

IN THE CONSTITUTIONAL COURT

OF

SOUTH AFRICA

Case No: 1012 / 2022

In the matter between:

UMBUKUDI, MAPULA

Applicant

and

SOUTH AFRICAN FEDERATION OF SWIMMING

Respondent

and

**INSTITUTE FOR ACCOUNTABILITY IN
SOUTH AFRICAN SPORT**

Amicus Curiae

**FILING SHEET:
RESPONDENTS #S34 HEADS OF ARGUMENT**

BE PLEASED TO TAKE NOTICE THAT the Respondent's heads of argument in response to the Applicants review application is presented for service and filing by:-

KMNG ATTORNEYS

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**TO: THE CLERK OF
THE CONSTITUTIONAL COURT
JOHANNESBURG**

AND TO: APPLICANTS ATTORNEY

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#S34: Heads of Argument

Points in *limine*

1. Requirements of an interdict

- 1.1. The applicant has not satisfied the requirements of an interdict in that she has not proven that her legal right, such as the right to a good name and dignity has been infringed. In this the applicant is the perpetrator.
- 1.2. That she will suffer irreparable harm if the interdict is not granted against the respondent.
- 1.3. The applicant has not proven that no other remedy is available to her within the organisation. We reiterate that the applicant has remedies within the scope provided for by the Constitution of the Federation. Therefore, the urgent application for an interdict must be dismissed.

2. Abuse of court process (Self-created urgency)

- 2.1. The applicant having all rights to resolve this matter by way of arbitration as bestowed upon her by rule 10 of SAFS read together with sec 7(2) of the Promotion of Administrative Justice Act.
- 2.2. Driven by her anxiety of a self-created urgency to interdict the proceedings, the applicant chose not to take this route but rather inundate this court with matters that could have easily been resolved through alternative dispute resolution methods. The court in Mineral

Sands¹ stated that “abuse of process can as stated appear in different forms... and the most arguably common, type of abuse of process is the use of rules of court, for example to delay a case or to deliberately misemploy a claim for urgency...” this is what we see in this case.

- 2.3. The applicant has failed to show this court that her right to freedom of speech will be vindicated by granting the interdict and therefore it should not be granted.

3. Due process of the law

- 3.1. While we agree that sec 34 give the applicant right to seek recourse through the courts but we reiterate that this does not give the right to abuse court proceedings. Judicial review is not there for the taking as seen on sec 7(2) PAJA. In EFF V Gordon the court held that not all litigants who knock on the Courts doors will be given the opportunity to argue their case orally or in writing.
- 3.2. The Act is clear that prior to approaching the courts, all internal remedies must have been complied with. A person can only seek judicial review as last resort.
- 3.3. The court in the Mpaphuli case (Kroon AJ) quoting *Telcordia* in the Supreme Court of Appeal held that –

¹ Mineral Sands Resources PTY LTD & Others v Redelle & Others 2022 (ZACC37)

- i. private arbitrations would, as a starting point, fall within the ambit of s 34 of the Constitution;
- ii. the rights contained in the section 'may be waived unless the waiver is contrary to some other constitutional principle or otherwise *contra bonos mores*';
- iii. by agreeing to arbitration, parties waive their rights *pro tanto*; they usually waive the right to a public hearing;
- iv. by agreeing to arbitration, the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else;
- v. by agreeing to arbitration, the parties limit interference by the courts to the grounds of procedural irregularities set out in s 33(1) of the Act, and,
- vi. by necessary implication, they waive the right to rely on any further ground of review, 'common-law' or otherwise.²

Grounds for judicial review

If the court finds that this matter is susceptible to public law review, we submit that the grounds for judicial review have not been met on the following grounds:

The decision was taken by the federation which had the power and authority. The Applicant is put to prove bias or reasonable suspicion of bias on the part of the Respondent. The Respondent followed all proper procedure as per rule 10 of the federation and clause 29 of SASCO which rendered the procedure fair and legal. The decision was taken in

² Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) par. 65

good faith as the Applicant was called upon to answer the charges and was invited to secure legal representation.

MERITS

4. Rule 10 as an internal remedy.

- 4.1. According to sec 13 of the National Sports and Recreational Act; every sport and recreational body will in accordance with its internal procedure and remedies provided for in its constitution resolve any dispute arising among its members or with its governing body.
- 4.2. The Constitution of SASCO – a regulatory body under which SAFS falls; contains sec 29 which when read together with rule 10 of SAFS schedule 2 aligns with sec 13 of the NSRA, constitutes an internal remedy for the purposes of sec 7(2) of PAJA.

5. Interest of justice

- 5.1. Proceedings need to be fair, presided over by an impartial adjudicator amongst other things. In this instance, to serve interest of justice a provision has been made through the Constitution of the federation to ensure that all parties rights are not waived or compromised.
- 5.2. Sec 34 does not limit how a matter needs to be resolved to achieve a resolution that is agreeable for parties in dispute. When assessing the interest of justice, the focus must be on procedural fairness, lawfulness, rule of law and impartiality.

6. Scope of arbitrators

- 6.1. An arbitrator is well within their scope to preside over the dispute. Arbitrators are called upon to find facts, apply the law and grant relief to the parties in dispute. Arbitration is a private, non-national system of dispute resolution by an impartial tribunal. The applicant has every right to be heard by an impartial arbitrator. The fairness in this matter is that there is judicial oversight over a decision of the arbitrator. For the award to be enforced, it must be verified by the courts.
- 6.2. South African judiciary system is awake to the principle of party autonomy; meaning that courts are reluctant to interfere in private matters where parties consented to alternative dispute resolution mechanisms for parties to decide on matters in dispute through the application of relevant laws. Parties to an agreement are free to select an appropriate procedure for dispute resolution. In this case the Federation has provided for same as seen on rule 10.

7. Constitutional issues

- 7.1. In *S v Mhlungu*; the court held that it would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. This view was supported by Akerman J in *The National Coalition for Gay and Lesbian Equality* case.
- 7.2. The scope of an arbitrator is determined by the arbitration agreement between the parties. The fact that Constitutional issues have been raised, this does not invalidate the arbitration agreement,

nor does it allow for the applicant to not follow due process of the law.

8. Limitation of rights analysis

- 8.1. While we respect the applicants right to freedom of expression as contained in sec 16 of the Constitution; it is trite that no right in the Bill of rights is absolute but limited by nature in terms of sec 36³ This point was confirmed by the court in *Manuel v EFF*.
- 8.2. We submit that the limitation of the Applicants right is reasonable and justifiable. The limitation analysis applies to this matter.
- 8.3. The nature of the right is that it should not infringe on the right of others, in this case the applicant infringed the right of other swimmers to associate with the federation and the right of the federation to a good name. The importance of the purpose of the limitation is that there is an abuse of discretion by the applicant which infringes the Respondents dignity where her right to freedom of speech is concerned. The nature of limitation; is that the Federation seeks to protect its members and a less restrictive measure was applied to address the incorrectness of her actions by applying the rules of natural justice.
- 8.4. We therefore submit that the application for the reviewing and setting aside of the decision by the SAFS must be dismissed as well as the order declaring rule 8 unconstitutional.

³ Constitution of the Republic of South Africa, section 7 (3)

9. Rights of the Federation

- 9.1. Applicant`s actions triggered rule 8.1 and 8.2 respectively as contained in schedule 4 of the SAFS conduct rules in the respondents Constitution. The applicant intentionally contravened the rules and has conducted herself in a manner that is disruptive to the Federation`s order of business, forcing the Federation to take disciplinary measures.
- 9.2. The Federation is within its right to act against the applicant to protect the interests of its members. The decision brought under review before this court was taken under an empowering provision, rule 8 of Chapter 4 SAFS, read together with rule 10 of SAFS and sec 33 of the Constitution.
- 9.3. In the Ndoro v SAFA case the court highlighted that “the is no other way to conduct professional football save in compliance with this regulatory scheme. FIFA and its progeny are singular source of professional football regulation; compliance is not optional, and the rules are backed by cohesive sanctions.” Similarly, the respondent has its own internal rules and processes that must be adhered to.

10. Access to courts

- 10.1 The Constitution is the Supreme law of the land and any law or conduct inconsistent with it is invalid and the obligation imposed by it must be fulfilled.

10.2 The constitution makes provision under section 34 for disputes to be resolved in a fair public hearing before a court of law **OR** where appropriate another independent and impartial tribunal or forum.

Section 34 is twofold; the first part refers to public hearings in a court of law and the latter part to independent and impartial tribunals and forums. It however, is silent on whether or not the tribunals and forums should be private or public.

10.3 We submit that s34 is more of a guiding provision than it is a peremptory one as far as a dispute resolution forum is concerned. This section leaves it at the discretion of disputants to choose a dispute resolution mechanism.

10.4 We therefore submit that the right to access to court enshrined in section 34 applies to both a court of law and Arbitrations.

Appropriateness

10.5 Considering the arbitration agreement and the principle of ***Pacta Sunt Servanda***, we submit that Arbitration is the appropriate forum for the resolution of the present dispute.

10.6 The dictionary meaning of appropriate is “*suitable or proper in the circumstances.*”

10.7 In the present circumstance the Applicant breached section 7 (2) of PAJA by not exhausting internal remedies.

10.8 The section states that “no court or tribunal shall review an administrative action in terms of the Act unless any internal remedy provide for in any other law has been first exhausted.

10.9 It is common cause that the Applicant did not exhaust any of the Respondents internal remedies but rushed to obtain an urgent interdict.

10.10 It is compulsory for the Applicant to exhaust the relevant internal remedies before approaching a court for review unless exempted from doing so by way of a successful application under s7(2) (c) of PAJA.

10.11 The Applicant has failed to demonstrate that exceptional circumstances exist that warrant her nonadherence with s7(2) (a) or that it is in the interest of justice for the exemption to be granted.

10.12 Furthermore, through their act of abandoning the disciplinary process Applicant failed to pursue a non-constitutional remedy which if successful might have rendered it unnecessary to consider the constitutional validity of Rule 8 of chapter 4 of SAFS domestic rules.

10.13 In *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2002 (2) SA 1 CC at para 21; the court reiterated the principle that

“where it is possible to decide any case, civil or criminal without reaching a constitutional issue, that is the course which should be followed”.

10.14 Though nothing stops the Applicant from reverting to traditional court procedures; parties to this dispute consented to submit their dispute to private arbitration which is an independent forum and not a court of law. The agreement is legal and binding on all parties and we submit that the principle of “*pacta sunt servanda*” which states that “***obligations created in terms of an agreement must be kept***” applies and must be honoured.

10.15 The Applicant can't consent to arbitration proceedings and later decide to abandoned them with no good cause. It is therefore appropriate for this court to remit the matter back to arbitration for the parties to exercise due process of the law.

Fair Public Hearing Requirement

10.16 Though private in its nature Arbitration is a voluntary and fair process presided over by an Impartial arbitrator. An Arbitrators role is that of an impartial empire who's sole job is to administer justice efficiently, expediently and effectively; all of which is in the public interest.

10.17 Much like judges, arbitrators do not make the law but uphold it through their decisions. they also make a decision by application of law and arrive at a final decision, as courts do. The right to access to court is therefore not limited to statutorily adjudicatory institutions.

10.18 The court in Mphaphuli quoting the decision of the court in Chelsea v West held that: *“there is a great correspondence between arbitrations and judicial proceedings”*.

10.19 Therefore s34 does not prevent the present matter from being decided by an Arbitrator also the public hearing requirement falls within the purview of a court of law and not an independent and impartial tribunal.

11. Prayers

Wherefore we pray for the following order;

11.1.1. For the court remit the matter back to arbitration for consideration

11.1.2. To dismiss the review application of rule 8 in its entirety

11.1.3. To dismiss the declaration of unconstitutionality of rule 8.

11.1.4. For the matter to be dismissed with costs plus cost of two counsel.

11.1.5. Further and alternative relief.

DATED AT JOHANNESBURG ON THIS 30th DAY OF NOVEMBER 2022

KMNG ATTORNEYS

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