

SOUTH AFRICA / JUDGMENT

Louisvale Pirates v South African Football Association (40614/2011) [2012] ZAGPJHC 78 (4 May 2012) [2012] ZAGPJHC 78

COURT

South Gauteng High Court, Johannesburg

BEFORE

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CASE / FILE NUMBER

40614/2011

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 40614/2011

DATE:04/05/2012

In the matter between:

LOUISVALE PIRATES Applicant and SOUTH AFRICAN FOOTBALL ASSOCIATION Respondent

J U D G M E N T

MBHA J:

INTRODUCTION

- [1] The applicant seeks an order declaring a ruling by the respondent's disciplinary committee dated 23 July 2011 null and void, that the applicant be reinstated to the South African Football Association (SAFA) Vodacom Promotional League, Northern Cape Province ("the promotional league"), and that the respondent be interdicted from commencing with the 2011/2012 season. During argument Mr Young, who appeared on behalf of the applicant, informed me that the applicant was not pursuing the order to interdict the respondent from commencing with the promotional league. This is understandable considering that the Vodacom Promotional League had already started to run from the beginning of August 2011.

- [2] The main thrust of the applicant's complaint is that the respondent's disciplinary committee constituted on 23 July 2011 did not have the legal competence and jurisdiction in terms of inter alia, the constitution of SAFA to adjudicate a dispute in terms of which the applicant's affiliation to the promotional league was terminated.
- [3] This application is opposed. The respondent has raised a point in limine namely, that the applicant has not exhausted all internal remedies as it has failed to appeal in terms of the rules of SAFA.

FACTUAL MATRIX AND THE BACKGROUND FACTS TO THE DISPUTE

- [4] The applicant is a soccer team and member of the Khara Hais Local Football Association Northern Cape Province, which in turn is affiliated to SAFA. The applicant was allocated to play in a number of soccer matches on 19 and 20 February 2011, 30 April 2011 and 1 May 2011. The applicant did not participate in any of these.
- [5] On 13 July 2011 the respondent issued a letter summoning the applicant to appear before the SAFA national disciplinary committee. The applicant was charged with four acts of misconduct for failing to honour soccer matches on the dates mentioned in para [4] above. In terms of Rule 28.6 of the SAFA Competition Uniform Rules (the Competition Rules) a team that fails to participate in a soccer match must furnish a written explanation within 48 hours to the respondent. No correspondence to this effect was placed before the Court as proof that the applicant duly furnished a written explanation to the respondent within 48 hours as required by the aforesaid rule. The indictment also records that in the event of the applicant being found guilty, the applicant has a right of appeal in terms of the rules set out in the SAFA Constitution.
- [6] During the disciplinary hearing the applicant was represented by its managing director, the deponent to the founding affidavit. The applicant pleaded not guilty to three of the charges and admitted guilt on the second charge, for failing to honour the soccer match on 20 February

2011. The basis of the applicant's defence in respect of the three charges it pleaded not guilty, is:

6.1 On 19 and 20 February 2011 while travelling to the venue for the scheduled soccer matches, the motor vehicle in which the entire team was travelling broke down when they were about 120 kilometres from the venue and they could not secure alternative transport to take them to the soccer match.

6.2 In respect of the fourth count, namely failing to honour a soccer match on 1 May 2011, the applicant's representative testified that on the day in question he was attending a funeral in Namibia when he found out that the other members of the club had not made the necessary travelling arrangements for the team. He said when he learnt of what was happening, he urgently came back to take the team to the venue which resulted in them arriving late only to find that the match had already been declared a walkover.

6.3 A designated SAFA official awarded three points and two goals in favour of the home team against the applicant in each of the four matches in terms of the provisions of Rule 28.4 of the Competitions Rules.

- [7] During the hearing the respondent, as the pro forma complainant, produced evidence in the form of match reports completed by match officials which confirmed that the applicant failed to attend or to honour the four matches.
- [8] The applicant was found guilty as charged and its participation and affiliation with the Vodacom Promotional League was terminated with immediate effect. The disciplinary committee also recommended that the applicant's participation in the league, be downgraded to lower than the Vodacom Promotional League, for the 2011/2012 soccer season.

THE APPLICANT'S CASE

- [9] The applicant contends that the designated SAFA official, by awarding three points and two goals in favour of the home team

against the applicant in respect of each of the four matches, acted ultra vires and in violation of Rule 28.4. The rule provides that for the first offence in a season the powers of the disciplinary committee

are delegated to a designated SAFA official, to effect a sanction of awarding the match and two goals to the opposing team. The applicant further contends that the designated SAFA official, by awarding all four matches to the opposing teams, effectively usurped the duties of the disciplinary committee in respect of three matches of the four matches, contrary to Rule 28.4 stating that a designated SAFA official has the powers of a disciplinary committee only in respect of the first offence in a season.

- [10] The applicant's further complaint is that it was charged after the closing of the 2010/2011 soccer season, which ended on 1 May 2011, more than two months after the alleged offences were committed, and before a national disciplinary committee and not a provincial disciplinary committee as contemplated in Regulation 7.3 of the Vodacom League Regulations.

THE POINT IN LIMINE

- [11] The respondent submits that the applicant cannot succeed on the basis that the applicant has failed to exhaust all internal remedies, consisting of an appeal in terms of the rules of SAFA. On the other hand, the applicant maintains that the respondent's

national disciplinary committee did not have jurisdiction to impose the sanction it did on the applicant; that in terms of the common law it is not necessary for a party to first exhaust all internal remedies before approaching the court, unless this is expressly provided for in a statute. The applicant accordingly submits that in the absence of such statutory requirement and having regard to the circumstances of this case, the applicant was entitled to approach the court in

pursuance of the relief that it seeks. The applicant further submitted that as the respondent is a voluntary association exercising private powers, this matter is not subject to the provisions of the Promotion of the Administrative Justice Act 3 of 2000 (“PAJA”).

THE RELATIONSHIP BETWEEN SAFA AND ITS MEMBERS

- [12] As I have pointed out above, the applicant is a fully fledged member of SAFA participating within SAFA’s Vodacom League. Its affiliation and subordination is provided for in article 17.4 of the constitution of SAFA, which provides that “Members shall be subordinate to SAFA and must comply with this constitution, the Regulations and any directive issued by SAFA”
- [13] Clause 3 of the competitions rules provides that SAFA competitions shall be played in streams, like the Vodacom League, under technical rules determined by SAFA. It is further stipulated in clause 4, under the heading “Relegation and Promotion”, that on entering any competition administered by SAFA, teams undertake to observe its rules and regulations. Further, importantly, clause 4.1.4.2 expressly provides that teams accept that all administrative and disciplinary matters connected with any competition administered by SAFA, shall be dealt with in accordance with the rules and regulations of SAFA.
- [14] Clause 21 provides that the appointed SAFA disciplinary committee shall act in conformity with and apply and follow the procedures laid down in the rules and regulations, as well as the SAFA constitution. In terms of clause 25 any team aggrieved by any decision made or penalties imposed by the disciplinary committee, has the right to appeal to a relevant Appeals Committee, constituted by SAFA in terms of its constitution and rules. Further relief, also in terms of the SAFA constitution rules and regulations, may be obtained by reference to arbitration.
- [15] Article 70.5 of the constitution of SAFA provides that subject to the Constitution of the Republic, and save in circumstances where there is a need for urgent relief of a sort which cannot be obtained through the dispute resolution procedure contemplated by this article, no body or individual falling under the jurisdiction of SAFA shall approach a court of law to decide on a dispute it has with a body or individual affiliated to SAFA. The constitution further provides that SAFA shall have jurisdiction on disputes between its members. Furthermore, members will not take any dispute to ordinary courts unless specifically provided for in the constitution and regulations.
- [16] Clearly, the applicant, as a fully fledged member of SAFA, is bound by and subject to SAFA’s constitution, rules and regulations. There is thus a contractual relationship between SAFA and its constituent members. In *Constantinides v Jockey Club of SA* 1954 (3) SA 35 (C) at 44B, the court recognized that the constitution of a voluntary association is a contract, resulting in a contractual relationship between the association and its members. This means that save in certain exceptional circumstances, like those mentioned in para

[15] above, the applicant is bound to exhaust all internal remedies provided to it in terms of the constitution, rules and regulations of SAFA, before it can approach this court for the relief it seeks. See *Jockey Club of South Africa v Feldman* 1942 AD 340 at 360, and *Turner v Jockey Club of South Africa* 1974 (3) SA 633 AD at 657.

[17] It is trite law however, that the existence of internal remedies in the form of for example internal disciplinary procedures and arbitrations, do not automatically oust the court's jurisdiction. It was summed up by Tindall JA in *Feldman* (supra) at 351, as follows:

"The exclusion of the jurisdiction of the courts of law on the merits is not contrary to public policy, and our courts have recognized that the decisions of such tribunals on the merits are final; but if the tribunal has disregard its own rules or the fundamental principle of fairness, the court can interfere."

(See also *Crisp v SA Council of the Amalgamated Engineering Union* 1930 AD 255 at 237-8.)

[18] The rule is therefore well-established that in the event of a domestic authority failing to comply with its own rules by, for example, acting ultra vires its powers or the rules of natural justice, the court has jurisdiction to determine the appeal. (See SALJ Vol. 96, 1979 p 552-559.)

[19] The applicant's main and sole basis for approaching this court directly and not appealing to SAFA's appeal board is that the respondent, in violation of regulation 7.3 of Vodacom League Regulations, summoned the applicant to appear before the national disciplinary committee and not a provincial disciplinary committee, as prescribed by the regulation. In my view, this submission is fundamentally flawed.

19.1 Article 66 of the SAFA constitution expressly provides that its judicial bodies are the national disciplinary committee and the national appeal board. Furthermore Rule 6 of the Vodacom League Regulation stipulates that all disciplinary matters shall be dealt with by the national disciplinary committee. There is no provision which establishes a provincial disciplinary committee, as the applicant would have it.

19.2 Rule 7.3 of the Vodacom League Regulations merely provides that a person designated to do so, shall co-ordinate all disciplinary

matters and ensure that these are finalised within twenty one days. The applicant therefore has misread the provisions of this

regulation.

[20] There is no justifiable basis for the applicant to approach this court, instead of exhausting the internal remedies available to it. The applicant has also failed to demonstrate any reason why I should exercise my discretion in favour of entertaining the dispute as opposed to SAFA's Appeal Board. For these reasons, I find that the respondent's point in limine must be upheld.

DOES PAJA APPLY IN THIS CASE?

[21] It has, in my view, correctly been contended, that the respondent is a private body and a voluntary association, that is wholly

unconnected to the State. Indeed, in its Articles of Association it is described as a universitas with full legal personality and a public benefit organisation in accordance with the provisions of section 33 of the Income Tax Act of 1962, as amended.

Its main objects are inter alia,

21.1 To carry on the public benefit activity of administering, developing, co-ordinating and promoting the game of football in which the participants take part in accordance with the principles laid down in the Statutes of FIFA (“the Federation Internationale de Football Association”).

21.2 Improve, promote, regulate and control the game of football throughout the territory of South Africa in accordance with the principles of fair play and its unifying, educational, cultural and humanitarian values, particularly through youth development programmes, and organise competitions in Association Football in all its forms;

21.3 Promote friendly relations between its members, clubs, officials, players and in society generally for humanitarian objectives; and

21.4 Settle disputes arising between members or bodies or persons connected directly or indirectly with football within the jurisdiction of SAFA.

[22] What must be considered is whether the respondent’s action in subjecting the applicant to a disciplinary procedure, amounted to an administrative action. The corollary to this question is whether or not PAJA is applicable in this case. Clearly if it is, this would mean that the applicant would first have to exhaust the internal procedures as prescribed by SAFA’s constitution, rules and regulations before it can approach the court.

[23] Section 1(b) of PAJA defines an “administrative action” as any decision taken, or any failure to take a decision by

“(a) or

(b) a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ... ”

[24] PAJA accordingly does not confine the definition of administrative action to decisions only by organs of State or public bodies.

It also includes any decision taken, or any failure to take a decision by a natural or juristic person when exercising a public

power or when performing a public function, which adversely affects the right of any person and which has a direct, external legal

effect. An empowering provision is defined as “a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken” (my emphasis). I am accordingly of the view that the constitution of SAFA in terms of which soccer is governed in this country, constitutes an empowering provision in terms of which the respondent carries out its functions including disciplining its members.

[25] The respondent is the dominant and only soccer body governing the game of soccer in the country. It exercises this power

nationally and whatever decision it makes, on any matter involving soccer, effects the public. I am also informed that it partly

receives its funding from the government. It is accordingly a body which performs a public function which is to, inter alia, entertain the nation, provide employment and develop, control and manage sporting activities for all young and old nationally. It is also a well-known fact that soccer is a sport which is enjoying wide-ranging support in South Africa resulting in the fate of soccer teams and players being a matter of public interest. It is thus of vital importance that the respondent exercises its decisions within the strict rules of natural justice as all soccer teams, players, soccer matches and associated activities fall within the public interest domain. Although the respondent is a private body or voluntary association, the public at large has an interest in what happens in soccer generally. It stands to reason that the disciplining and the possible subsequent suspension of soccer teams by the respondent, is of necessity a matter of public interest or concern.

[26] In *President of South Africa and Others v South African Rugby Union Football Union and Others* 2000

(1) SA 1 (CC) at para [172] the Constitutional Court held that:

“... Although it is true that very often the management and financial affairs of an autonomous private association will not be matters of public concern, it is not correct that they may never be. The use of the adjective 'public' in the phrase 'matter of public concern' does not mean that only public organisations or State institutions may be the subjects of a commission of inquiry vested with Commissions Act powers. 'Public' in this context qualifies 'concern' ...” It follows that the Commissions Act applies to a commission inquiring into the internal management of private autonomous organisations, provided that those affairs are indeed matters of public concern...”

The court continued thus (at para [173]):

“...There are many private institutions which, for historical or practical reasons, are privately controlled, although their activities

manifestly affect members of the public and give rise to considerable public interest and, at times, public concern.”

[27] In *Tirfu Raiders Rugby Club v SA Rugby Union and Others*

[2006] 2 All SA 549 (C) at paragraphs 27-28, Yekiso J examined the nature and powers exercised by the SA Rugby Union; the fact that it had jurisdiction over the game of rugby throughout the country; the authority it exercised over provincial rugby unions in terms of its Constitution, as well as the public interest in the game and its administration. The learned Judge held that the S A Rugby Union's powers had to be classified as public powers and its conduct was sufficiently public in nature to warrant the application of PAJA.

[28] Article 70 of the SAFA Constitution expressly provides that all proceedings (regarding discipline) "shall be conducted on the principles of natural justice". The respondent is required to uphold the Bill of Rights and the rules of natural justice in every disciplinary proceeding it conducts. In the case of *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) at 1376C-G, Kirk-Cohen J held that the rules of natural justice are in the first place rules of public law, but that they do

sometimes apply in the sphere of private law, when they are incorporated by contract. He accordingly held that"

It is only where the constitution of a voluntary association incorporates the rules of natural justice that they then apply between the association and its members or those with whom it has privity of contract".

[29] Applied to the facts of this matter, I am satisfied that the disciplinary procedure and hearing to which the applicant was

subjected, constituted the exercising, by the respondent, of a public function. I accordingly find that the provisions of the Promotion of Administration Justice Act, No. 3 of 2000 are applicable to SAFA and its members in respect of matters concerning disciplinary procedures.

[30] Section 7(2)(a) of PAJA provides that no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for, has first been exhausted. It is common cause that the applicant has not exhausted the internal procedures in terms of the constitution, rules and regulations of SAFA. The applicant has also failed to show any reasons justifying a departure from the provisions of PAJA I have already referred to. It follows that the respondent's point in limine must be upheld.

THE MERITS

[31] Although I have upheld the respondent's point in limine, which decides the fate of this matter, I have nonetheless decided to deal with the merits.

[32] The applicant's further complaint is that it was punished twice for the same offence in that twelve points in total were awarded to the opposing four teams in respect of the four soccer matches that the applicant failed to honour, and that it was subsequently summoned to appear before the national disciplinary committee regarding its failure to honour the same matches.

- [33] In terms of clause 24.2.7 of the SAFA Rules, a soccer team commits an offence if it fails to fulfil a soccer fixture for which a date and a venue had been fixed by SAFA. This clause must be read together with clause 28.1 which provides that:

“It shall be an offence for a team not to be present in/at the change- rooms at the match venue by at least sixty minutes before the scheduled kick-off time, or for the team not to have taken the field at least five minutes prior to the kick-off time.”

- [34] Rule 28.3 is of importance: it stipulates that where a match is not played because of the late or non-arrival of a team, the offending club shall forfeit the match points and may be charged with misconduct. Other than points being deducted or awarded to the opposing team, the offending team is liable to be disciplined for failing to honour a match. In addition, Rule 28.3 provides that “impossibility of performance as the result of a vehicle breakdown, or that the offending team was unable to locate the match venue, shall not be a defence to this charge”. It will be recalled that the applicant’s defence at the disciplinary enquiry was that the team experienced a motor vehicle breakdown when they were about 120 kilometres from the venue and that the other members of the club had never made adequate travelling arrangements for the game. These defences were properly rejected in terms of the rules. I am accordingly unable to fault the finding of the national disciplinary enquiry in this regard.
- [35] Rule 28.5 of the SAFA Rules provides that a team conceding three walkovers in a season will have its membership/affiliation/participation terminated from SAFA, subject to the prescribed disciplinary procedures and a recommendation to that effect to the SAFA competitions committee. Rule 28.6 of the Rules provides that in the event of a team conceding a walkover and failing to submit a report within 48 hours of the termination of a game, it may be charged, in which event the report by the referee in respect of the aborted soccer match, shall constitute conclusive proof of misconduct.
- [36] In the opposing affidavit, the respondent denied that any report was furnished by the applicant in respect of the four matches which the applicant failed to honour. During the hearing before me counsel for the applicant did not furnish any proof of such correspondence. I accordingly accept that the applicant failed to submit a report within 48 hours of the termination of a game in violation of Rule 28.6.
- [37] The applicant’s further complaint is that the disciplinary committee terminated the applicant’s membership of the Vodacom League with immediate effect and omitted to submit a recommendation of termination of the applicant’s affiliation to the SAFA Competitions Committee. In my view this allegation is without any basis as the ruling by the national disciplinary committee does contain a recommendation that the applicant should participate in the league lower than the Vodacom League for the 2011/2012 season.
- [38] For all these reasons, I find that:

38.1 The applicant has failed to exhaust all the internal remedies, in particular that it has failed to appeal as provided for in the Rules of SAFA.

38.2 Although in argument the applicant waived reliance on interdictory relief, I nonetheless find that the applicant has failed to satisfy the requirements for such relief.

[39] I accordingly make the following order:

The application is dismissed with costs.

B H MBHA

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT G. M. YOUNG

INSTRUCTED BY BOTHA, MASSYN & THOBEJANE

ASSOCIATED ATTORNEYS

COUNSEL FOR THE RESPONDENT N. NHARMURAVATE

INSTRUCTED BY MASIKE ATTORNEYS

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