

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-CIV-ACT- DEL-2020/00309

In the matter between:

STANISLAUS UISEB

PLAINTIFF

and

ALL PEOPLE'S PARTY ("APP")

1ST DEFENDANT

VINCENT KANYETU

2ND DEFENDANT

THE TOWN COUNCIL FOR THE MUNICIPAL

OF GROOTFONTEIN

3RD DEFENDANT

ELECTORAL COMMISSION OF NAMIBIA

4TH DEFENDANT

Neutral Citation: *Uiseb v All People's Party* (HC-MD-CIV-ACT-DEL-2020/00309)
[2021] NAHCMD 311 (1 July 2021)

CORAM: PRINSLOO J

Heard: 17 – 21 May 2021

Delivered: 1 July 2021

Flynote: **Civil Practice** – Plaintiff’s claim based on damages suffered but for the unlawful recall – Relationship between a political party and its members is contractual – Section 13(1)(g) of the Local Authorities Act – Decision to withdraw a member of a political party without first affording him a hearing – Principles of natural justice, the *audi alteram partem* rule applied.

Summary: The plaintiff, a councillor for the Council of the town of Grootfontein and a member of the first defendant (All People’s Party) was withdrawn as a councillor on purportedly exercising its power in terms of section 13(1) (g) of the Local Authorities Act, 1992. The plaintiff instituted action proceedings against the defendants seeking for an order for payment of damages he suffered as a result of first defendant’s actions to recall him as a councillor from the Council of the town of Grootfontein and interest at a rate of 20% from the months (in respect of the amount in each month not having lapsed at the time of the finalisation of this action) from the month thereof until the date of final payment.

The plaintiff alleged that the relationship between himself and the first defendant is based on a contract. The plaintiff further alleged that the first defendant unlawfully and, unfairly took the decision to recall him and was made without a fair process being followed, in that the plaintiff was not afforded an opportunity to be heard before the decision was taken.

It was contended on behalf of the first defendant that the relationship between itself and the plaintiff was not a contractual one, in that he failed to refer to the relevant provisions of the first defendant’s constitution or other documents of the first respondent which indicated that the relationship between itself and the plaintiff was one of a contractual nature; the first defendant further averred that by virtue of the provisions of section 13(1)(g) of the Local Authorities Act and the candidacy nomination form, it was entitled to withdraw the plaintiff as a member of the Council. The first defendant denied that there was any lawful basis for the plaintiff’s contention that his withdrawal as councillor needed to be preceded by a hearing.

Held that a political party’s Constitution and its Code of Conduct (if it has one) constitute the contract between the political party and the members of that political

party and that the terms of the political party's Constitution and Code of Conduct are justiciable in a Court of law. Relying on the judgment in the matter of *Nambinga v Rally Democratic and Progress and 18 others (HC-MD-CIV-MOT-GEN- 2017/00738) [2018] NAHCMD 102 (20 April 2018)*.

Held that the rule of law enforces minimum standards of fairness both substantive and procedural. In the absence of stipulated procedure, the courts must imply procedural requirements necessary to ensure that the principles of natural justice are observed. The decided cases on this subject establish the principle that the courts will readily imply terms where necessary to ensure the fairness of the procedure.

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

Held further that as the Party's Constitution and Code of Conduct is silent on the procedure to follow in case of a grievance and how to follow a disciplinary process it is just logical that the common law principles of natural justice must apply. The maxims *audi alteram partem* ('hear the other side') and the *nemo iudex in propria cause* ('no one may judge his own cause') remains apposite. The *audi alteram partem* rule can never be taken away from an aggrieved party in our constitutional dispensation.

ORDER

1. The first defendant is ordered and directed to pay the plaintiff the combined amount of N\$202 790.43.

2. Interest on the aforesaid amount at a rate of 20% from February 2017 until date of payment.
3. Costs of suit.
4. The matter is finalized and removed from the roll.

JUDGMENT

PRINSLOO J

Introduction

[1] The plaintiff, Stanislaus Uiseb, a member of the first defendant, All People's Party, instituted an action seeking for damages against the All People's Party (hereinafter "APP" or "the Party"), Vincent Kanyetu Kanyetu, the Town Council for the Municipality of Grootfontein and the Electoral Commission of Namibia, the defendants herein.

[2] Only the APP and second defendant filed their notice of intention to defend. Where I therefore refer to the defendants it is reference to the first and second defendants. It is also important at this point to note that the plaintiff's legal practitioner indicated that the plaintiff would not pursue the claim against the second defendant.

The plaintiff's pleadings

[3] By way of particulars of claim, the plaintiff brought an action against the defendants based on damages caused by the alleged unlawful withdrawal of the plaintiff's appointment as a councillor of the Grootfontein Town Council. The

damages are in the form of a loss of income allegedly suffered from the date that the plaintiff was withdrawn as councillor until the intended end of his term of office as councillor. The withdrawal of the plaintiff by the Party resulted in the Grootfontein Town Council stopping to pay him his monthly remuneration from February 2017 until November 2020.

[4] It is the plaintiff's case that a contractual relationship existed between him and the party and by virtue of this contractual relationship the Party had to act lawfully, procedurally, fairly and reasonable which implies that the plaintiff should be afforded the opportunity to be heard before making any decisions that would affect him.

[5] The plaintiff pleaded that the Party breached this duty towards him when he was withdrawn as councillor, purportedly acting in terms of s.13(1)(g) Local Authorities Act, 23 of 1992 (the 'Act'), without affording him any hearing alternatively, an opportunity to show cause otherwise why he should not be removed from his position.

[6] The plaintiff pleaded that as a result of the Party's conduct, he suffered damages from 08 February 2017 to 20 November 2020 in the amount of N\$280 491.50 (now amended to N\$202 790.43), being the combined monthly allowance that the plaintiff would have received from the third defendant on account of his position as a member of the Grootfontein Local Authority Council.

[7] The plaintiff initially prayed for an order in the following terms:

- '1. An order in terms of whereof the first defendant is ordered and directed to pay the plaintiff the combined amount of N\$280 491.50 pleaded in paragraphs 13.1 to 30.31.
2. An order in terms whereof the first defendant is ordered and directed to pay the plaintiff interest on the aforesaid amount at a rate of 20% from the months (in respect of the amount in each month not having lapsed at the time of the finalisation of this action) pleaded in paragraphs 13.1 to 30.31 hereof, from the month thereof until the date of final payment.

3. An order in terms whereof the first defendant's purported removal and/or withdrawal of the plaintiff as a Councillor in and/or for the third defendant is declared unlawful, void of all consequences and set aside.
4. An order in terms whereof the first defendant's decision, consequent to paragraph 12 hereof, is declared unlawful, void of all consequences and set aside.
5. An order in terms of whereof the first defendant's decision, consequent to paragraph 12 hereof, to nominate Victoria Hausiku as Councillor in the second defendant is declared unlawful, void of all consequences and set aside.
6. An order in terms whereof the third defendant's decision, consequent to paragraph 12 hereof, to swear in Victoria Hausiku as Councillor in the third defendant is declared unlawful, void of all consequences and set aside.
7. An order in terms whereof any defendants electing to oppose this action are ordered and directed to pay the plaintiff's cost, being the costs of one instructing and one instructed counsel.'

[8] It is important to note that the plaintiff has since abandoned prayers 3,4,5 and 6 and is only pursuing claims 1,2 and 7 (such costs being cost of suit only). The plaintiff amended his claim amount to N\$238 153-30. The plaintiff further amended the claim amount upon a query from the court as to be the actual loss the plaintiff suffered being N\$202 790.43.

Defendants' plea

[9] As previously indicated, only the APP and second defendant entered an appearance to defend the plaintiff's claims. The defendants filed a special plea of jurisdiction, however at the commencement of the trial, the defendants abandoned the special plea of jurisdiction.

[10] On the merits, the defendants denied that a contractual relationship existed between the plaintiff and the APP or that the plaintiff was a *bona fide* member of the Party. The defendants pleaded in amplification that the plaintiff did not at all times carry on work to enhance and advance the aims of the Party. In addition thereto, the defendants pleaded that the relationship between the parties is governed by the Party's Constitution and Code of Conduct, the standard terms and conditions of the

candidacy nomination form, as well as the provisions of the Act in the execution of his duties. Therefore in exercising its discretion in terms of section 13 of the Act, the Party acted fairly, reasonably and consistently with its known practice and procedure.

[11] The defendants further denied that the plaintiff had a legitimate expectation of serving the full term of his contract because he failed to comply with the Party's Constitution, Code of Conduct, and to an extent, the Act, which conduct culminated in indecent behaviour, missing meetings and not performing his duties as required. Further to that, the defendants pleaded that the regional branch members of the APP signed a petition in terms of the Code of Conduct, as a result of which the regional branch called a meeting to discuss the plaintiff's behaviour. However, despite the notice, the plaintiff failed to appear or avail himself for the meeting to discuss the issues raised by the local constituents, therefore tacitly waiving his right to be heard.

[12] The defendants further pleaded that the plaintiff was recalled in February 2017, which recall was only made effective in March 2017, and the current civil proceedings were only instituted in February 2020. The defendants pleaded that the plaintiff should have mitigated his harm by bringing the matter before the court in 2017 if he was not able to prosecute the matter through a grievance procedure for whatever reasons. The defendants pleaded that the failure of the plaintiff to do so aggravated the supposed loss of income that the plaintiff claims he is entitled to, had it not been for the extended time which the plaintiff failed to act, he would not have incurred such loss and/or damages as such liability cannot be placed on the defendants for the full amount, if any, at all and therefore the plaintiff's claim should be dismissed with costs.

Evidence adduced

Plaintiff's case

[13] On behalf of the plaintiff, Mr Stanislaus Uiseb testified that he became a member of the APP on 18 April 2014, which resulted in a contractual relationship between himself and the Party (then duly represented by the second defendant).

[14] Mr Uiseb testified that on 04 December 2015 the APP nominated him to serve as the Party's representative member in the Grootfontein Town Council. He was duly sworn in as a councillor with a five(5) year service term, which would have expired on 20 November 2020. Mr Uiseb testified that he had a reasonable and legitimate expectation that he would serve the full duration of his appointment.

[15] Mr Uiseb testified that sometime after 22 September 2016, Mr Hausiku, the Regional Coordinator of the Party, showed him a letter dated 22 September 2016 inviting him (Mr Hausiku) to attend a meeting at the APP head office on 3 October 2016 to discuss the issues around the operations of the APP Grootfontein Branch as well as the activities of the Grootfontein Town Council. Mr Uiseb testified that Mr Hausiku invited him to accompany him to the meeting, but he declined as he did not receive an invitation.

[16] Mr Uiseb testified that he attended a Harambee Workshop for councillors in Oshakati for two and a half weeks during that period. Upon returning home, his wife showed him a letter similar to Mr Hausiku's but addressed to him. Mr Uiseb stated that sometime after 03 October 2016, he received a phone call from the second defendant enquiring why he did not attend the meeting on 03 October 2016 at the Party's headquarters. Mr Uiseb informed the second defendant that he did not attend as he was not invited. The line went dead, and Mr Uiseb phoned the second defendant back to explain that even if he received an invitation timeously, he would not have been able to attend the meeting as he was due to attend the Harambee Workshop.

[17] Mr Uiseb testified that on 07 October 2016, he received a letter from the second defendant requesting him to set a date for the consultation in Windhoek at his own cost. Mr Uiseb testified that the letter further stated that in the event of his failure to attend management would take a decision on "facts and reports available to us" but was silent as to what facts and reports the letter referred to. Mr Uiseb informed the second defendant telephonically that he would only be available in the last week of November 2016 and the first week in December 2016. The second defendant told him that because his dates were close to the festive season, the

meeting could not be scheduled in 2016. Mr Uiseb testified that he asked for the agenda of the meeting but received nothing to that effect.

[18] Mr Uiseb testified that during January 2017, the second defendant came to his house and requested him to attend a meeting at a home in Blikkiesdorp, Grootfontein but did not inform him what the meeting was about. Mr Uiseb testified that he went to the designated address after approximately 30 minutes to attend the meeting but only found his colleagues of the Grootfontein Branch there. Mr Hausiku informed the plaintiff that the second defendant was supposed to chair the meeting but had to leave for Rundu. The plaintiff testified that nobody told him what was supposed to be discussed at the meeting.

[19] Mr Uiseb testified that on 08 February 2017 he received a letter from Mr Kariko, the Chief Executive Officer of the Grootfontein Municipality, informing him that the APP recalled him as a councillor in terms of the Local Authority Act of 1992. Mr Uiseb testified that he did not know the reasons why the Party recalled him. Mr Uiseb testified that he was unaware of any complaints from the APP Grootfontein Branch against him or any complaints directed to the Party's head office. Mr Uiseb testified that he was never confronted by anyone regarding allegations of untoward conduct or misconduct.

[20] Mr Uiseb testified that the APP did not afford him any hearing alternatively, an opportunity to show cause otherwise before he was recalled as a councillor. The witness insisted that the APP acted unfairly, unreasonable, unprocedural and unlawful and thus breached the contractual relationship between them. Mr Uiseb testified that after being recalled, the first defendant unlawfully and wrongfully nominated and caused the swearing-in of Victoria Hausiku.

[21] Mr Uiseb testified that as a direct consequence of the Party's conduct, he suffered damages in respect of the remuneration he would have received monthly during his tenure. The plaintiff testified that the damages suffered should be calculated from 08 February 2017 to 20 November 2020, amounting to N\$238 153-30 (now amended to N\$202 790.59). He added that the councillors received a salary increment during July 2017 but had no documentation in support of this contention.

[22] Mr Uiseb testified that on 29 March 2017 he informed the management of the Party that he intended to file a grievance against its decision to recall him as a councillor and that he proceeded to file his grievance on the same day. He testified that the Constitution and all the other instruments of the APP do not make provision for a grievance procedure or any other internal procedure that its members must follow to resolve internal disputes. The purpose of his grievance letter was an attempt to resolve the dispute amicably.

[23] Mr Uiseb testified that he made several phone calls to the President of the APP, Mr Ignatius Shixwameni, and the second defendant, Mr Vincent Kanyetu. They both informed him that they could not reverse their decision to recall him as a councillor. Mr Uiseb testified that his legal practitioner addressed a letter of demand to the APP demanding his reinstatement and payment of contractual damages. However, the APP's management did not respond to the plaintiff's demands.

[24] During cross-examination, Mr Brendell questioned the plaintiff on what he understood the terms of the contract to be. Mr Uiseb testified that he understood the terms of the contractual agreement to be that he would serve as a councillor representing the APP until the end of his term and that the party had the right to recall him lawfully by following the proper procedures. The witness added that if the APP followed the correct procedure, he would have accepted the recall.

[25] Mr Uiseb further testified that he did not sign a contract with the Party, but signed the swearing-in statement when he was sworn in as a representative of the Party. Mr Uiseb testified that when he signed the membership card, Mr Hausiku signed his membership card on behalf of the Party in his representative capacity as district co-ordinator of the Grootfontein branch. In addition thereto, he accepted the nomination by the APP to be appointed as its representative on the Town Council of Grootfontein.

[26] When asked by Mr Brendell when he became aware of the letter dated 22 September 2016, Mr Uiseb testified that he only became aware of the letter

addressed to him after 3 October 2016 when he returned from the workshop he attended in Oshakati for two and a half weeks.

[27] Mr Brendell also confronted the plaintiff regarding the delay in approaching the High Court with his claim. Mr Uiseb testified that he applied for legal aid from the Legal Aid Directorate, and he had to wait for the outcome of the matter at the Labour Commissioner before he could approach the High Court. After he received the ruling of the Labour Commissioner on 13 September 2019, he again approached the Legal Aid Directorate, who appointed his current legal representative.

[28] On the issue of mitigating his loss, Mr Uiseb testified that he mitigated his loss by writing insurance policies where he earned an average monthly commission of N\$1000.

[29] This concluded the plaintiff's case.

Defendants' case

[30] Two witnesses were called to testify on behalf of the defendants' case, namely Mr Ignatius Shixwameni and Mr Vincent Kanyetu Kanyetu.

[31] The following was common cause as testified to by the defendants' witnesses. The witnesses testified that the plaintiff became a member of the APP on 18 April 2014 and was subsequently nominated on 04 December 2015 as the successful candidate to act as APP's representative on the Town Council of Grootfontein. The plaintiff was appointed as a councillor in terms of the Act and was subsequently recalled by the Party in terms of section 13 (1) (g) of the said Act. The circumstances that gave rise to the plaintiff's recall were that the management of the APP received numerous complaints from the branch leaders in Grootfontein regarding the plaintiff's behaviour.

[32] The witnesses testified that these complaints against the plaintiff were followed up with a petition in terms of the Code of Conduct. Upon receipt of these complaints, management informed the Grootfontein branch that an internal

investigation had to be conducted and to report on the plaintiff's unsatisfactory behaviour that they were complaining of. The witnesses further testified that a letter dated 22 September 2016 was addressed by the Acting Secretary-General to the plaintiff wherein the plaintiff was invited to a consultative meeting to be held on 03 October 2016 and that despite the plaintiff receiving the letter and Mr Vincent Kanyetu being dispatched as a representative to Grootfontein to invite the plaintiff, the plaintiff failed and/or refused and/or neglected to attend the meeting and failed to inform them of his inability or unavailability prior to the meeting.

[33] The witnesses testified that in the interest of hearing the plaintiff out, they extended a second invitation on 07 October 2016 to the plaintiff, requesting him to provide them with a date when he was available within two weeks to attend a meeting with the management. This correspondence was hand-delivered to the plaintiff's house, whereafter the plaintiff telephonically confirmed that he received the letter but still failed and/or neglected and/or refused to furnish them with dates. According to the witnesses, they advised the plaintiff in the said letter that they would take decisions on the agenda items based on the available information and reports. A meeting was held with some of the complainants based on their complaints and management resolved to recall the plaintiff due to the absence of the plaintiff, his apparent disinterest in ventilating the issues and the persistence of his actions despite the branch's efforts.

[34] The witnesses testified that the Party actioned the resolution on 08 February 2017 and dispatched a letter to the Chief Executive Officer of the third defendant and plaintiff informing them that the plaintiff has been recalled and that he was replaced with Miss Victoria Hausiku Masora. However, the recall was only actioned by the third defendant on or about April 2017. In addition, the witnesses confirmed receipt of the plaintiff's correspondence dated 29 March 2017 wherein the plaintiff indicated that he was not happy with the decision taken to recall him and that due process was not followed. After receipt of the plaintiff's letter, they held the view that due process was completed and followed for about three months, they would thus be unable to retract their decision.

[35] The witnesses testified that they were shocked and confused when they received the summons as the decision was taken in 2016 and implemented in March/April 2017. They testified that every councillor must abide by the policies and the Codes of Conduct of the party and that the plaintiff failed and/or refused and/or neglected to sign the candidacy nomination form, however it was tacitly agreed to upon his election as councillor.

[36] According to the witnesses in terms of the candidacy nomination form, the plaintiff agreed that should he be found by the Party and residents of his branch not to be acting in the best interest of the party, to be recalled in accordance with the procedures of the Party and that the party members and party leaders have the final say on his position as councillor.

[37] It is the testimony of the witnesses that at every juncture of the removal, they provided the plaintiff with reasons of the removal, and it seemed as if he understood and therefore the Party in so as it was capable complied with the laws of natural justice and that the plaintiff, by his conduct and/or omissions, accepted the recall and/or failed to act as a reasonable person would prevent the losses he claims he incurred.

[38] In addition to the above Mr Shixwameni testified that he is the President of the first defendant and has occupied the said position since its inception. Mr Shixwameni testified that the plaintiff's behaviour was that he would miss meetings, had rude public behaviour, and treated other members with contempt. He added that the head office was informed that the plaintiff ignored requests for a meeting to discuss his behaviour. Accordingly, they sent a representative from the head office to discuss the problem together with other issues from the members.

[39] During cross-examination, when questioned by Mr Coetzee as to whether a contractual relationship existed between the plaintiff and the Party, Mr Shixwameni testified that the contractual relationship that existed between the parties is one of membership. Mr Shixwameni further disputed that the plaintiff attended a workshop in Oshakati for longer than two and half weeks, as he claims.

[40] Mr Coetzee questioned the witness as to when the plaintiff was provided with reasons for his recall. Mr Shixwameni testified that only Mr Kanyetu would be able to testify on that aspect. However, Mr Shixwameni testified that they provided reasons at every juncture but that reasons were only provided at the management meeting, which meeting the plaintiff could not attend because he is an ordinary member of the party.

[41] The next witness called on behalf of the defendant was Mr Vincent Kanyetu, the second defendant herein. He testified that he is the Secretary-General of APP.

[42] In addition to the earlier summary of the evidence, the second witness Mr Kanyetu, testified that no contract was entered into between the Party and the plaintiff and that the plaintiff was only provided with a membership card. Mr Kanyetu testified that they received numerous complaints about the plaintiff's inappropriate behaviour, such as being under the influence of alcohol, missing meetings and failing to contribute the required contribution of N\$200 per month. Mr Kanyetu testified that some of the members called him on his cellphone and informed him of the plaintiff's conduct. Some demanded that the plaintiff be removed with immediate effect.

[43] Mr Kanyetu testified that due to the nature of some of the complaints, they attempted to talk to the plaintiff about his behaviour, both officially and in his personal capacity. Mr Kanyetu testified that on 22 September 2016 he delivered a letter to the plaintiff inviting the plaintiff to attend a meeting scheduled for 03 October 2016 in Windhoek where the plaintiff could respond to the allegations made by the branch members.

[44] Mr Kanyetu testified that when the plaintiff failed to appear for the meeting of 03 October 2016 they tried to reach him via telephone, but the plaintiff's phone was off, resulting in the rescheduling of the meeting.

[45] Mr Kanyetu testified that the plaintiff called him on his cellphone in the middle of the night whilst under the influence of alcohol trying to justify his behaviour and he informed the plaintiff to reply in writing and that the plaintiff failed to do so. On 22 January 2017, the branch wrote another letter wherein they indicated that they could

no longer deal with the intense disrespectful and inappropriate behaviour and sent a recommendation requesting the plaintiff's immediate removal.

[46] Mr Kanyetu testified that they only heard from the plaintiff when they received the summons and that the plaintiff was featured in the newspapers and made numerous social media posts wherein he insulted APP and slandered the reputation of APP in the public eye but made no further attempts to have his grievance heard nor attempt to have them re-elect him as a councillor.

[47] Mr Kanyetu testified that despite the plaintiff having an opportunity to take remedial action as soon as reasonably possible to prevent unnecessary loss, he failed to do so and that the plaintiff should have prevented his loss of income and sought other forms of income alternatively actively pursued the supposed appeal and/or grievance actively.

[48] During cross-examination, Mr Coetzee questioned Mr Kanyetu about the meeting scheduled for 22 September 2016 and whether a time for the said meeting was provided for in the letter to which the plaintiff was supposedly late as per his testimony. Mr Kanyetu testified that no meeting was scheduled to take place in September 2016 but if such meeting took place in Grootfontein, it would have been between himself and the plaintiff and not management.

[49] Mr Kanyetu further confirmed that the plaintiff indeed called him after 3 October 2016, informing him that he only received the letter dated 22 September 2016 upon returning from his workshop in Oshakati.

[50] When confronted with the contents of the letters as to why same did not make mention of the agenda or the allegations against the plaintiff in any of the letters or the reports and facts available to them, Mr Kanyetu insisted that the plaintiff knew about the allegations against him and the purpose of the meeting because he was informed telephonically.

[51] Mr Kanyetu further confirmed during cross-examination that the plaintiff called him to inform of his availability pertaining to the letter of 7 October 2016

wherein he requested the plaintiff to provide dates for the rescheduling of the meeting in writing.

[52] Upon a question of Mr Coetzee as to whether the complainants attended to the meeting held by the management committee, Mr Kanyetu testified that the complainants do not attend the management meetings held in Windhoek, therefore, resulting in a contradiction between himself and Mr Shixwameni, according to Mr Coetzee.

[53] When confronted with the purpose of the disciplinary hearing, Mr Kanyetu testified that the management committee was the right body to deal with the issue at hand because it was empowered by the Party to take the decision to recall the plaintiff. The witness testified that the matter had dragged on for some time and it was urgent as it was affecting the party negatively.

[54] On the issue of the plaintiff's grievance, Mr Kanyetu testified that they did not respond to the plaintiff's grievance because the case was closed at that time. In addition, Mr Kanyetu confirmed the plaintiff's case that management did not provide the plaintiff with reasons for his recall because the reasons were clear to the plaintiff.

[55] This concluded the defendant's case.

Closing arguments

On behalf of the plaintiff

[56] Mr Coetzee, on behalf of the plaintiff, argued that the court had to determine whether a valid agreement existed between the plaintiff and the Party and referred the court to the case of *Jeremia Nambinga vs Rally for Democracy and Progress and 18 Others*¹ wherein the court held that the relationship between a political party and its members is contractual. The court further held that the Party's Code of Conduct (if it has one) constitutes the contract between the political party and the political party

¹ (HC-MD-CIV-MOT-GEN-2017/00378) [2018] NAHCMD 102 (20 April 2018). Plaintiff's heads of arguments para 15.

members and that the terms of the political party's Constitution and Code of Conduct are justiciable in Court of law.

[57] On the issue of whether the plaintiff was afforded the opportunity to exercise the right to be heard, Mr Coetzee referred the court to the case of *Nghidimbwa v Swapo of Party of Namibia*², wherein the court held the following:

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

[89] It must also be poignantly observed and repeated that it is assumed that Parliament presumed the application of the *audi alteram partem* principle in every legislative enactment unless provided otherwise and in clear and unambiguous language. '

[58] Mr Coetzee argued that in light of the *Nghidimbwa* judgment, the defendants failed to comply with the rules of natural justice as such therefore the issues fall to be decided in favour of the plaintiff. Counsel submitted that the plaintiff's evidence that he did not receive any notice to attend a hearing remains unchallenged.

[59] Mr Coetzee submitted that Article 9 of the APP's Constitution makes provision for a disciplinary committee and that the Party's witnesses confirmed that the plaintiff did not receive a notice to attend a disciplinary hearing, let alone receiving misconduct charges. Mr Coetzee further submitted that the plaintiff's evidence that because of the Party's conduct, he did not receive any allowance from the Grootfontein Town Council as from February 2017 until November 2020 remains unchallenged as such the breach of the contractual relationship between the plaintiff and Party was unlawful. The conduct of the Party was a *condictio sine qua non* for the damages the plaintiff suffered.

² (HC-D-CIV-MOT-GEN-2016/00257) [2017] NAHCMD 298 (16 October 2017).

[60] On the issue of whether the plaintiff mitigated his loss, Mr Coetzee submitted that the plaintiff's evidence that the plaintiff mitigated his damages by writing insurance policies as from May 2017 and is earning an average monthly commission in the sum of N\$1000 remains unchallenged. Mr Coetzee submitted that it is crystal clear that the plaintiff took steps to mitigate his loss and that the defendant's witnesses did not deny that the plaintiff is an insurance agent and therefore, the first defendant did not discharge the evidential burden in respect of this issue.

[61] Mr Coetzee submitted that this court is not the appropriate forum to determine the plaintiff's guilt on the allegations of his untoward conduct. The defendants did not prove these allegations of misconduct at a disciplinary hearing. It also did not inform the plaintiff that he must show cause why he should not be recalled as a result of the allegations of misconduct. Mr Coetzee submitted that the evidence of any complaints of misconduct amounts to hearsay evidence because its veracity is depended on the credibility of witnesses that were not called as witnesses at the trial.

[62] In conclusion, Mr Coetzee argued that the plaintiff undoubtedly suffered damages as a consequence of APP's unlawful recall of him as a councillor for the third defendant.

On behalf of the defendants

[63] Mr Brendell, on behalf of the defendants, submitted that the defendants were under no obligation to conform to the principles of natural justice but nevertheless duly complied with same. Mr Brendell, on the objection raised by the plaintiff in that certain portions of the defendants' witnesses statements contained hearsay submitted that the defendants are governed by their Constitution, Policies, Procedures and Code of Conduct, which as a result outlines hierarchical structures. The leaders and the members of the Party operate on a reporting basis which amounts to their procedure. Mr Brendell submitted that it was the evidence of the defendants' witnesses that the reporting structures amount to telephonic consultations, letters and petitions and therefore, the evidence adduced by the defendants' witnesses does not amount to hearsay.

[64] Mr Brendell argued that the reports according to the defendants' witnesses, were also received by way of written communications as such that cannot be amounted to hearsay. Mr Brendell submitted that reliance must be placed on the defendants' witnesses evidence.

[65] On the issue of whether a contract existed between the plaintiff and the APP, Mr Brendell referred the court to the matter of *Muvangua v Hiangoro*³ wherein it was held that "when determining whether a contract has been formed, one must ascertain first whether the minds of the parties have actually met and the approach in the determination is essentially subjective. If consensus is found to exist, that is the end of the inquiry". Mr Brendell submitted that the defendants' witnesses testified that a contractual relationship was not created; therefore there was no meeting of the minds/ consensus nor a reasonable reliance of consensus as required to establish a contract. As such it is submitted that the plaintiff failed to allege and prove the existence of the contract with sufficient particularity in order for the court to adopt his version.

[66] Mr Brendell submitted that the plaintiff's reliance on natural justice is legally misplaced as the principles of natural justice do not find application in a claim based on a contract. Mr Brendell further submitted that the principles of natural justice and the principles of contract are mutually exclusive and should not be relied upon in one claim and in this regard referred the court to the matter of *Newpoint Electronic Solutions (Pty) Ltd v Permanent Secretary, Office of the Prime Minister*.⁴

[67] Mr Brendell submitted that the plaintiff relies on a contract but seeks redress on the basis of administrative law. Counsel submitted that the plaintiff's contention to base his claim on a contract by incorporating the principles of natural justice amounts to an incompetent claim and should be dismissed with costs.

[68] Mr Brendell submitted that in the event the court is satisfied that the principles of natural justice do apply or that it did form an inherent part of the contract, then the defendants duly complied with the rules of natural justice by

³ *Muvangua v Hiangoro* (HC-MD-CIV-ACT-OTH-2019/00768) [2020] NAHCMD 292 (16 July 2020). See First and Second Defendants heads of argument para 10.

⁴ (HC-MD-CIV-MOT-REV-2018/00277) [2020] NAHCMD 40 (3 February 2020). Supra para 20.

affording the plaintiff at least three opportunities to state his case before the management committee and the plaintiff elected to disregard them. On this score, Mr Brendell further submitted that according to the evidence of the defendants' witnesses that they were not obliged to refer the matter to the Disciplinary Committee, but that the management committee was vested with the power to recall the plaintiff if it is in the interest of the Party.

[69] Mr Brendell submitted that the plaintiff did not provide sufficient proof to show that he did not know of the allegations against him. Mr Brendell further submitted that the plaintiff did know of the allegations against him or should have reasonably known, as his evidence that he was entirely in the dark is not substantiated in any manner and amounts to a fallacy.

[70] Mr Brendell argued that the plaintiff's testimony that he was never confronted and was unaware of the allegations against him does not hold water. As a reasonable person, he never endeavoured to find out what the reasons for his recall were. Plaintiff's grievance letter is further silent on requesting reasons for his recall, which concludes that he was well aware of the reasons.

[71] Mr Brendell further argued that the plaintiff could not prove that he indeed received no income from the end of January 2017 as the evidence by the defendants' witnesses is that the recall was only effected from March/ April 2017. Mr Brendell argued that the plaintiff's evidence under cross-examination that he writes insurance policies to mitigate his loss was an afterthought as same was not part of his pleadings or his evidence in chief and that the plaintiff could not provide any evidence in this regard for the court to place reliance thereon.

[72] Mr Brendell argued that the plaintiff failed to come to court immediately as he should have done and that a period of two years without reason proved that he waited in order to claim more funds. The plaintiff's reliance on legal aid is baseless. According to Mr Brendell legal aid does not take long to instruct a legal representative. As such, counsel submitted that the plaintiff failed to prove why he could not come to court earlier.

[73] Mr Brendell submitted that the cases of *Amupanda*⁵ and *Nghidimbwa*⁶ do not find application in this matter as the *Amupanda* matter deals with the expulsion of a member from a political party and the relief was sought for in terms of Rule 76 of the High Court Rules. The *Nghidimbwa* matter equally so was sought in terms of Rule 76 and that the relationship in that matter was found to be a contractual relationship premised on the party's own Constitution and the judgment of *Amupanda*. Mr Brendell argued that at no point was it stated in those cases that the application is of a general application but that effect was given to the spirit and import of the Constitution of the Swapo Party. As a result, Mr Brendell submitted that it is an entirely different Constitution relied upon in the present matter, and that the spirit and import of the first defendant's Constitution is what should prevail.

[74] Mr Brendell concluded by submitting that the plaintiff failed to establish and prove his claim and that the positions of law and evidence of the first and second defendants find proper application herein.

Issues for determination

[75] Having dealt with the evidence before me, it is my considered view that the issues for determination are the following:

- a) Whether a contractual relationship existed between the plaintiff and the first defendant;
- b) Whether the first defendant complied with its own policies and procedures alternatively the principles of natural justice in the process of recalling the plaintiff;
- c) If the actions of the first defendant was *sine qua non* with the damages suffered by the plaintiff (if any).

The applicable law and application to the facts

⁵ *Amupanda v Swapo Party of Namibia* (A 215/2015) [2016] 126 (22 April 2016).

⁶ See footnote 2.

Valid contract

[76] Ueitele J argues that Namibia is a constitutional democracy. It is a system of governance that 'we the people' consciously and purposefully opted for to constitute a truly free, just and united nation, with a promise to secure to all its citizens justice, liberty and equality. In order to make the promise of justice, liberty and equality to all its citizens a reality the Constitution of Namibia guarantees its citizens the right to:

'...participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and; subject to such qualifications prescribed by law as are necessary in a democratic society to participate in the conduct of public affairs, whether directly or through freely chosen representatives.'⁷

[77] In the matter of *Amupanda*⁸, Parker J held that:

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

[4] Like the powers of Government, these powers of political parties are capable of misuse or abuse. Similarly, too, the important question is this. Has the law any means of controlling the abuse or misuse of powers of political parties?'

[78] This Court has held that the relationship between a political party and its members is contractual. The Court went on to hold that a political party's Constitution and its Code of Conduct (if it has one) constitute the contract between the political party and the members of that political party and that the terms of the political party's Constitution and Code of Conduct are justiciable in a Court of law.⁹ (Own emphasis)

[79] In addition to the above in deciding whether the relationship between the plaintiff and the first defendant was one of a contractual nature, it is prudent that I deal with the concept of offer and acceptance. When the court inquired from the

⁷ *Naminga v Rally for Democracy and Progress* (HC-MD-CIV-MOT-GEN-2017/00378) [2018] NAHCMD 102 (20 April 2018).

⁸ See footnote 5.

⁹ See footnote 7.

plaintiff as to whether the Party offered him the position of councillor as a result of his nomination, the plaintiff indicated that the Party offered him the position and he accepted the position, which resulted in him being sworn in as councillor of the APP in the Grootfontein Town Council.

[80] An offer is made when a party puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed. In *Wasmuth v Jacobs*¹⁰, Levy J said:

‘It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it accepted it will bind the offeror’.

[81] Furthermore, Van Niekerk J quoted in *Seagull’s Cry v Council of the Municipality of Swakopmund*¹¹ the case of *JRM Furniture Holdings v Cowlin*¹² in which the following was stated that:

‘The trite rule relevant in this regard is that the acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no consensus and therefore no contract. (*Wessels Law of Contract in South Africa* 2nd ed vol I para 165 et seq.) Willie *Principles of South African Law* 7th ed at 310 states the principles thus:

“The Person to whom the offer is made can only convert it into a contract by accepting, as they stand, the terms offered; he cannot vary them by omitting or alerting any of the terms or by adding proposals of his own. It follows that if the acceptance is not unconditional but is coupled with some variation or modification of the terms offered no contract is constituted . . .”.¹³

[82] Having dealt with the above I am convinced that the relationship between the plaintiff and the APP is one of a contractual nature. During cross-examination, the first witness indicated that the contractual relationship that existed between the parties is one of membership. Both witnesses for the defendants confirmed that every councillor must abide by the policies and the Codes of Conduct of the Party

¹⁰ 1987 (3) SA 629 (SWA) 633D

¹¹ 2009 (2) NR 769 at 780 D.

¹² 1983 (4) SA 541 (W) at 544B.

¹³ See also *National Cold Storage, a Division of Matador Enterprise (Pty) Ltd v Namibia Poultry Industries (Pty) Ltd* 2015 (3) NR 844 (HC) pp 850 – 851, para [15] and [16].

being the governing statutes that regulate the conduct and behaviour and activities of the party and its members.

First defendants constitutional framework

[83] Article 4 provides for the party structure and the duties of the different party structures:

‘4.1.4 Management Committee

- a) Organizational and Financial reports of the party for submission to the NB. There shall be an establishment of a Management Committee of the Party with the additional members of the Management Committee appointed by the NB (National Bureau).
- b) The MC shall meet once a month.
- c) The MC shall constitute of the Secretary-General, Deputy, Treasurer General, Deputy, Chief Administrator, a member of the finance and audit committee, heads of wings and three other Party members appointed by the NB amongst its members on technical expertise.
- d) The MC shall be chaired by the Secretary-General.
- e) The MC shall supervise the work of the party on a daily basis.
- f) The MC shall closely monitor the work of the party at regional and constituency level.
- h) (sic) The MC shall ensure the implementation of Party policies and programs at all structures of the organization.
- i) The MC shall cause the preparation of periodic Organizational and Financial reports of the Party for submisson to the NB.’

[84] Article 7 of the Constitution provides that the motto of the party is Equality, Justice, Prosperity, Unity and Democracy.

[85] Article 9 provides for the disciplinary committee:

‘ Article 9: Disciplinary Committee

- a) There shall be established by the NB, a disciplinary committee of the party with the mandate to oversee the enforcement of the party constitution.
- b) The code of conduct as established and endorsed by the CCC, shall form part of the constitution.

- c) Procedures for instituting disciplinary action by any structure of the organ forms part of this constitution.
- d) Appeal of any disciplinary decisions against any member of the Party shall be to CCC, whose decision shall be binding and final.'

[86] I find it prudent to deal with the relevant articles of the constitutional framework of the APP. The APP's constitution explicitly deals with the functions of the management committee and the disciplinary committee. The management committee, according to the Constitution, is not mandated or tasked to deal with matters relating to disciplinary actions, yet Mr Kanyetu testified that the management committee took the decision to recall the plaintiff because the management committee was the right body to deal with the issue at hand because it was empowered by the Party. One then wonders what the purpose of the disciplinary committee is. It would appear then that the management committee acted beyond the powers afforded to it in deciding to recall the plaintiff.

[87] The APP's Constitution and Code of Conduct are silent on the procedures that an aggrieved member should follow. Mr Kanyetu testified that despite having received the plaintiff's grievance letter on 29 March 2017, approximately a month after he was recalled, the defendants were of the opinion that the matter was dealt with and did not find the need to respond to same as 90 days had passed after the plaintiff's recall. Yet in their testimony, the witnesses state that the plaintiff could have mitigated his loss by making further attempts to have his grievance heard or take remedial action as reasonably possible in order to prevent unnecessary loss and he failed to do so. I disagree with the defendants' contention on this score in that the plaintiff attempted to have his grievance heard when he addressed a letter to the APP on 29 March 2017 wherein he requested the management of the APP to provide him with the party's manifesto/constitution to enable him to file his grievance. The plaintiff then still proceeded to file his grievance on the same date.

[88] The management of the Party pride themselves in their Constitution and Code of Conduct yet it appears as if both only comes into play when it best suits them.

Principles of natural justice

[89] As the Party's Constitution and Code of Conduct is silent on the procedure to follow in case of a grievance and how to follow a disciplinary process it is just logical that the common law principles of natural justice must apply. The maxims *audi alteram partem* ('hear the other side') and the *nemo iudex in propria cause* ('no one may judge his own cause') remains apposite. The *audi alteram partem* rule can never be taken away from an aggrieved party in our constitutional dispensation.

[90] Angula, DJP in the *Nghidimbwa v SWAPO Party of Namibia*¹⁴ at para 65 of the judgment referred to the *Swaziland Federation of Trade Union v The President of Industrial Court of Swaziland and Others* the *audi alteram partem* principle was eloquently described as follow:

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

Angula DJP went on further to state that:

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

And

¹⁴ *Nghidimbwa v SWAPO Party of Namibia* (HC-MD-CIV-MOT-REV-2016/00257) [2017] NAHCMD 298 (16 October 2017).

[74] The rule of law enforces minimum standards of fairness both substantive and procedural. In the absence of stipulated procedure, the courts must imply procedural requirements necessary to ensure that the principles of natural justice are observed. The decided cases on this subject establish the principle that the courts will readily imply terms where necessary to ensure the fairness of the procedure’.

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

[91] In this regard, I share the same sentiments as my Brother. The APP did not act in accordance with the principles of natural justice when the management committee expected from the plaintiff to deduce from the vague letters what was to happen to him if he failed to attend to the consultative meeting. The APP failed to afford the plaintiff the right to be heard and to answer to the allegations as it is expected of it. The mere argument on behalf of the APP that the invitation letters were sufficient to comply with the principles of natural justice is bad in law and must fail.

[92] The APP relied heavily on complaints, petitions and a letter dated 22 January 2017 submitted to it by branch leaders as to the behaviour and untoward conduct of the plaintiff, which resulted in the management committee resolving to recall the plaintiff, however the petition and the letter was not provided to this court. Further, the APP failed to call any of the branch leaders or local party members to testify and confirm its witnesses evidence. I agree with Mr Coetzee in so far as the witnesses rely on evidence or information provided to them by people who were not called as witnesses, amount to hearsay evidence and as such should and will not be considered by the court.

[93] Both witnesses for the defendants conceded that the letters of 22 September 2016 and 03 October 2016 were silent on the plaintiff's alleged misconduct or untoward behaviour.

[94] What happened in the current matter is what Angula DJP warned against when he said in the *Nghidimbwa*¹⁵ matter that power vested in political parties and organizations by s 13 of the Local Authorities Act, to withdraw a councillor must be rationally connected to the purpose for which the power was given. 'It must not be exercised for instance to punish or embarrass the councillors who may be perceived not to be toeing the political party's line. Furthermore the power should not be used for ulterior motives.'¹⁶

[95] The management committee of the Party operated in their exclusive 'bubble' and made decisions that directly affected the plaintiff without giving him proper notice of the intended action or the opportunity to be heard. This prompted the plaintiff to pursue the possible avenues open to him, i.e. an attempt to follow a grievance procedure and seeking relief from the Labour Commissioner's office, which took months to resolve. The defendants severely criticized the plaintiff for only issuing summons in 2020. However, the plaintiff who appears to be a man of straw had to rely on the Legal Aid Directorate for assistance to prosecute his claim. I am satisfied that the plaintiff mitigated his damages to the best of his abilities.

Is the actions of the first defendant sine qua non with the damages, if any, that the plaintiff suffered?

[96] It is an undisputed fact that if the plaintiff completed his terms as councillor with the Grootfontein Town Council he would have earned an amount of N\$ 202 790.43 (after tax) for the period February 2017 to November 2020.

[97] If the Party afforded the plaintiff notice of the intended disciplinary proceeding with the necessary details to enable him to answer to the allegations by the branch members or alternatively gave proper notice to the plaintiff of his intended withdrawal

¹⁵ Footnote 14 above.

¹⁶ Supra footnote 14 at para 70

as councillor and in that instance give him the opportunity to present his case against the intended withdrawal then the current proceedings might not have been instituted at all.

[98] There is no doubt in my mind that the actions of the first defendant is the direct cause for the loss of income, i.e the damages that the plaintiff suffered and as a result the plaintiff is entitled to the relief sought.

Order

1. The first defendant is ordered and directed to pay the plaintiff the combined amount of N\$ 202 790.43.
2. Interest on the aforesaid amount at a rate of 20% from February 2017 until date of payment.
3. Costs of suit.
4. The matter is finalized and removed from the roll.

PRINSLOO JS
JUDGE

APPEARANCES:

PLAINTIFF:

E COETZEE

Of Tjitemisa & Associate, Windhoek

FIRST AND SECOND DEFENDANT:

A BRENDELL

Of Shikongo Law Chambers Windhoek