

SOUTH AFRICA / JUDGMENT

# Nafcoc (Limpopo) and Others v Kgolane and Others (35826/2011) [2015] ZAGPPHC 1013 (31 July 2015)

**[2015] ZAGPPHC 1013****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

J Louw

**CASE / FILE NUMBER**

35826/2011

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**Source record****IN****THE HIGH COURT OF SOUTH AFRICA****[GAUTENG****DIVISION, PRETORIA]****CASE****NUMBER: 35826/2011****DATE:**

31 JULY 2015

In the matter

**between:**

NAFCOC

(LIMPOPO).....FIRST

APPLICANT

IZAAC

MASEKWAMENG.....SECOND

APPLICANT

SG

MOSENA.....THIRD

APPLICANT

HK

MAKGAE.....FOURTH

APPLICANT

MR

SHAI.....FIFTH

APPLICANT

A

MONAKEDI.....SIXTH

APPLICANT

R

LIVHOYI.....SEVENTH  
APPLICANT  
MPHO  
MOGALE.....EIGHTH  
APPLICANT  
And  
SELLO MAHLAGAUME  
KGOLANE.....FIRST  
RESPONDENT  
THEMBA  
MALULEKE.....SECOND  
RESPONDENT  
NOAH  
SERAGE.....THIRD  
RESPONDENT

## JUDGMENT

A.J. LOUW AJ

[1] This matter has a long history. The heading as set forth above also does not correctly set forth the parties to the application and counter-application. The First, Second and Third Respondents namely in the course of these proceedings brought a counter-application. In the counter-application the First, Second and Third Respondents joined as further Respondents in the counter-application, as First Respondent NAFCOC (Limpopo), izaac Masekwameng (as Second Respondent) NAFCOC (National) as Third Respondent and Lawrence Mavundla was Fourth Respondent.

[2] I intend to refer to the parties as follows:

NAFCOC (Limpopo) as First Applicant;

Izaac Masekwameng as Second Applicant;

SG Mosena as Third Applicant;

HK Makgae as Fourth Applicant;

MR Shai as Fifth Applicant;

A Monakedi as Sixth Applicant;

R Livhoyi as Seventh Applicant;

Mpho Mogale as Eighth Applicant.

Sello Mahlagaume Kgolane as First Respondent;

Themba Maluleke as Second Respondent;

Noah Serage as Third Respondent;

NAFCOC (National) as NAFCOC (National); and Lawrence Mavundla as Mavundla.

[3] The application started off as an urgent application for an interdict. Part A of the Notice of Motion that was dated June 2011 is an urgent application for an interdict. Part B, namely the main application, is what is relevant for purposes of my judgment. The amended relief sought in the main application is as follows:

*“1. A declarator declaring that the purported election of office bearers (including Respondents 1 - 3) on 21 April 2011 is ultra vires the constitution of Nafcoc (Limpopo) and as such null and void;*

2. The respondents are interdicted from:

- (a) holding themselves out as the duly elected executive committee members of Nafcoc (Limpopo);
- (b) interfering with the day to day activities of running of Nafcoc (Limpopo);
- (c) appropriating or attempting to appropriate Nafcoc's (Limpopo) assets and/or entering into contracts with third parties whilst holding themselves out as the duly authorised representatives of Nafcoc (Limpopo);
- (d) arranging meetings and chairing meetings whilst holding themselves out as the duly elected representative of Nafcoc (Limpopo).

3. Costs.

4. Further and/or alternative relief. ”

[4] The First, Second and Third Respondents brought a counter-application against the First Applicant, the Second Applicant, NAFCOC (National) and Mavundla in terms of a counter-application that was filed on the 18th July 2011. By notice of withdrawal dated the 28th January 2013, the First, Second and Third Respondents withdrew prayers 1.1 and 1.2 of the counter-claim. Prayers 1.1 and 1.2 intended to declare the 2008 NAFCOC Constitution the valid and binding constitution and to declare the 2011 Constitution void. Prayers 2, 3 and 4 of the counter-application were not withdrawn. In terms thereof relief that can be summarised as follows is sought:

4.1 That the NAFCOC (National) decision to declare a moratorium on elections be declared invalid and be set aside;

4.2 That the decision taken on 28 (sic) April 2011 to terminate the First, Second and Third Respondents' membership of NAFCOC (Limpopo) be found to have violated the First, Second and Third Respondents' rights to procedural fairness and an order setting aside the 28 (sic) April 2011 decision;

4.3 A conditional prayer, namely if it is found that the 21 April resolutions were not validly passed, an order directing that NAFCOC (Limpopo) convene a meeting of its council, that the financial affairs including full and proper reporting on all financial matters be placed on the meeting agenda; that a motion of no confidence be placed on the meeting agenda and that nominations of new office bearers of the Executive Committee, to the extent necessary, be tabled. The counter-application is opposed by the First to the Eighth Applicants as well as NAFCOC (National).

- [5] At the hearing of the application only the First to the Eighth Applicants appeared. During his argument Mr De Wet, who appeared on behalf of the Applicants, also made submissions on behalf of NAFCOC (National) who also instructed Mr De Wet to argue on its behalf. I grant the amendment of the date of 15 April 2011 to read as 21 April 2011 in prayer 1 of the main application applied for in terms of the written notice of amendment dated 9 October 2014.
- [6] In view of the fact that I have the First, Second and Third Respondents' version in front of me, I have to take cognisance of their defences and counter-application, despite their absence. Accordingly Mr De Wet presented his argument and I adjudicate the matter on the full set of papers.
- [7] I had the names of the First, Second and Third Respondents called out before argument by Mr De Wet started. The Respondents were not present.
- [8] Before setting forth the facts relevant herein I need to point out that there were a number of urgent or interlocutory applications that were adjudicated upon in the course of these proceedings. This included a joinder application by the Second to Eighth Applicants to be joined as Applicants in the main application. The necessity for the joinder application arose because of the fact that the First to the Third Respondents raised a defence of non-joinder. The plea of non-joinder was raised because of the fact that a purported meeting of the First Respondent was held on the 21st April 2011. At this purported meeting (the legality whereof I will deal with herein later) elected a new executive committee of the First Applicant and voted out the then executive committee of the First Applicant. The First, Second and Third Respondents are respectively the new president elected on the 21st April 2011, the vice-president elected on the 21st April 2011 and the treasurer elected on the 21st April 2011.
- [9] The Second Applicant deposed to the affidavit in the joinder application. At the time he was not aware of the identity or the physical whereabouts of the other members of the purported new executive committee and they are not mentioned by name in the joinder application to be joined as Respondents. Insofar as it is relevant at this time, the Applicants were of the view that the purported meeting of the 21st April 2011 was not properly constituted and any election that took place at the time was null and void or ultra vires the constitution of the First Applicant.

[10] The Second Applicant then states in paragraph 6 of the paginated papers of the joinder application the following:

*“I am advised that during the hearing of the urgent application it was informally agreed between the representatives of the parties that Respondents 1-3 will inform the other members of the “new executive” of the order sought whereupon the other members of the “new executive” will join/intervene in this application as Respondents or furnish an affidavit to the effect that they abide the Honourable Court’s decision. ”*

[11] The following order was made by Mr Acting Justice Van der Bijl in the joinder application on the 8th November 2011:

**‘IT IS ORDERED**

1. THAT they be joined in the Main Application hearing, as Applicants Two to Eight as appears from the heading herein.
2. THAT the Applicants two to Eight shall, within 3 days of this order, deliver their founding affidavit, which is Annexure “J” hereto, on the First, Second and Third Respondents’ attorneys of record.
3. THAT the Respondents One to Three are entitled to deliver and answer to the Founding Affidavit of Applicants Two to Eight within 15 days after service of this Order should the Respondents wish to do so.
4. THA T the costs of this Application be const (sic) in the cause. ”

[12] In an urgent application brought by the First Applicant Jordaan, J granted an order in the following terms against the First, Second and Third Respondents on the 19th July 2011:

BY AGREEMENT between the parties, the following order is made:

1. The Respondents are hereby interdicted from:
  - a) interfering in any way with the bank account held at Absa, Polokwane, in the Applicant’ name;
  - b) interfere with the rights and obligations created by the current lease agreement in respect of 103 Marshall Street, Polokwane, nor will they take steps to occupy these premises other than by order of Court;
  - c) From interfering with the daily activities of the person’s (sic) identified in paragraph 2.1 to 2.10 of Annexure “G” to the founding papers insofar as such persons’ activities purport to be in relation to the Applicant.

This order serves as an interim interdict pending the final adjudication of Part B of this application.

2. The parties shall ensure that a copy of this order is furnished to all members of their executive committees or alleged executive committees;
  3. Costs are reserved;
  4. The parties shall refer this application and the counter-application to the Deputy Judge President with a joint request for a special allocation and they shall adhere to the following time table:
    - a) the Applicant will supplement the answering affidavit on or before 29 July 2011, if so advised;
    - b) the Applicant will furnish a replying and/or answering affidavit on or before 19 August 2011;
    - c) the Respondent will have the opportunity to reply to the answering affidavit to the counterclaim on or before 2 September 2011;
    - d) the Applicant will file heads of argument on 16 September 2011 and Respondent will file heads of argument on or before 23 September 2011.”
- [13] On 19 June 2012 Fabricius, J granted the following order in favour of the First to Eighth Applicants against the First to the Third Respondents in the urgent court:

IT IS ORDERED

1. THA T the respondent (sic)are interdicted from organising, arranging, or holding or attending a meeting purported to be a meeting of the first applicant, which meeting has been scheduled to be an alleged “elective council meeting”, to be held on 22 June 2012 at Meropa Casino, or any other place.
  2. Costs in main application. ”
- [14] On 14 August 2013 Bertelsmann, J ordered in favour of the First to the Eighth Respondents against the First to the Third Respondents as follows:

*“IT IS ORDERED THAT:*

1. The Respondents are interdicted from organising, arranging, holding or attending a meeting purported to be a meeting of the Applicants’ Limpopo Council, to be held on 15 August 2013 at 11h00 at Waterland, Polokwane or any other place or time;
2. The order be forthwith e-mailed to the Respondents at [nafcoclimpopo. org\(a\).amail. com](mailto:nafcoclimpopo.org(a).amail.com);
3. The Respondents forthwith distribute this order to all their followers and publicising this Order and distributing same, in the same manner in which they had sent out notices convening the abovementioned meeting, as referred to in paragraph 1 above;
4. Costs, on attorney and client scale. ”

- [15] NAFCOC is the acronym for the National African Federated Chamber of Commerce and Industry. It is an organisation with legal personality and perpetual succession. It is a voluntary organisation not for profit and is an organisation representing small, medium and micro enterprises in
- general and historically disadvantaged people in particular within the Republic of South Africa.
- [16] Two Constitutions of NAFCOC are referred to. I refer to the provisions of the 2011 Constitution and point differences with the 2008 Constitution where necessary.
- [17] The financial year of NAFCOC ends on the last day of February of each year or such other date as the council of NAFCOC may determine.
- [18] The members of NAFCOC are the subscribed affiliated sectorial constituencies, organised sectorial based provincial structures and other organised business formations, bodies or associations admitted in accordance with its Constitution. Individual members admitted to membership shall be entered in the province and/or sector's register of members. Applicants for membership shall pay the subscription fee applicable at the time of applying for membership which shall be repayable if the application is unsuccessful. The subscription fees must be paid annually by each member, the subscription fees shall be paid directly into the national membership account or existing members on or before the expiry of the 12 month period from the date of joining or last renewal, upon which a grace period of no more than 60 days shall be provided for the renewal of membership. Failure to renew membership shall result in the automatic termination of membership without further notice. New members joining NAFCOC shall serve 12 months probation during which he/she shall not vote any member into office and/or be voted into any executive position at any level unless the NAFCOC National Executive Committee decides otherwise.
- [19] Membership terminates on receipt by NAFCOC of written notice from the member of his resignation, or if the council decides to terminate the membership of a member on grounds considered reasonable in their discretion and if it gives written notice to the member of such termination or if, in terms of clause 13.3 of the Constitution a person's membership can be suspended if the member is guilty of conduct which brought or is likely to bring NAFCOC or any of its affiliate members into disrepute provided that such member shall be furnished with particulars of such alleged conduct and and provided further that the council shall furnish its reasons for such termination or suspension. Such member shall be afforded the opportunity of stating his or her case at a sitting of the disciplinary committee constituted in terms of the provisions of the Constitution and/or Code of Conduct. Any member who ceases to be a member after failing to pay membership fees shall be regarded as a new member upon application for membership by such member.

- [20] In terms of clause 14.1 of the Constitution NAFCOC shall hold an annual general meeting not later than 9 months after the end of each financial year in addition to any other general meetings held during that year and shall designate the meeting as such in the notice convening the meeting. In terms of clause 14.2 not more than 15 months shall lapse between the date of one annual general meeting and the next.
- [21] In terms of clause 15 NAFCOC shall hold electoral conferences once every 5 years for its general membership. The electoral conference shall be held in the last quarter of the 5th calendar year on a date and venue to be determined by the executive committee.
- [22] In terms of clause 16 other general meetings shall be referred to simply as general meetings with no absolute decision making powers but convened solely for the purpose of sharing business information, ideas and strategies.
- [23] It is necessary to point out that the 2008 Constitution has identical wording regarding the times when annual general meetings must take place. The electoral conference in terms of the 2008 Constitution, however, must be held every 3 years. The limitation of the nature of general meetings other than an annual general meeting is not to be found in the 2008 Constitution.
- [24] The 2008 Constitution does not contain a clause similar to clause 22.10 of the 2011 Constitution. In terms of clause 22.10 of the 2011 Constitution the council and/or executive committee may terminate membership if it suspects that the particular member is plotting against and/or conniving with the opposition for the purpose of undermining and discrediting the authority and vision of the duly elected council and/or executive of NAFCOC.
- [25] The council of NAFCOC is NAFCOC's supreme decision making body on matters of policy and strategy. The council elects an executive committee constituting of at least 10 members of the Council. In terms of the 2011 Constitution members of the executive committee shall be elected once every 5 years at a council meeting to be held within 60 days from the date of expiry of the term of office of the executive committee. The provisions of the 2008 Constitution regarding the constitution of the council are not the same. The 2008 Constitution provides that the members of the executive committee shall be elected once every 4 years at a meeting to be held within 60 days from the date of expiry of the term of office of the executive committee.
- [26] By notice dated the 30th September 2014 the attorneys for the First to the Third Respondents withdrew as attorneys for the First to the Third Respondents.
- [27] It is necessary to bring the dispute between the Applicants and the Respondents to finalisation. The question that must first and foremost be resolved is whether all the necessary parties are before the court. Not

only does the First to the Third Respondent raise, in paragraph 10.2 of their answering affidavit, the non-joinder of parties with a direct and substantial interest in the dispute, but also and even in the absence of it being raised by any of the parties, a court is obliged to *mero motu* raise the question whether all necessary parties are joined in the proceedings.

[28] The First, Second and Third Respondents expressly and in detail in paragraphs 18 to 23 (paginated papers 106 to 107) of the counter-application raised the defence of non-joinder. Firstly it is raised with regard to the five Executive Committee (EXCO) members not joined at the inception of the matter (a defect that was rectified with the joinder of the Second to the Eighth Applicants) as well as the non-joinder of the four new EXCO members that were elected at the purported NAFCOC (Limpopo) meeting on the 21st April 2011. It is interesting to note that neither were the names of these persons mentioned nor were they indeed joined by the First to the Third Respondents nor did these persons attempt to intervene in these proceedings. The approach of the First to the Third Respondents in this regard certainly were not in any way assistive of speeding matters up to finalisation. It was also said in the said paragraphs 18 to 23 that NAFCOC (National) must be joined. This defect was rectified in that the First to the Third

Respondents themselves joined NAFCOC (National) as a Respondent in the counter-application.

[29] Mr De Wet does not dispute that the “new” EXCO members ought to be joined. His argument is that the First to the Third Respondents, whilst being represented, agreed that the unnamed additional members of the “new executive” will file affidavits to the effect that they will abide the decision of this Court. I referred to the undertakings in this regard in paragraph 11 of this judgment. It is also dealt with in the replying affidavit of the Applicants and their answering affidavit in the counter-application (paragraph 10 page 219).

[30] Undoubtedly the unnamed new EXCO members have a direct and substantial interest in the dispute as intended in judgments such as *Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (AD)*. From that judgment as well as later judgments there are two essential principles of law to be borne in mind:

- (1) That a judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given, and
- (2) That the court should not make an order that may prejudice the rights of parties not before it.

See: *Amalgamated*, *supra* at 651.

[31] Courts refrain from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or taking other adequate steps to ensure that its judgment will not

prejudicially affect the non-joined parties' interests. The third possibility is that the non-joined party consents to be bound by the judgment without it being represented in the matter. This invariably will have to be done in writing. The mere non-intervention of an interested party who has knowledge of the proceedings does not make the judgment binding on him as *res judicata*. The undertakings referred to in the papers of this matter are not direct undertakings from the unnamed "new" EXCO members.

See: *Amalgamated*, supra at 659 - 660.

[32] In the circumstances the matter must either be postponed so as to enable the joinder of the unnamed new EXCO members or the application must be dismissed or, thirdly consideration must be given to the granting of a rule nisi.

See: *Amalgamated*, supra at 651; *Mashike and Ross NNO and Another v Senwesbel Limited and Another* 2013 (3) All SA 20 (SCA) at par 22.

[33] In the circumstances of the matter Mr De Wet in the alternative submitted that a rule nisi be issued and indicated proposed terms of such a rule nisi.

[34] I am inclined to adhere to this request in view of the fact that dismissing the application and ordering the First to the Eighth Applicants to join all necessary parties in new proceedings, will just prolong an already drawn

out dispute. Secondly, such an approach will be of little value in the absence of knowledge on the part of the Applicants as to who the additional persons are that they ought to join. The First to the Third Respondents did not disclose the names of the other "new" EXCO members. In these circumstances and although it is clearly not, on the case law that I consulted, a consistent general approach to issue a rule nisi in circumstances where there is a difficulty of non-joinder, it appears to be the proper, just and correct approach in the circumstances of the matter. In addition the issue of a rule nisi in such circumstances has the sanction of the Supreme Court of Appeal as well as the sanction of courts of this Division.

See: *Ex parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T) at 478A - 479B;

*Ex parte Jacobson*: *In re Alex Jacobson Holdings* 1984 (2) SA 372 (WLD) at 377 - 378;

*Amalgamated*, supra at 651 and 652.

[35] A rule nisi will cater for the exigencies of this matter. Van Dijkhorst, J in *Ex parte Sengol Investments (Pty) Ltd* supra at 478E - G explained the nature of a rule nisi as follows:

*"A rule nisi is a judicial invitation to join issue and the failure to appear after proper notice thereof is regarded as a waiver of the right to be joined and a submission to the order of the Court."*

[36] The facts relevant for purposes of this matter are now discussed. On 17 March 2011 the First Applicant's EXCO met. The EXCO requested the Second Respondent to arrange a council meeting, he being the deputy secretary on the EXCO. The request to the Second Respondent was that he must arrange a council meeting, that is a meeting of the Limpopo Province

Council of the First Applicant. The Second Respondent must arrange the meeting in consultation with the Second Applicant as the chairperson of EXCO. The date and agenda of the council meeting would be finalised during discussions between the Second Respondent and the Second Applicant. There is some dispute between the Second Applicant and the Second Respondent as to the arrangements. The Second Respondent alleges that the Second Applicant refused to convene a meeting but then "in a moment of weakness" instructed the Second Respondent to convene a meeting for the 21st April 2011. The Second Applicant's version is that shortly after the EXCO meeting of the 17th March 2011 the Third Respondent contacted the Second Applicant telephonically and in a rude and aggressive tone demanded to know why a meeting had not been convened as yet. According to the Second Applicant the Third Respondent demanded that the Second Applicant sanctions a meeting that had been convened for the 21st March 2011. The Second Applicant explained to the Third Respondent that there was no urgency in the proposed meeting and that the proposed meeting would only be an information meeting. The Second

Applicant further explains that the

National Executive of NAFCOC (National) resolved earlier in 2011 that no committee meetings to elect or to dissolve structures shall be convened, without consent of the President of NAFCOC (National), in consultation with the National Council.

It is clear from the explanation of both the Second Applicant and the Second Respondent that there was dissatisfaction with the council, there are allegations of mismanagement of funds and that Mavundla dispatched a letter on the 18th March 2011 to all provincial and sector councils and EXCO members that explained that a rift had formed within NAFCOC and Mr Mavundla (as National President) announced a moratorium on the formation of any new NAFCOC structures and any elections. The moratorium was to remain in force for 24 months. The moratorium was also to be applied at both national level as well as provincial and sectoral level. The persons in the grouping of the First, Second and Third Respondents were dissatisfied with this situation. The said letter is Annexure "B" (paginated pages 60 to 61) to the founding affidavit. It indeed refers to questions of mismanagement. It indeed refers to a moratorium on formation of NAFCOC and affiliate structures and it expressly states that no structure shall be dissolved or realigned or be elected without an explicit written permission from the President.

[37] The Second Applicant explains that during the first week of April 2011 he became aware that the Second Respondent had nevertheless gave

notice by SMS of a proposed council meeting on the 21st April 2011. This was to take place at the Miami Lodge, Polokwane where the First Applicant's meetings are normally held. The Second Applicant says he met with the Second and Third Respondents at Phalaborwa on the 9th April 2011. At this meeting he told them that the proposed meeting of the 21st April 2011 was unauthorised and that neither the date, nor the agenda were discussed with or approved by the Second Applicant. The Second and Third Respondents refused to cancel the meeting scheduled for the 21st April 2011. The Second Applicant then cancelled the proposed meeting scheduled for

the 21st April 2011 by means of an SMS addressed to all members containing the following wording:

*“Nafcoc member: purported council meeting for 21/4/11 called by Mr Maluleke T is not constitutional and therefore cancelled forthwith until further notice. From Masekwameng NI Chairperson”.*

It is common cause that the meeting of the 21st April 2011 went ahead. It is the version of the First to the Third Respondents that at this meeting the council, at a validly convened meeting, determined that the then current EXCO should be dissolved in its entirety and that a new EXCO should be elected and they went forth and did so. He says in the answering affidavit that the newly elected EXCO conducted themselves thereafter as the new leadership of Limpopo and the Second Respondent says that the old guard (led by the Second Applicant) resisted, refusing to acknowledge that they have been voted out of office and they refused to relinquish power.

18] On 13 April 2011 the Second Applicant handed a letter to the Second Respondent (that is Annexure “C” to the founding affidavit at page 62) wherein a number of allegations are made and wherein the Second Respondent is directed to respond within 72 hours of receipt of the letter why the EXCO should not consider charging him with gross misconduct that borders on bringing the organisation into disrepute and to implement sections 13.2, 13.3 and 22.10 of the EXCO Constitution against the Second Respondent. Similar letters were directed tot the First and Third Respondents. The First to the Third Respondents were invited to attend an EXCO meeting on the 20th April 2011, but they failed to turn up. On the 28th April 2011 the First to the Third Respondents’ membership were terminated. The dispatch and receipt of the letters are not in dispute.

Subsequent to the meeting of the 21st April 2011 the First to the Third Respondents and presumably their newly elected EXCO members endeavoured to sign a lease agreement on behalf of the First Applicant, endeavoured to change the authorised signatories of the Applicants’ bank account, endeavoured to physically take over the premises of the First Applicant and arising out of all that the interdictory relief granted by Jordaan, J on 19 July 2011 followed. A further order by Fabricius, J on 19 June 2012 followed as referred to earlier and a further order of Bertelsmann, J followed in the next year, namely on the 14th August 2013. In summary there is a continuous dispute between the Applicants

on the one hand and the Respondents on the other hand as to the validity of the 21 April 2011 meeting and the validity of the resolutions of that meeting.

[39] It is the Applicants’ version that the meeting of the 21st April 2011 was not properly constituted and any decisions arising from that meeting are void and of no effect. The First to the Third Respondents contend that a meeting was validly constituted and the resolutions thereof are valid and binding. It is thus clear that there are directly opposite views as to the validity of the 21 April 2011 meeting. What is common cause with regard to the 21st April 2011 meeting is that it was constituted as an information meeting. (See paragraph 74 at page 123 of the Second Respondent’s opposing affidavit).

- [40] It is common cause that the First, Second and Third Respondents attempted to interfere with the day to day activities of the First Applicant, attempted to appropriate assets and to enter into contracts whilst holding themselves out as the duly authorised representatives of the First Applicant and lastly also that they arranged meetings and chaired meetings whilst holding themselves out as the duly elected representatives of the First Applicant and more particularly as duly elected executive committee members of the First Applicant.
- [41] It is common cause on the affidavits that the provincial structures of NAFCOC operate autonomously from the national structure. (Founding affidavit paragraph 4 at page 10 and answering affidavit paragraphs 91 to 93 at page 120). It is thus necessary to keep in mind that this is a dispute essentially between the First Applicant, being the Limpopo Provincial Structure and members of the First Applicant. For purposes thereof the Limpopo Provincial Structure adopts and uses the National Constitution of NAFCOC to direct the relationship between the First Applicant and its members. The dispute that is raised in the papers regarding the NAFCOC (National) Constitution of 2008 as opposed to the NAFCOC (National) Constitution of 2011 again essentially pertains to the dispute that exists in the Limpopo Province between inter alia the First to the Third Respondents and the First to the Eighth Applicants. For purposes of the dispute NAFCOC (National) the First to the Third Respondents indeed joined Mr Mavundla and NAFCOC (National). The First Respondent and NAFCOC (National) are both in terms of their Constitutions organisations with legal personality and perpetual succession, capable of suing and been sued in their own name and holding properties of all kinds apart from their members in terms of clause 2 of the Constitutions. Thus for purposes of the attack on the Constitution of NAFCOC (National) only NAFCOC (National) is the party to sue or to be sued. It is not necessary to join all its members.

See: De Waal v Van Per Horst 1918 TPD 277.

- [42] The import of the withdrawal and abandonment of prayers 1.1 and 1.2 of the counter-application, namely the declarations of invalidity of the March 2011 Constitution and for a declaration that the 2008 version of the Constitution is valid and binding, must be considered. That withdrawal came on the 28th January 2013. NAFCOC (National) filed an opposing affidavit to the counter-application on the 23rd September 2011 and thereafter also filed a supplementary opposing affidavit dated the 5th September 2012. In both these affidavits detailed evidence is presented with regard to the process of amendment of the Constitution of NAFCOC (National) and extensive evidence is presented therein of the fact that the First and Second Respondents (if not the Third Respondent) took part in these procedures that the Respondents now wish to attack. The only conclusion to be made from the fact that there is a withdrawal and abandonment of prayers 1.1 and 1.2 of the counter-application, is that the validity of the 2011 Constitution is accepted by the First, Second and Third Respondents and that the issue as to whether the 2011 Constitution or the 2008 Constitution applies, is not in issue since the 28th January 2013. I will accordingly adjudicate the matter with reference to the provisions of the 2011 Constitution in the dispute between

the First to the Third Respondents and NAFCOC (National).

[43] What must be added, is that there is no replying affidavit to the supplementary answering affidavit of NAFCOC (National) as deposed to by the Third Applicant. The telling further actions from the First, Second

and Third Respondents after filing of the supplementary answering affidavit by NAFCOC (National) is the notice of withdrawal of the relief claimed in prayers 1.1 and 1.2 of the counter-application. Thus the whole attack on NAFCOC (National) and in particular the attack on the 2011 version of the Constitution of NAFCOC (National) as a separate entity, falls away.

[44] In addition for the reasons mentioned in the supplementary opposing affidavit of NAFCOC (National), I find that prayer 2 of the counter-application, namely that NAFCOC (National) could not place a moratorium on its elections is not relief that the First, Second and Third Respondents have locus standi to apply for as they are not members of NAFCOC (National), they were only members of the First Respondent.

[45] The relief in prayer 3 of the counter-application, concerning the termination of the First, Second and Third Respondents' membership of the First Applicant, is a matter that I must consider and the relief sought in prayer 4 similarly are matters that I would need to consider.

[46] Having regard the evidence of NAFCOC (National) regarding the process of amendment of its Constitution resulting in the acceptance of the 2011 version of the NAFCOC (National) Constitution on 17 March 2011 it is clear that the version of the First to the Eighth Applicants that the applicable Constitution as regards the First Applicant and its constituent members, must be incorrect. The First to the Eighth Applicants make the mistake to assume that by replacing of the NAFCOC (National) Constitution on 17 March 2011, ipso facto the Constitution of the First Applicant also changed to the 2011 Constitution. That is not so. The First Applicant operates as an independent and autonomous body. A constitutional amendment requires a long process in terms of clause 32 of the 2011 Constitution and a similar process of amendment for repeal of its Constitution is prescribed in clause 33 of the 2008 Constitution. It is in any event also nowhere in the evidence on behalf of the First to the Eighth Applicants even mentioned that after adoption of the 2011 Constitution by NAFCOC (National) that the 2008 Constitution was replaced through the process prescribed in clause 33 of the 2008 Constitution. I therefore find that the applicable Constitution of the First Respondent is not the 2011 Constitution but indeed the 2008 Constitution as annexed to the answering affidavit and counter-application of the First to the Third Respondents.

[47] In the opposing affidavit the First, Second and Third Respondents raised as number of points in limine, I already dealt with the non-joinder point and will return to that later.

[48] The point of urgency is not relevant any longer.

[49] The third point raised is what is termed in Hoexster, Administrative Law in South Africa, Second Edition at 518 - 519 that the Applicants proceed by way of indirect review of the resolutions of the meeting of 21 April

2011. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at par 32 it is also described as “defensive” or “collateral” challenge to the validity of an administrative act. Oudekraal at par 35 says a collateral challenge to the validity of an administrative act will be available “... only “if the right remedy is sought by the right person in the right proceedings”. Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law.” When the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence because the validity of the administrative act constitutes the essential

pre-requisite for the legal force of the action that follows and accordingly the subject may not then be precluded from challenging

its validity. If a court is on the other hand asked to set aside an invalid administrative act in procedures for judicial review it has a discretion whether to grant or withhold the remedy. This discretion is an essential and pivotal role in the Administrative Law for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide.

See: Oudekraal at par 36.

No hard and fast rules can in this regard be laid down.

See: *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parrow Factory)* 1991 (2) SA 527 (CPD); and *National Industrial Council v Photocircuit* 1993 (2) SA 245 (CPD) at 252J - 254B.

[50] This is undoubtedly a case where there is no reason to refuse Applicants relief on grounds of the fact that their attack on the resolutions of 21 April 2011 is a collateral attack.

[51] The alleged lack of authority point in limine is not a valid point in view of the fact that the proceedings is indeed also supported through the Secretary and executive committee of the First Applicant.

(See: paginated papers 228 - 230).

[52] In summary, I found that the 2011 Constitution applies with regard to NAFCO (National) and that the 2008 Constitution applies insofar as the First Applicant and the further Applicants the First to the Third Respondents are concerned.

[53] On the papers it is common cause that the meeting of 21 April 2011 was intended to be an information meeting. That is the version of the Applicants and that is also the version of the First, Second and Third Respondents. (See paragraph 74 at page 123 of the paginated papers). Nowhere was any notice given thereof that an election of office bearers

would take place on the 21st April 2011. In terms of clause 18.2 of the 2008 Constitution notice of the place, day and hour of the meeting as well as in the case of special business, the general nature of such business must be indicated. Purely on grounds hereof the resolutions taken and in particular the replacement of office bearers is invalid and of no force or effect as there was no compliance with this provision of the 2008 Constitution.

See: *Visser v Minister of Labour and Another* 1954 (3) SA 975 (WLD) at 983C - 984F.

The wholesale replacement of office bearers must take place in terms of the provisions for an electoral conference that are described in inter alia clause 15 of the 2008 Constitution.

[54] The purported termination of the membership of the First, Second and Third Respondents in terms of the documents contained in Annexures "D1" to "D11" (pages 62 to 73 of the paginated papers) simply does not comply with the provisions of the applicable Constitution, namely the 2008 Constitution. The 2008 Constitution does not contain the clause 22.10 upon which the Applicants wish to rely and the provisions of clauses 13.3 and 13.4 of the 2008 Constitution were not complied with by the First Applicant. Accordingly the termination of membership of the First, Second and Third Respondents cannot stand.

[55] The Applicants as well as NAFCOC (National) attempt to rely on the provisions that prescribe when annual subscriptions must be paid. However, in terms of the 2008 Constitution the non-payment of subscriptions in terms of clause 12.7 of the 2008 Constitution will only apply after notice to rectify in terms of clause 13.2 is given. Accordingly I cannot find in favour of the Applicants and NAFCOC (National) that the membership of the First, Second and Third Respondents was terminated as a result of non-payment of their annual subscriptions. In view of my findings it is not necessary to refer this specific question to oral evidence as was in the alternative submitted in the Heads of Argument on behalf of the First to the Eighth Applicants.

[56] In the circumstances prayer 1 of the main application, subject to the question of joinder, must be granted.

[57] The common cause facts show that prayers 2(b), (c) and (d) must be granted, again subject to the joinder question. The Applicants are not entitled to prayer 2(a) as the First, Second and Third Respondents were indeed duly elected executive committee members and the process in terms of which their membership of the First Applicant was purportedly terminated is void accordingly that prayer cannot be granted. A duly elected committee continues to hold office until it retires or is dismissed where no steps are taken to elect a new committee, even though its term of office under the Constitution of the organisation has expired.

See: Joubert, The Law of South Africa, First re-issue volume 17 par 329 at p251.

- [58] As regards the counter-application prayer 1 was abandoned and prayer 2 is relief that the First, Second and Third Respondents cannot apply for as discussed above.
- [59] As regards prayer 3 of the counter-application relief must be granted in view of my findings that neither the provisions of the correct Constitution nor any proper procedure was followed with regard to the termination of the membership of the First, Second and Third Respondents.
- [60] The Applicants as well as NAFCOC (National) rely on clause 28.2, 28.2.1, 28.2.4 and 28.2.6 of the 2011 Constitution for the so-called moratorium on elections. The wording of especially clause 28.2.6 that refers to the fact that the council may perform “any other related function for the benefit or interest of NAFCOC” simply is not open for the wide interpretation that it enables its council to place a moratorium on elections. It needs to be remembered that the Constitutions of NAFCOC (National) as well as of the First Applicant constitute the agreement between the members thereof. They are all this bound by the terms thereof and they must comply with its provisions. The moratorium is invalid.

See: Engineering Workers SA v Abrahams and Others 1982 (2) SA SECLD at 333D-F.

- [61] I am of the view that the First, Second and Third Respondents are not entitled to the wide relief applied for in prayer 4 of the counter-application. It is 2015 and elections of office bearers and so on might have taken place in the intervening time before the hearing of the matter and before this judgment. Accordingly the order will be limited to an instruction that the executive committee and council of the First Applicant must convene a general meeting where the following must be agenda points:

1. Election of office bearers;
2. The reporting on the financial affairs of the First Applicant;
3. Compliance with the electoral provisions as provided for in the applicable Constitution.

I make no finding as to whether the 2008 Constitution is still applicable as, in the meantime, through proper procedure the 2011 Constitution might have been adopted.

- [62] In view of the absence of the “new” fellow EXCO members of the First, Second and Third Respondents, per force a rule nisi must be issued.

- [63] I considered the question of the costs. In view of the findings I have made and the order I propose it is clear that both the Applicants and the

Respondents have had a measure of success in these proceedings. In addition they are or were all members of the First Respondent who all appeared to genuinely have the best interests of the First Respondent at heart. In the circumstances the fairest order is that no costs order is made.

- [64] Mr De Wet informed me the local newspaper is the Polowane Observer.

[65] I accordingly make the following order:

1. A rule nisi with return date 3 November 2015 is issued, calling upon all interested persons and in particular the persons purportedly elected as executive committee members of the First Respondent on the 21st April 2011 to show cause why an order should not be made in the following terms:
  - 1.1 It is declared that the purported election of office bearers (including First, Second and Third Respondents) on 21 April 2011 is ultra vires the then applicable Constitution of the First Applicant, being the 2008 Constitution, and as such is null and void;
  - 1.2 The First, Second and Third Respondents are interdicted from:
    - 1.2.1 Interfering with the day to day activities or running of the First Applicant;
    - 1.2.2 Appropriating or attempting to appropriate the First Applicant's assets and/or entering into contracts with third parties whilst holding themselves out as the duly authorised representatives of the First Applicant as purportedly elected on the 21st April 2011;
    - 1.2.3 Arranging meetings and chairing meetings whilst holding themselves out as the duly elected representatives of the First RespsPftfent as purportedly elected on the 21st April 2011.
  - 1.3 The moratorium on elections as set forth in the NAFCOC (National) notification dated 18 March 2011 is declared invalid.
  - 1.4 The purported termination of membership of the First, Second and Third Respondents taken on 28 April 2011 by the First Respondent is declared void and of no effect.
  - 1.5 The First Respondent is ordered to convene a meeting of its Council in accordance with the provisions of its Constitution as applicable as at date of this order and the following issues must be placed on the agenda (without thereby limiting the enrolment of other issues):
    - 1.5.1 Reporting on the financial affairs of the First Applicant;
    - 1.5.2 The election of office bearers at a future date in accordance with the provisions of the applicable Constitution of the First Applicant;
  - 1.6 The meeting of the Council of the First Respondent must be convened within 3 months from the date of the final order;
  - 1.7 No costs order is made.
2. The rule nisi must be served on the First, Second and Third Respondents' main place of business situated at 107 Marshall Street, Polokwane by Sheriff;
2. The rule nisi must be published once in English in the Polokwane Observer;

3. The order must in addition be served on the attorneys who represented the First, Second and Third Respondents in these proceeding;
4. The contents of paragraph 1.2 (with its subparagraphs) operate as an interim interdict pending the return day.

SIGNED AT PRETORIA ON THIS DAY 31 OF JULY 2015.

J LOUW AJ

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