeed they did regularly in the activities of the vigilante "committees" on our frontiers.

The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operate to restore the imbalance which was created by the offence or public charge, to reaffirm the temporary lost feeling of security and, perhaps, to satisfy the latent urge "to punish"....

A result considered untoward may undermine public confidence and where the trial has been concealed from public view, an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively it is important that society’s criminal process "satisfy the appearance of justice"....

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<sup>8</sup> 1990 (3) SA 937 (W).

<sup>9</sup> US Supreme Court Reports vol 65 Lawyers 2nd ed op 973.

And the appearance of justice can best be provided by allowing people to observe it....People in an open society do not demand infallibility from their institutions but it is difficult for them to accept what they are prohibited from observing....

Instead of acquiring information about trials by first-hand observation or by word of mouth from those who attend it, people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contributes to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system"....'

[15] I fully endorse the above views and find them applicable even in matters which do not involve criminal trials. As the Supreme Court of the United States of America has observed the appearance of justice can best be provided by allowing people to observe its working. People in an open society do not demand infallibility from their institutions but it is difficult for them to accept what they are prohibited from observing. In addition the applicant has not placed any facts before court that for reasons of morals, the public order, or national security as is necessary in a democratic society, the application must be heard in camera. I accordingly allowed the public and the press to sit in and observe and listen to the debates in respect of the application.

The points *in limine*.

[16] I now return to consider the points *in limine* raised by Kuku Sesilia Ndapandula Elifas (who is the first respondent in this matter. Since the second respondent did not take part in these proceedings I will from here on simply refer to Kuku Elifas as the respondent) in her opposing affidavit. As I indicated above the first point raised is the authority of Mr. Walenga to institute the proceedings on behalf of the Ondonga Traditional Authority. The respondent states that at least eight of the traditional councilors, who include Mr. Walenga who deposed to the affidavit on behalf of the applicant, were suspended from their offices as traditional councilors and as such did not have the authority to act on behalf of the Ondonga Traditional Authority.

[17] If the authority of the applicant to institute the proceedings is challenged at the onset of the proceedings, it would not be competent for this Court to determine anything

else (including whether the matter must be heard on urgent basis) without first deciding the issue of the applicant's authority; that is, without first deciding whether the applicant is properly before court. I therefore start with the question whether or not the Mr Walenga was authorised to institute these proceedings on behalf of the Ondonga Traditional Authority.

[18] The case of *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*<sup>10</sup> is regarded as the main authority in respect of the question whether proceedings instituted on behalf of an artificial person are properly instituted or not. Watermeyer AJ, dealt with the argument submitted in respect of the *ratio* behind the requirement that a deponent should be authorised to bring an application on behalf of an artificial person as follows:

'It must always be proved, so he argued, that the applicant is in fact a party to the proceedings, for if this were not so the successful respondent who is awarded costs might find himself unable to enforce the award against the applicant. There was, he submitted, a special danger when the litigant was an artificial person, like a company, because if it should subsequently transpire that no proper resolution to litigate had been passed the company would be free to take the point that it was not bound by the Court's order because it had never authorized the proceeding to be taken.'

[19] The learned Judge continued and said<sup>11</sup>:

'This seems to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorized will be provided by an affidavit made by the official of the company annexing a copy of the resolution but I do not consider that form of proof necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf.' (Underlined for emphasis)

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<sup>10</sup> 1957 (2) SA 347 (C).

<sup>11</sup> *ibid.*

[20] In the matter of *Otjozondjupa Regional Council v Dr. Ndahafa Aino-Cecilia Nghifindaka*<sup>12</sup> Muller J after analyzing some authorities, stated that in our jurisdiction the position is as follows:

(a) The deponent of an affidavit on behalf of an artificial person has to state that he or she was duly authorised to bring the application and this will constitute that some evidence in respect of the authorisation has been placed before the Court;

(b) If there is any objection to the authority to bring the application, such authorisation can be provided in the replying affidavit;

(c) Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively;

(d) Each case will in any event be considered in respect of its own circumstances;  
and

(e) It is in the discretion of the Court to decide whether enough has been placed before it to conclude that is the applicant who is litigating and not some unauthorised person on its behalf.'

[21] In the matter of *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd*<sup>13</sup> this Court Per Damaseb JP stated that it is an established principle of our law that:

'...a company [or an artificial person] has no soul of its own and acts through human beings who must be authorised to act on its behalf; and, secondly, if there is undisputed evidence that no such authority existed, the purported actions by persons purporting to act on its behalf are invalid. The latter gives rise to the principle that where there is a challenge to authority, those relying on it must prove it. But it is not any challenge; and that is where Mr. Bava misses the point: I apprehend, the question is not so much whether in the face of a challenge to authority and being afforded the opportunity to prove it, Shimwino failed to produce a resolution authorising him; rather it is this: was the respondent, on the facts of this case, justified to question the indubitably necessary allegation by Shimwino that he was duly authorised to act on behalf of the applicant in launching this application?

<sup>12</sup> An unreported judgment of the Labour Court of Namibia Case No.: LC 1/2009 delivered on 22 July 2009.

<sup>13</sup> 2011 (1) NR 298 (HC).

[52] It is now settled that in order to invoke the principle that a party whose authority is challenged must provide proof of authority, the trigger-challenge must be a strong one. It is not any challenge: Otherwise motion proceedings will become a hotbed for the most spurious challenges to authority that will only protract litigation to no end. This principle is firmly settled in our practice. It was stated as follows in *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1190E – G:

“In cases in which the respondent in motion proceedings has put the authority of the applicant to bring proceedings in issue, the Courts have attached considerable importance to the failure of the respondent to offer any evidence at all to suggest that the applicant is not properly before the Court, holding in such circumstances that a minimum of evidence will be required from the applicant. This approach is adopted despite the fact that the question of the existence of authority is often peculiarly within the knowledge of the applicant and not his opponent. A fortiori is this approach appropriate in a case where the respondent has equal access to the true facts.” ‘

[22] It is clear from the authorities that I have cite, that there must at least be something to show that the litigation on behalf of an artificial person has been authorised. In the *Otjozondjupa Regional Council* matter Muller J accepted that in several matters Courts have regarded a statement under oath by a deponent that he or she had been duly authorised to bring the application, as sufficient.

[23] In the founding affidavit of this application, the deponent (Mr. Walenga) to the applicant’s affidavit, states that he is a senior traditional councilor of the applicant and further states under oath that he is duly authorised to depose to the affidavit and to lodge the application. The first respondent denied this statement. In the applicant’s replying affidavit the same deponent (Mr. Walenga) said the following:

‘The first respondent unexpectedly raises my authority to act on behalf of the Ondonga Traditional Authority (OTA). As a result I am advised to apply to be joined as a second applicant herein ....

5. I deny that I do not have the authority of the OTA to bring this application on behalf thereof. The meeting of 15 April 2017 was a grassroots democratic meeting attended by over 700 community members as well as at least seventeen members of the Ondonga Traditional Council including its properly appointed chair.

6 This meeting discussed the issues and the concerns (amongst others) around the incapacity of the OTA and the abuse of *Omukwaniilwa's* signature was discussed. This obviously goes to the core of the decision making process and functioning of the OTA.

7. I say that this meeting, which includes the *quorum* for the Ondonga Traditional Council and its chair, Peter Kauluma appointed in terms of section 9(3) of the Act by the *Omukwaniilwa* creates a mandate to approach this court to obtain access to the *Omukwaniilwa*.'

[24] The deponent (Mr. Walenga) to the applicant's supporting affidavit then referred to minutes of a community meeting of the Ondonga Traditional Authority held on 15 April 2017 (the minutes were attached to the founding affidavit as Annexure "JW 4"). Those minutes under the heading "Way forward and Resolutions" reflect the following:

'The meeting resolved for the OTA to do the following:

5.1 ...

5.5 If it means going to court then they should go ahead and bring justice.'

[25] Mr. Coleman, although conceding that the Ondonga Traditional Authority did not pass a resolution authorising Mr. Walenga to institute and prosecute the application, argued that the community meeting of 15 April 2017 did authorise the Ondonga Traditional Authority to institute and prosecute the application. As regards the contention of the respondent that Mr. Walenga and seven other traditional councilors were suspended and did not have the authority to act on behalf of the Ondonga Traditional Authority, Mr. Coleman in response argued that the suspension was contrary to the Traditional Authorities Act, 2000 and was thus invalid and can be ignored by those who were 'purportedly' suspended.

[26] In my view the question that needs to be answered in this matter is whether the respondent was, on the facts of this case, justified to question the allegation by Walenga that he was duly authorised to act on behalf of the Ondonga Traditional Authority to launch this application or put otherwise is the 'trigger-challenge' raised by the respondent a strong one.

[27] In my view the respondent is, on the facts of this case (the facts being that,(a) there is no resolution taken by the Ondonga Traditional Authority authorising the institution and prosecution of the application (b) the respondent has placed facts before

court in which the position of Mr. Kauluma as chairperson of the Ondonga Traditional Authority is being questioned and that some of the traditional councilors have been suspended from their offices and can therefore not act on behalf of the Ondonga Traditional Authority), justified to question the allegation by Mr Walenga that he is authorised to act on behalf of the Ondonga Traditional Authority or in other words the 'trigger – challenge' is not just any challenge but is a strong challenge.

[28] I say so for the following reason. It is common cause that apart from Mr. Walenga's say so, he has not attached a copy of a resolution by the Ondonga Traditional Authority authorising him to on its behalf institute and prosecute these proceedings. Secondly he and seven other traditional councilors' capacity to represent the Ondonga Traditional Authority is, by virtue of their suspension, being questioned.

[29] The challenge by the respondent thus required of Mr. Walenga to have placed some evidence before court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. In the replying affidavit, Walenga does not, as he was entitled to do, place 'some evidence' with respect to his authority before court, he simply states that he did not expect the challenge to his authority to act on behalf of the Ondonga Traditional Authority to be raised and that he has been advised to apply to be joined as a second applicant.

[30] The argument that the community meeting of 15 April 2017 is the source of authority is in my view untenable. I say so for the following two reasons. First the meeting of 15 April 2017 was a community meeting of the Ondonga Traditional community and not a meeting of the Ondonga Traditional Authority, the Ondonga Traditional community cannot take resolutions on behalf of the Ondonga Traditional Authority.

[31] Secondly the resolution by the Ondonga Traditional community meeting that 'If it means going to court then they [the Ondonga Traditional Authority] should go ahead and bring justice' can by no stretch of imagination be interpreted that the Ondonga Traditional Authority has duly resolved to institute these proceedings. The most generous interpretation which may be placed on that resolution is simply that the members of the Ondonga Traditional community who were present at the meeting of 15 April 2017 have given their blessing or approval for the Ondonga Traditional Authority to

institute legal proceedings. The decision to institute legal proceedings must still be that of the Ondonga Traditional Authority and the Authority has never taken that decision.

[32] I am therefore satisfied that the respondent's point with respect to Mr. Walenga's authority to institute and prosecute the application on behalf of the Ondonga Traditional Authority is well taken. I accordingly conclude that Mr Walenga was not duly authorised to act on behalf of the applicant in launching this application.

Walenga's "application" to be joined as a second applicant.

[33] Mr. Walenga's fallback position was that because his authority to act on behalf of the Ondonga Traditional Authority was challenged, he has been '*advised to apply to be joined as a second applicant in the application.*' Mr. Shikongo who appeared for the respondent argued that the advice which Walenga received is irrelevant. He argued that Walenga simply states that he has been advised to apply to be joined as the second applicant, but does not so apply. He argued that since there was no application from Walenga for him to be joined as a second applicant, he (Walenga) was not properly before court.

[34] To this argument Mr. Coleman replied that since the application was brought on an urgent basis and the first relief which was sought in the application was for an order condoning the non-compliance with the rules, Mr. Walenga's application to be joined as a second applicant could be moved from the bar.

[35] Before I consider the question whether Mr. Walenga is properly before Court or not I find it appropriate to preface my consideration of that question with a reminder by Justice O' Reagan<sup>14</sup> that:

'...a court may not forget that court rules are adopted in order to ensure the fair and expeditious resolution of disputes in the interest of all litigants and the administration of justice generally. Accordingly, a court may not condone non-compliance with the rules even by lay litigants where non-compliance with the rules would render the proceedings unfair or unduly prolonged.'

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<sup>14</sup> In the matter of *Worku v Equity Aviation Services (Namibia) (Pty) Ltd (in Liq) and Others* 2014 (1) NR 234 (SC) at p 240 para [17].



[36] In the definition part of the Rules the word “application” is defined as ‘an application on notice of motion as contemplated in Part 8’. Part 8 of the Rules commences with Rule 65 and Rule 65 (1) amongst other things reads as follows:

‘65. (1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.’

[37] Rule 65 (1) of the Rules of Court is peremptory. An application which commences new proceeding must be on notice of motion to person who may be affected by the relief sought and also compels the registrar to sign that notice of motion. Despite the injunction that every application must be on notice of motion supported by an affidavit as to the facts on which the applicant relies for relief, the Rules of Court by Rule 70(1) make exception with respect to interlocutory and other applications incidental to pending proceedings. That rule reads as follows:

‘70 (1) Despite rules 65 to 69, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and, if the application is contemplated in a case management report referred to in rule 24, it must be heard as directed by the managing judge.’

[38] The exception that is introduced by Rule 70 (1) is that, with respect to interlocutory and other applications incidental to pending proceedings there is a discretion as to whether to institute the application on notice supported by such affidavit as the case may require or not. The discretion must, be exercised in a judicious manner. The joinder of parties to proceedings that are pending before Court is governed by Rule 40. Rule 40(5) provides that any party who seeks a joinder of parties must apply for such joinder to the managing judge for directions in terms of rule 32(4).

[39] Mr Coleman argued that since the application was launched on an urgent basis and the first relief that was sought was for the Court to condone the applicant’s non-compliance with the rules of Court it was permissible for Walenga’s application to be joined as a second applicant to be made from the bar.

[40] There is no rule that exempts a party who launches an application on an urgent basis to comply with the rules of court. An urgent application, although, brought under Rule 73 is an 'application' as defined in Rule 1. The only qualification is that in an urgent matter an applicant may amend 'the rules of the game' without asking prior permission of the Court.<sup>15</sup> The intent of Rule 73 is that such amendment is permissible only in those respects and to that extent which is necessary in the particular circumstances.

[41] Rule 73 (3)<sup>16</sup> enjoins the Court to dispose of an urgent matter by procedures 'which as far as practicable in terms of the rules of Court or as the Court considers fair and appropriate.' That obligation must of necessity be reflected in the attitude of the Court about which deviations it will tolerate in a specific case. The mere existence of some urgency, if any, cannot therefore justify an applicant to depart from the procedures which are in accordance with the rules and which are fair to their opponents. The applicant must, in all respects, responsibly strike a balance between the duty to obey Rule 70(1) (i.e. to apply on notice to parties who may be affected) and the entitlement to deviate from the rules.

[42] On the practical level, the case of *Ex Parte Sudurhavid (Pty) Ltd: In Re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*<sup>17</sup> sets out the law applicable in applications to intervene or to be joined as a party to proceedings which are pending before a court. The principles which were set out in that case are that:

'The applicant [to be joined or to intervene] must satisfy the Court that:

(i) he has a direct and substantial interest in the subject-matter of the litigation, which could be prejudiced by the judgment of the Court ... and

(ii) the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a *prima facie* case or defence — it is not necessary for the applicant to satisfy the Court that he will succeed in his case or defence. '

<sup>15</sup> *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W), and also see *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A).

<sup>16</sup> Which reads as follows:

'(3) In an urgent application the court may dispense with the forms and service provided in these rules and may dispose of the application at such time and place and in such manner and in accordance with such procedure which must as far as practicable be in terms of these rules or as the court considers fair and appropriate.'

<sup>17</sup> 1992 NR 316 (HC) which was approved by the Supreme Court in the matter of *Kahuure and Another in re Nguvauva v Minister of Regional and Local Government and Housing and Rural Development and Others* 2013 (4) NR 932 (SC).

[43] How will a respondent, who has not been served with an application for intervention or joinder, be able to deal and answer to allegations which an applicant must make if the respondent was not served with application for joinder? In my view an application to intervene or to be joined as a party to proceedings pending before court must, for it to be fair, come before the Court in the formal manner in which all matters should come before the Court - that is, on notice properly served on parties who are part of the proceedings before court. An application to intervene or to be joined to proceedings pending before court moved from the bar is such a distinct departure from the usual procedure of this Court that I am not disposed to follow or allow it. Mr Walenga is thus not properly before court.

[44] Mr Shikongo citing as authority the case of *Namibia Grape Growers and Exporters Association and Others v The Minister of Mines & Energy and Others*<sup>18</sup> urged me to dismiss the matter. The Supreme Court in the matter of *Cargo Dynamics Pharmaceuticals (Pty) Ltd v Minister of Health and Social Services and Another*<sup>19</sup> has indicated that the proper cause to follow, where the merits of a matter have not been decided is to strike the matter from the roll rather than to dismiss it. I will accordingly not dismiss the case but simply strike it from the roll. In the light of the conclusion I have reached, the second point *in limine*, does not arise for decision.

### Costs

[45] Given that the respondent, was compelled to oppose the application, and given that the application has not succeeded, the general rule, namely that costs follow the course apply, and it is thus appropriate to order that the applicant and Mr Walenga to pay the costs of the opposition.

[46] In the premises, I make the following order:

1. The application is struck from the roll.
2. The applicant must pay the first respondent's costs.

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<sup>18</sup> 2002 NR 328 (HC).

<sup>19</sup> 2013 (2) NR 552 (SC).

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SFI Ueitele  
Judge

**APPEARANCES**

**APPLICANT:**

George Coleman  
Instructed by AngulaCo Incorporated  
Windhoek.

**1<sup>st</sup> RESPONDENTS:**

Elias Shikongo (with him Sandra Miller)  
Of Office of Shikongo Law Chambers.  
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