IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 09/2058

In the matter between:

HARE, NEIL CLIVE Applicant

and

THE PRESIDENT OF NATIONAL COURT OF APPEAL NO 140 First Respondent

MOTORSPORT SOUTH AFRICA Second Respondent

J U D G M E N T

BLIEDEN, J:

[1] This is an application for the review and setting aside of the decision of the second respondent's National Court of Appeal (NCA) No 140 made on 2 December 2008. The decision of the NCA is annexed to the applicant's founding affidavit.

[2] It is common cause that the relationship between the applicant (and his son) and the second respondent arises from a contract between them. The terms of the contract between the parties are to be found in the "*handbook*" as explained by the applicant in his founding affidavit.

[3] It is further not in issue that the decision of the second respondent's NCA which is now sought to be reviewed and set aside, relates to an incident which occurred in the course of a go-kart racing event that took place in Cape Town on 19 July 2008. The applicant's son was involved in this incident. The applicant appealed, in terms of the contract between him and the second respondent, to the second respondent's Court of Appeal (COA). That appeal was unsuccessful and the applicant then appealed, also in terms of the contract between him and the second respondent, to the NCA. His appeal to the NCA was also unsuccessful and that decision is the one that has now being brought on review before this Court.

[4] The second respondent has opposed the application on various grounds which will be dealt with later in this judgment. The first respondent opposes the application only insofar as it relates to a costs order which is being sought against him.

[5] On the papers before the court it is plain that the applicant has brought the present application in terms of the Promotion of Administrative Justice Act

No 3 of 2000 (PAJA) and, for that purpose the principles of administrative law as provided for in PAJA are relied upon.

[6] The first issue to be decided in this matter is whether the decision of the NCA is reviewable by the court in terms of PAJA or any other legislation. On behalf of the respondents it was submitted that it was not.

[7] Inasmuch as it is relevant to the present case, the following definition of "*Administrative Action*" in PAJA applies:

> "*Any decision taken, or any failure to take a decision, by –*
>
> *(a)* *…*
>
> *(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 …*"

[8] On behalf of the respondents counsel submitted that the decision which is sought to be reviewed is not one that was taken "*… when exercising a public power or performing a public function* …". As authority for this submission I was referred to *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) at 1374H-1377H.

[9] The facts in *Cronje's* case are relevant in the present case. They are accurately summarised in the head note which is at page 1362H-1363B:

> "*The applicant had been the captain of the national cricket team. He had involved himself in various corrupt activities and had been replaced as captain and withdrawn from the national team. When his*

contract with the respondent expired shortly thereafter, the respondent did not renew it. The applicant decided to quit representative cricket and his association with the respondent, which fact he confirmed under oath at a commission of enquiry. The respondent subsequently passed a resolution banning the applicant for life from all activities of the respondent and its affiliates. The applicant was given seven days in which to make representations concerning the resolution if he so desired. The applicant applied for an order reviewing and setting aside the resolution and interdicting the respondent from performing certain actions. The applicant averred, inter alia, that he had been entitled to a hearing before the resolution was taken and had not been and that his right to fair administrative action contained in s 33 of the Constitution of the Republic of South Africa Act 108 of 1996 had been violated."

[10] In the *Cronje* case, Kirk-Cohen J, after thoroughly analysing a large number of authorities, concluded that in the exercise of its powers the United Cricket Board was not a public body. It was a voluntary association wholly unconnected to the State. Its functions were private not public. In my view the judge was correct in this finding.

[11] In the present case, the mere fact that the second respondent is the sole controlling body for motorsport in South Africa, does not render the decisions of its tribunal an "*exercise of public power*" or "*the performance of a public function*". Its position is exactly the same as that occupied by the United Cricket Board in the Cronje case.

[12] In the circumstances its decisions, which include the decision against which the present review is directed, do not qualify as "*administrative action*" as defined in PAJA and are therefore not subject to judicial review.

[13] In my view counsel for the respondents is correct in his submission that even if the contract between the parties had incorporated the rules of natural justice, as one of its terms, any remedy the applicant may have had would have been a contractual remedy and not one founded in administrative law. See *Transman (Pty) Ltd v Dick and Another* 2009 (4) SA 22 (SCA) at 32D-F.

[14] In any case, in the present matter the contract between the parties, which is before the court, does not incorporate, as one of its terms, the application of any administrative law rules. The applicant therefore does not have such a contractual remedy.

[15] It is further plain from a reading on the contract, as submitted by the respondents' counsel, that the applicant has "*… renounced, under pain of disqualification (see GCR186) the right to have recourse except with the written consent of Motorsport South Africa to any arbitrator or tribunal not provided for in its rules*". Furthermore, in terms of the same contract, the applicant agreed that the decision of the NCA would be final and "*… not subject to review except on appeal in accordance with these rules*" (GCR66 page 134).

[16] Counsel for the applicant, on this aspect of the argument referred me to the decisions in *Klein v Dainfern College and Another* 2006 (3) SA 73 (T) and *Taylor v Kurstag and Others* 2005 (1) SA 362 (W) as cases which supported his argument that this Court had the power to review the decision of the COA. A reading of these two cases shows that they are both

distinguishable on the facts from the present case. In both of these cases it was held that the decision of the body against which the review was directed was not governed by PAJA. However, on the basis that the decision in the *Dainfern College* case incorporated the principles of natural justice the court entertained the application. In the present case there is no room for such a finding.

[17] The facts in the present case are on all fours with those in the *Cronje* case, and for the reasons stated in that case, this Court has not the jurisdiction to hear the present review.

[18] Having come to this finding, it is unnecessary to deal with the merits of the present application. However, in regard to these merits which were argued by counsel representing the parties, I am of the view that the applicant did not make out a case for review against the properly exercised discretion of both the COA and the NCA.

[19] In the circumstances the application is dismissed with costs.

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P BLIEDEN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	
DATE OF JUDGMENT	