SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPORTABLE

Case No.: 2011/8727

Date:15/04/2011

In the matter between:

DR MTUTUZELI NYOKA Applicant

and

CRICKET SOUTH AFRICA Respondent

J U D G M E N T

MOJAPELO, DJP

The Indian Professional League ("IPL") held its tournament in South Africa in the first half of 2009. The tournament was hosted by Cricket South Africa ("CSA"). The event was by all accounts a great success. Mr Gerald Majola ("Mr Majola"), as the CEO of CSA, handled negotiations and concluded the

agreement with the Indian authorities for the staging of the tournament in this country. Dr Mtutuzeli Nyoka ("Dr Nyoka"), as the president of CSA praised Mr Majola for the role he played in negotiating and staging the tournament.

If it all ended there it would have been a happy ending of a good story. However, the payment of bonuses by the IPL to the staff of CSA and the way in which the payments were handled by CSA unleashed a wave of events that wrecked and strained relationships within management of CSA and culminated in a special general meeting of CSA on 12 February 2011. At that meeting CSA took a decision to remove Dr Nyoka from his office as the president of CSA, the position to which he had been re-elected unopposed in August 2010. Dr Nyoka and Mr Majola, and the roles they played, are central to the strained relationship in the management of CSA, and in order to understand fully the cause thereof, it is important to contextualise them.

This is how the major events in that chain flowed:

Sequence of Events:

During the period March – August 2009, a dispute raged in relation to the IPL in South Africa. Rumours emerged (and were taken up by the Gauteng Cricket Board ("GCB"), which is one of the eleven associate members of CSA) that Mr Majola had personally received (or was to receive) a significant payment from the IPL.

Dr Nyoka confronted Mr Majola with these rumours. Mr Majola categorically denied receiving any personal benefit from the IPL. Flowing from this interaction, Dr Nyoka supported Mr Majola in resisting the accusation from the GCB. Dr Nyoka believed Mr Majola and accepted that he had not received any personal benefit from the IPL.

On 10 July 2009, a special general meeting was held to deal with the GCB's allegations of mismanagement in respect of the IPL tournament. According to the minutes of that meeting Mr Majola "*informed the meeting that, in his negotiations with IPL he had included an amount for bonuses for the CSA staff and this news was applauded by the members."* No particularity was sought and none was given about the IPL bonuses. In particular, Mr Majola did not mention that he was to benefit or had benefitted from the bonuses he had negotiated and no amounts were mentioned.

Despite Mr Majola's report, the GCB persisted in its allegation that Mr Majola had received personal benefits from the IPL. To meet this allegation, Mr Majola is said to have shown Dr Nyoka and Mr Skjoldhammer, the chairman of GCB, a copy of the Heads of Agreement concluded with IPL, which made no mention of any bonus. Based on this evidence Dr Nyoka insisted that the GCB apologise for its accusations of impropriety against Mr Majola. Unbeknown to Dr Nyoka or the GCB, Mr Majola had not disclosed the full IPL agreement to them and had withheld the "Schedule of Payments" which reflected a bonus payable to him in the sum of R1 131 062.00.

In his President's annual report for 2008/9 prepared in mid 2009, Dr Nyoka praised Mr Majola for his work as CEO. Dr Nyoka also praised Mr Majola in 2009 for his work as CEO on other occasions. This was all prior to 13 July 2010 when the bonuses received by Mr Majola from the IPL and the International Cricket Council ("ICC") were revealed. Throughout and until after 13 July 2010 Mr Majola remained silent on the bonus he had received.

In September 2009, the ICC Champions' League Trophy was held in South Africa. Without the knowledge of Dr Nyoka or the remuneration committee, Mr Majola received a further bonus in an amount of R644 081. This too was not disclosed.

In April 2010, at the end of the CSA financial year, Dr Nyoka considered the work done by Mr Majola during the year, specifically his contribution to the success of the IPL and ICC tournaments, and motivated to the Remuneration Committee of CSA ("Remco") payment of an extraordinary bonus to Mr Majola equal to eight months' salary, rather than the usual three months. This recommendation was approved by Remco and the special bonus was paid to Mr Majola by CSA. However, Mr Majola made no disclosure that he had already received R1, 795,143.00 in bonuses which had been paid without reference to or approval of the board or Remco. Had Remco known of these bonuses it would not have agreed to the special payment, apart from the fact it would have taken up the non-disclosure issue. This is specifically

confirmed by Mr Paul Harris, who was the chairman of Remco at the time when the extraordinary CSA bonus was approved and paid.

> On 09 July 2010 the Audit Committee of CSA met with Deloitte, the external auditors, to sign off the 2010 financial statements. At this meeting Deloitte were not aware of the payment of the IPL and ICC bonuses, because of the way in which the bonuses were reflected in the financial statements (in the loan accounts and not in the revenue accounts). The financials were thus approved.
>
> On 10 July 2010 Deloitte were notified of the bonus payments and the signing off of the financials was postponed. Instead steps were taken and an independent auditor was appointed to conduct an internal audit.

On 13 July 2010, before CSA's auditors, Deloitte, had signed off on the financial statements for the year ended April 2010, Mr D O Thomas (an independent auditor), delivered a report following his review of CSA's accounting records. Mr Thomas reported that: a pool bonus of R2,732,172.00 had been received for the IPL tournament and of that amount, R1,131,062.00 had been paid to Mr Majola and R797,999.00 to D McIntosh. He reported further that a bonus pool of R2,024,951.00 had been received for the ICC Trophy, and of that, R644,081.00 had been paid to Mr Majola and R649,986.00 to D McIntosh. In total, 67 per cent of the bonuses received by CSA had been paid to these two individuals. In addition, Mr Thomas identified travel and expenses claims which

appeared to be abnormal. He sent his report to Mr Colin Beggs (then head of CSA's audit committee), who in turn reported to Dr Nyoka.

Dr Nyoka was dismayed at this news since it was directly at odds with the consistent denial by Mr Majola that he had received any personal benefit from the IPL tournament. This was the turning point in the relationship between Dr Nyoka as president and Mr Majola as CEO of CSA. Dr Nyoka immediately consulted a list of experienced individuals on the corporate governance ramifications and the correct steps forward.

On 4 August 2010, following a confrontation between Dr Nyoka and Mr Majola, Mr Majola finally revealed the Schedule of Payments which formed part of the agreement with the IPL. The schedule reflected the personal benefit that Mr Majola had negotiated for himself. Previously Mr Majola had only shown Dr Nyoka the IPL Heads of Agreement without the schedule.

Dr Nyoka sought advice from Prof Mervyn King SC, who was then chair of CSA's Legal and Governance Review Committee of CSA, and on his advice, immediately took steps to appoint an external Commission to investigate the bonus issue.

At a board meeting held by way of teleconference on 4 August 2010, it was unanimously decided that CSA's management committee ("MANCO") should appoint an independent, external committee to review the circumstances surrounding the payment of the bonuses in the two tournaments.

On 5 August 2010, MANCO met and decided to appoint a Commission headed by former Chief Justice Langa, assisted by the auditing firm KPMG. On the same day, Mr Majola proposed to pay back the bonuses he had received. It was by this stage essential to ensure that the CSA financial statements for the year ending April 2010 be approved without delay.

On 6 August 2010, CSA's audit and risk committee met and decided to recommend the approval of the financials by the board subject to the repayment of the bonus monies by Mr Majola and McIntosh and an external review of the bonus issue. This decision was conveyed to Deloitte who insisted on an independent inquiry as a condition for them signing off the financial statements.

Thereafter, a briefing meeting was held with former Chief Justice Langa and KPMG, to brief them on their mandate and terms of reference.

At a further teleconference held later in August, the board again unanimously endorsed the external review.

On 1 September 2010, Mr Majola, accompanied by his lawyer, met with Dr Nyoka and complained about the process which had been followed. He wanted an opportunity to make representations directly to the board and to persuade it to reverse its earlier resolutions. At that meeting, Mr Majola stated to Dr Nyoka that in the past "he has never declared his bonus to any CSA President". Clearly, Mr Majola had operated with the express intention of keeping the bonus a secret and that secret would have remained so in the absence of the Thomas audit report.

On 16 September 2010, Mr Ray Mali, a CSA board member, arranged a meeting with Dr Nyoka and Mr Majola. An attempt was made at reconciling Mr Majola and Dr Nyoka. Some reconciliation was achieved but this did not detract from or dilute Dr Nyoka's resolve to pursue the necessary inquiry, nor did it vindicate Mr Majola.

A board meeting was held on 17 September 2010. Deloitte were in attendance, and were questioned about why the bonuses had been paid from a CSA account without being detected by them. After further discussion the following decision was recorded: *"The general consensus of the board was to proceed with the appointment of a Commission (with the exclusion of Deloitte and KPMG). Mr Matheson was asked to expedite the matter as quickly as possible."*

This was the third occasion on which a unanimous decision for the appointment of an external Commission was taken by the board.

On 28 September 2010, Mr John Bester (the new chairperson of CSA's finance and commercial committee ("Fincom") prepared a memorandum. Although he confirmed the board's decision of 17 September 2010 to appoint an external Commission comprising of Chief Justice Langa and himself, he recorded that he had held informal discussions with Mr Majola and had met with Dr Nyoka and the vice president, Mr A Khan, and in the light thereof suggested an internal review of the bonus issue rather than an external one. This was the first time that an internal investigation was suggested in the place of the external one that had been agreed to and confirmed by the board of CSA at least three times.

The memorandum does not provide reasons for this change. In a supplementary affidavit filed the day before the hearing of this application, Mr Bester explains for the first time, as far as I can establish, that the internal investigation was suggested as a preliminary process, and that the external investigation would have been resorted to if the internal process found good reasons for that.

On 29 September 2010, a board teleconference was held to discuss this proposal. CSA has attached a minute of that teleconference. Dr Nyoka denies that this is an accurate recordal of the teleconference. The inaccuracy of the minute has been confirmed by CSA in the supplementary answer. Contrary to CSA's earlier contention it appears that there were only 9 board members present when the teleconference started.

Despite three (3) prior resolutions to hold an independent external review, the board decided, in a hastily arranged teleconference, instead, to constitute an internal committee under the chairmanship of Khan ("the Khan Committee") with Mr Bester, also serving as a member. Mr Bester had made the proposal for the formation of the internal committee after discussions with Mr Majola. The content of those discussions have not been disclosed before this court.

> The decision to proceed with an internal inquiry in the place of an independent external one, was taken in the face of the concerns of the external auditors, Deloitte, who in a letter of the

same day (29 September 2010) expressed themselves as follows:

"Prior to signing the annual financial statements for the year ended 30 April 2010, we were informed that an independent enquiry would take place on the matters relating to the unauthorised bonuses, travel and related expenditure and fringe benefits. At that stage we were of the view that that an investigation was necessary in order to allow us to fulfil our statutory reporting requirements. Based on this understanding, we were satisfied with management's actions, and the financial statements were signed off accordingly.

Should an independent enquiry not be held in this regard, we may be obliged, in terms of our statutory obligations, to conduct a review ourselves. In the event that an enquiry or our review indicates that there has been a Reportable Irregularity, we will have to report details to the Independent Regulatory Board for Auditors (IRBA) in terms of the Auditing Professions Act 2005 (Act 26 of 2005) (APA). …

In relation to this matter, we strongly recommend to the Board to continue and conclude the independent enquiry. Failure to do so may have serious adverse consequences for CSA. …

I understand that there is a Board meeting this afternoon. Please distribute this letter to all your board members."

It is not clear whether this letter was distributed to the board members as specifically requested by the auditors. What is clear

> is that contrary to the express view and advice of the auditors, the internal Khan Committee was tasked to proceed with the investigations in the place of the independent external investigations which would have been chaired by the former Chief Justice Langa.
>
> Dr Nyoka and others presented evidence to the Khan Committee. Dr Nyoka's statement is "MN9". He confirms its correctness under oath.

The Khan Committee handed down its report shortly before 19 November 2010. It made a number of findings which Dr Nyoka, as well as the former chairmen of CSA's key governance committees, regarded as being in direct conflict with the evidence they had presented. This caused them to publicly criticise its findings.

The Khan report was presented to the board on 19 November 2010. Dr Nyoka recommended that the report be sent to the affiliate members of CSA for consideration and discussion at that level before a decision was taken by the board of CSA whether to endorse it or not. This proposal was rejected by Mr Majola who stated that he wanted to bring the matter to an end. It is questionable whether it was appropriate for Mr Majola to have been involved in any way in the discussion of this proposal. Although there is a dispute about the accuracy of the minutes of the meeting, it is common cause that the Khan report was accepted by the board. Dr Nyoka was not happy and submitted a statement of dissent explaining his position.

On 22 November 2010, a statement was released by the former chairmen of the CSA audit, finance and remuneration committees who had been in office during the period when the irregularities had occurred. The three individual chairmen (each an independent, senior, and respected individual) voiced their disapproval at the manner in which the undisclosed bonus payments had been dealt with. They also raised the specific concern that the funds of the CSA were to be preserved to develop the game at grassroots level rather than to enrich the executives who had already been adequately compensated.

On 13 December 2010, Dr Nyoka approached CSA's Vice President, Mr Khan (chairman of Khan Committee and now Acting-President) and requested Khan's comments on the statement so that an appropriate response could be submitted to the former chairmen. Khan declined because he regarded the matter as closed.

Dr Nyoka remained intent on obtaining answers to questions that had not been answered in the Khan Report. It concerned him that Mr Majola had misled him during 2009; that 'secret profits' had been made (contrary to CSA's Code of Best Practice) and not detected; and that he had been party to an undertaking to the auditors that an external inquiry would take place and (on that basis) the auditors had signed-off on the 2010 financial statements. He was concerned that the internal (Khan Committee) process followed by CSA, despite the undertakings to the auditors, would be viewed as a cover-up and tarnish the image of cricket generally. Dr Nyoka was intent on following these up.

Dr Nyoka met with resistance in advancing this line. His detractors, who believed the bonus issue should be laid to rest, rallied support for his removal as president. The affiliate member presidents met independently of Dr Nyoka on 08 January 2011 and then with Dr Nyoka on 09 January 2011. They sought to resolve the conflict between Mr Majola and Dr Nyoka. Dr Nyoka suggested independent meetings with each of the Presidents to understand their concerns and complaints. The process suggested by Dr Nyoka appears not to have found favour with affiliate presidents and was not followed. Instead, Dr Nyoka received notification that the affiliate presidents wished him to step down from his office as president of CSA.

This was the first intimation that the removal of Dr Nyoka from his position as president of CSA would be sought. It is important to set out in some detail the flow of events from this point onwards as this will be vital to determine whether Dr Nyoka received proper notice of the meeting or not.

Events leading up to Notice of and the Meeting:

On 19 January 2011, Mr Majola notified Dr Nyoka by letter of a requisition by the affiliate presidents for a special general meeting at which a resolution would be tabled to remove him from office as president of CSA. This was not the notice of the meeting but a requisition for one to be convened; it contained no date for a meeting.

On the same day, that is, on 19 January 2011, Dr Nyoka's use of his official e-mail address at CSA was suddenly terminated by the CSA –

despite the fact that he remained president. From that date Dr Nyoka could not receive or send emails using that address. CSA did not deny this in its initial answering affidavit.

In its supplementary papers the CSA states that on 19 January 2011, its computer server crashed. This is given as a reason why CSA cannot access the records of the 20 January 2011 emails. However, the so-called crash of the server apparently had the effect of terminating or cutting off the use of only Dr Nyoka's email address at CSA. There is no suggestion that the email address of any other director, official or employee of CSA was similarly affected.

CSA alleges that notice of a special general meeting to be held on 12 February 2011 at the Inter-Continental Hotel at OR Tambo International Airport was distributed to all concerned on 20 February 2011 and specifically to Dr Nyoka by email.

On 26 January 2011 Dr Nyoka addressed and sent a letter by email to CSA in which he stated, inter alia, that he had not received formal notice of the meeting of 12 February 2011 although he read about it in press reports. He also asked for reasons from each of the affiliate members of CSA for his proposed removal as president of CSA. He specifically requested, in the covering email, that his letter be sent to all members of the board and to members of a body called the members forum. He did not receive a response.

On 01 February 2011 Dr Nyoka addressed a further letter to CSA, which he copied to individual board members and to members forum. He sent

this by email together with copy of his earlier letter of 26 January 2011 to CSA. He pointed out that he had not received a response to the letter and email of 26 January 2011. In reply, Dr Nyoka received a letter purportedly written and signed "for and on behalf of the Affiliate presidents of Cricket South Africa" to the effect that they had received his correspondence and "the contents thereof are noted". CSA thus 'noted' that Dr Nyoka had not received notice of the meeting. It also, presumably, 'noted' his request for reasons. Dr Nyoka still did not receive notice of the meeting of 12 February 2011 nor any response to his request for reasons. CSA appears to have done nothing about what it had noted.

Dr Nyoka's e-mail of 1 February 2011 further elicited a response from two board members that they had not previously seen Dr Nyoka's correspondence. Clearly, Mr Majola had not distributed it as he was requested and required to do.

By 10 February 2011, Dr Nyoka had still not received notice of the general meeting although he was aware from press reports that it was to take place. He addressed a further e-mail to CSA (annexure 'MN26' at record p 155) in which he repeated that he had not received notice of the meeting. He pointed out that he had not been invited to the meeting despite being the person who was at the centre of the proposed vote and the only person able to respond in his defence. He said that if the decision was to be made by each of the affiliate members, he expected their respective boards to have consulted him or made enquiries from

him so that he could address any of their concerns. None of this was done. He pointed out that the unfortunate result of the approach adopted by CSA was to prejudice cricket and credible cricket administration.

Dr Nyoka finally received the notice of the meeting which was hand-delivered to him on 10 February, only two (2) days before the meeting. On 11 February 2011, Dr Nyoka sent a further note to Mr Majola as the CEO of CSA (annexure 'MN28' at record p157) calling for various documents that would properly sustain an inquiry into the financial records of CSA. This was ignored by the CEO.

The general meeting was indeed held on 12 February 2011. Dr Nyoka did not attend. At that meeting a motion of no confidence was adopted and the decision was taken to remove Dr Nyoka from his position as president of CSA. This also had the effect of removing him as director and chairperson of the board of CSA. It is this decision that Dr Nyoka now seeks to set aside on the basis that it is invalid.

Court proceedings:

On 28 February 2011 Dr Nyoka filed an urgent application in this court to challenge the decision of 12 February 2011 taken by CSA at the special general meeting of that day. He is henceforth referred to as the applicant. CSA is cited as the only respondent and it is thus also henceforth referred to as the respondent.

The applicant seeks an order to review and set aside the decision and to reinstate him to his position as president and chairperson of the respondent with immediate effect. The respondent opposes the challenge.

At first the applicant sought an order in terms of Part A of the Notice of Motion on an urgent basis pending the decision in Part B. The relief sought in Part A is the same as the relief sought in Part B. The only difference is that the relief in Part A was sought as an interim urgent measure pending the final decision for the same relief in Part B. Part A was initially to be heard on 15 March 2011 while Part B was to be heard on 10 May 2011.

The parties however agreed by arrangement with this court that the matter would be heard and disposed of in one hearing on 25 March 2011. The matter was accordingly heard before me on the latter date.

The proceedings before this court are thus in terms of Part B. Consequently, the determination of urgency is no longer an issue as a prerequisite for this court determining the main relief sought by the applicant. The arrangement for one hearing was reached without the applicant conceding that the relief he seeks is not urgent. The respondent has also not conceded that it is.

Internal Arbitration: *in limine:*

The respondent raised a point *in limine* in the original papers and persisted with the point in the hearing before me. The point is to the effect that the dispute should be referred to arbitration in terms of clause 25.1 of the respondent's Articles of Association ("the Articles") and that this court accordingly has no jurisdiction. Although the point was not

strongly argued, it remains an open issue between the parties. A ruling is thus necessary.

Clause 25.1 of the Articles provides that:

> "*Subject to the Constitution of the RSA, and save in circumstances where there is a need for urgent relief of a sort which cannot be obtained through the dispute prevention or resolution procedure contemplated in these Articles, no club, club member, official, Office Bearer or affiliate shall approach a Court of Law to decide a dispute it has with a body or individual falling under the jurisdiction of the company."*
>
> The word company in the clause refers to CSA (the respondent).

There are two grounds, on which the point *in limine* falls to be dismissed based on a proper reading of the clause, i.e., (a) urgency of relief; and (b) the nature of the dispute.

The applicant sought urgent relief in the proceedings. The matter was set down on 15 March 2011 as to the first part while the second part was to be heard on 10 May 2011. The first part could not be accommodated in the ordinary urgent court on 15 March 2011 due to its anticipated duration. It was referred to me on 17 March 2011 to be accommodated as special motion on urgent basis. It also appeared that the proceedings of 10 May 2011 would, because of the duration also require accommodation as a special motion that would require a day to be disposed of. The parties agreed through the intervention of this court to a

single hearing on 25 March 2011 instead of two separate hearings. Although by agreement urgency would not be argued as an issue, it remained on the papers, as it was neither abandoned nor conceded. Urgency thus persists in the current hearing on expedited times for final relief. This is relief of a sort which cannot be obtained through the dispute resolution procedures contemplated in the Articles.

> The respondent has contended in its answering affidavit, through Abdool Karim Khan, that there is no urgency as the next elections are due in August 2011 and "There will be nothing to preclude the Applicant from standing for election as president at an annual general meeting in August 2011." The contention is devoid of sincerity in the approach to this application. If there is illegality and invalidity of the nature complained of, it cannot be a proper response to say the applicant has the next elections available for him to change the course of events. It is patently in the interest of justice and all involved that illegality of that nature be adjudicated and decided upon at the earliest and without undue delay. This is what the applicant seeks from this court.

Secondly, the dispute is not one between an office bearer and a "body or individual falling under the jurisdiction of the company" as contemplated in clause 25.1 of the Articles. It is one between the applicant as an office bearer and respondent, the "company" itself.

I am satisfied that the jurisdiction of this court is, in the circumstances, not ousted by the arbitration clause in the Articles and that it is in the

interest of justice that this court should exercise such jurisdiction. The point *in limine* is without merit and is dismissed.

The Merits:

I now proceed to consider the application on its merits.

The applicant seeks an order to set aside the decision of 12 February 2011 on the basis that the decision is invalid. He complains that he was not given proper notice of the meeting though he is the person most affected by the decision. He was also not given the reasons and information that he required. He relies on a number of alleged irregularities including the contention that he was not afforded an opportunity to be heard at the meeting. I now proceed to deal fully with each of the grounds on which the applicant attacks the decision of 12 February 2011.

Notice:

The requirements for the removal of the president are dealt with in clause 4.6 of the Articles which provide that 'office bearers' may be removed during their term by the affiliate members at a general meeting held in accordance with the Articles, subject to the approval of two-third (2/3) of the vote of the affiliate members. The president of the respondent is an office bearer in terms of the Articles.

The procedural requirements for notices of meetings are contained in clause 7.5 which reads as follows:

> *"An Annual General Meeting and any General Meeting, which requires the passing of a special resolution as contemplated in Companies Act shall be called by 21 (twenty one) clear days notice in writing at the least … provided that the CEO has taken reasonable steps to give notice of a meeting, the accidental omission to give and/or the accidental giving of a defective notice (provided that by reason of such defect it is not misleading) of a meeting to, or the non-receipt of notice of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings of that meeting. The notices of meetings shall contain the business to be considered at such meeting."*

It is common cause that the applicant was entitled to notice. The first question is therefore whether he received the requisite notice.

On the papers the respondent alleges that notice of the meeting of 12 February 2011 was sent to the applicant and other members by email on 20 January 2011. The email referred to does not identify the email address used for the applicant. In the respondent's supplementary papers, Lesley Anne O'Donoghue ("O'Donoghue") records that she sent the relevant notices on behalf of the respondent and that she used the applicant's official email address and his private email address. What the respondent

is not able to say, and does not say, is that the applicant received the notice allegedly sent to him on 20 January 2011.

The applicant on the other hand states that he did not receive the official notice which was issued on 20 January 2011. He says he informed the respondent of that fact in writing by email on 26 January 2011, 01 February 2011 and on 10 February 2011 and has the necessary documentary proof of that communication which he placed before court. The respondent does not deny receipt of any of that correspondence from the applicant. It is also common cause that the respondent did not respond to applicant's emails of 26 January and 01 February, other than by acknowledging receipt of the email of 01 February 2011 and noting the contents thereof. There was absolutely no response to the email of 26 January 2011. Notwithstanding that the respondent noted the fact that the applicant had not received the notice, the respondent did not take any step to deliver the notice after receipt of the emails of 26 January and 01 February. It was only after the email of 10 February 2011 that the respondent caused the notice to be hand-delivered to the applicant on the same day, that is, two (2) days before the meeting, instead of 21 clear days as contemplated by clause 7.5 of the Articles.

According to Danny Myburgh, an expert and director of a Computer Forensic Lab, who conducted an investigation of the Blackberry device and laptop of the applicant, including an interrogation of the "iafrica" central record for the applicant's private email address:

(a) there is no record of any emails being received at the applicant's official email address after 19 January 2011; and

(b) there is no record of any emails being received by the applicant's private email from any address "@cricket.co.za" after 19 January 2011;

(c) specifically there is no record of the email from Lesley Donoghue sent purportedly on Thursday January 20, 2011 at 1:pm (Annexure 'AK8'at record 232) being received at the applicant's private email address at all. This is the email that had the official notice of the relevant meeting of 12 February 2011 as an attachment.

The evidence of Danny Myburgh is uncontroverted. I am satisfied on the papers that the contention that the applicant did not receive the notice purportedly sent to him on 20 January 2011 is well established. There is no real dispute as far as that is concerned. As I said earlier, while the respondent may allege that it sent the notice in question to the applicant, it cannot (and does not) deny that he did not receive it. I find accordingly that the applicant did not receive the notice allegedly sent to him on 20 January 2011. The very first time that he received notice of the meeting of 12 February 2011 was when the notice was hand-delivered to him on 10 February 2011, two days before the meeting. The notice delivered on 10 February 2011 was not proper notice of the meeting in terms of clause 7.5 of the Articles. I find accordingly that the applicant did not receive notice of the meeting in question while he was clearly entitled to receive it.

I am fortified in this factual finding by the statement made on behalf of the respondent in the supplementary heads of argument (para 19) which reads:

> *"It is not disputed that Dr Nyoka was entitled to receive a notice. It also appears that he did not formally receive a notice of the meeting until 10 February 2010 – although he was aware of the meeting before that time."*

I make the finding above not because of but despite this apparent concession.

The next question then is whether the proviso to clause 7.5 saves the proceedings and decision of 12 February 2011 from invalidity. In other words, in the language of the proviso, the question is whether "the CEO has taken reasonable steps to give notice of (the) meeting" to the applicant. If he did, then the non-receipt of notice by the applicant does not invalidate the proceedings.

The conduct of the respondent in relation to the giving of notice to the applicant stands to be assessed for reasonableness. Reasonableness is examined objectively and in the light of all the circumstances. The following factors are in my view relevant to the question whether the respondent took reasonable steps: (a) the respondent alleges that it sent the notice by email using the applicant's official and private email addresses; (b) the use of email address was permissible under the Articles; (c) the respondent was informed not once but three times of the fact that the applicant had not received notice of the meeting; (d) the respondent totally ignored the first written notification of

non-receipt of the notice; (e) despite the fact that the respondent 'noted' the fact that the applicant had not received notice of the meeting by 01 February 2011, the respondent took no steps to deliver notice to him; (f) the sole purpose of the meeting was to move the motion of no confidence in the applicant – he was thus central to the holding of the meeting and the only one who could respond to the motion; (g) there was a crash of the computer server at the respondent's offices on 19 January 2011 which affected the emails of 20 January 2011 because emails of that day cannot be retrieved – the respondent must have been aware of this at the time; (h) a "delivery status report" (annexure 'AK12' at record 237), relied upon by the respondent as proof that an email of 01 February 2011 was sent to the applicant, is a confirmation of a delivery to a wrong address (- with an extra 'm' - instead of) which the respondent and its counsel have confirmed does not exist; (i) the fact that 'AK12' was sent to a incorrect address for the applicant by the respondent relying on, possibly, the same distribution list used on 20 January 2011 raises questions of the reliability of the list; and the standard of care taken by the respondent to ensure notice is addressed correctly to the applicant is questionable; (j) if the respondent wanted to rectify the non-receipt of the notice by the applicant, it had ample opportunity do so: it could and should have done so by hand-delivery of the notice once the respondent was made aware on the two earlier occasions; (k) it was totally unreasonable for the respondent to wait until two days before the meeting to take effective steps to ensure delivery of notice to the applicant.

In the total circumstances neither the respondent nor its CEO (Mr Majola) took reasonable steps to give notice of the critical meeting to the applicant. In fact the applicant's non-receipt of the notice was simply ignored by the CEO and the respondent. It was due to deliberate failure on the part of the respondent that no steps were taken to deliver the notice between 26 January 2011 and 10 Feb 2011. The proviso to clause 7.5 does not help the applicant to save the decision of 12 Feb 2011 from invalidity.

> The respondent failed to give proper notice of the meeting to the applicant who was entitled to same. This failure is an irregularity which invalidates the proceedings. Resolutions taken at a meeting where persons who were entitled to receive notice or required to receive notice thereof did not receive such, are ordinarily invalid. (See ***Mtshali v Mtambo 1962 (3) SA 469 (GWLD) at 472 D-E; Wessels and Smith v Vanugo Construction 1964 (1) SA 635 (O) at 636G-637H; African Organic Fertilizers and Associated Industries v Premier Fertilizers Ltd 1948 (3) SA 233 (N) at 239-241; Visser v Minister of Labour 1954 (3) SA 975 (W) at 983C-984E****)*
>
> The application of the above rule need not be applied absolutely where the issues decided are non-contentious, trivial or of a formal nature. (See ***Visser v Minister of Labour (supra)***, ***African Organic Fertilizers and Assoc Industries v Premier Fertilizers Ltd (supra)***). However, the Courts have applied a common sense approach (***African Organic Fertilizers and Associated Industries v Premier Fertilizers Ltd***

(supra) **at 241 and** ***Visser v Minister of Labour (supra) at*** **983C**) taking all relevant factors into account, including the nature of the business to be transacted.

The provisions of Article 7.5 (regarding reasonable attempts to give notice) do not detract from this approach but rather confirm it. The concept of reasonableness applies in assessing the steps taken by the respondent to give notice to the applicant – the reasonableness of the steps being determined by the relevant circumstances.

The relevant considerations in the current case include the fact that the applicant was to be the central figure in the anticipated proceedings; the applicant had complained in his letter of 26 January that he had not received notice; the significance of the decision on his reputation and the reputation of the respondent; and very importantly, the fact that most of the affiliate representatives at the meeting had been given open mandates to consider all submissions and views before making a decision in the public interest. I return later to the significance of the open mandates.

These are not minor issues. It was not sufficient for the respondent to proceed with the meeting without ensuring that the applicant received proper notice. The resolutions taken at that meeting are invalid and ineffectual.

Affiliate Members, Affiliate Presidents and Mandates to vote:

Furthermore, a proper appreciation of the role of affiliate members, the presidents of affiliates and how these impacted on the voting is important in deciding whether the resolution which was purportedly taken at the meeting of 12 February 2011 should stand or not.

Affiliate Members of the respondent are defined in clause 1.3 of the Articles as follows:

'Affiliate Members' means the bodies that represent and serve as the respective custodians of amateur cricket in each of the regions in South Africa as determined by the member body from time to time and which currently comprises eleven bodies representing eleven regions [the eleven bodies are identified]"

The affiliate members are thus "the bodies" that represent and serve as custodians of amateur cricket in the regions. They are currently eleven and are specified in the Articles.

Each of these eleven affiliate members is, in turn, headed by a president (to be distinguished from president of respondent itself who is simply referred to as the president). With reference to these heads of affiliate members, clause 10.3 of the Articles, describing composition of the Board, states that it consists of three (3) office bearers, the CEO, "the eleven (11) presidents of the affiliate members", the 2 independent representatives, etc. The presidents of affiliate members are thus members of the board together with others. They represent their respective

> affiliate bodies and serve on the board as directors for as long as they remain presidents of such affiliates. They cease to be directors or board members when they cease to be presidents of their respective affiliate members (see clause 11.1). To distinguish them from the president of respondent they are referred to formally as “presidents of the affiliate members” or simply as “affiliate presidents” for short.

Thus while the Articles deal specifically with affiliate members and the role which they play, they differentiate the “affiliate members” from the eleven presidents of the affiliate members who are referred to in clauses 10.3 and 11.1 and who hold office as members of the board of the respondent. The presidents are individuals who are appointed to the respondent’s board and must be distinguished from the member bodies themselves. While the various presidents may act as individuals in conducting the work of the board of the respondent (as direct appointees to that board), they do not enjoy the same entitlement with regard to meetings, where the meeting is of the “affiliate members”. Where business concerning the affiliate members is conducted, the Articles necessarily require that each of the member bodies themselves has considered the business to be discussed at the respondent’s general meeting and has mandated an individual to represent their interests and carry out their mandate. This is one of the reasons why proper notice must be given to the members of such a meeting.

Of the affiliate bodies that have been referred to in the supporting affidavits, it appears that nine of the eleven voted for the applicant's removal. Two voted against his removal. However, of those nine individuals who attended the meeting, six had been sent to the meeting without indicating which way that representative should vote.

At least two of those six affiliate bodies do not appear to have had the information in order to take a view themselves. These are Free State and Eastern Province. The open mandate was clearly given by unions (located in different parts of the country who were not close to the personalities involved) to permit the representative attending the meeting to hear all representations and to make a decision in the best interests of the affiliate and cricket in South Africa. The meeting, at which representations were to be heard and considered, was the very forum at which the public interest was to be served. By effectively excluding the applicant from that meeting, the affiliate members were deprived of an opportunity to hear the applicant and from considering his submissions.

Eight votes were required to remove the applicant from office (two thirds of eleven) If those six presidents with an "open mandate" had received the appropriate information and/or had had an opportunity to hear representations from the applicant at the meeting, only two of them needed to have been convinced in order for the motion to be defeated. By excluding the applicant from the meeting through its irregular

process, the respondent caused only one side of the story to be conveyed to the members.

At a properly constituted meeting convened on proper notice, and once the affiliate members had been sufficiently informed to make a decision, the voting might have been different from what actually transpired on 12 February 2011. There is a high probability, in that event, that the two-thirds majority required to remove the applicant from office would not be achieved.

Consequently, the resolutions purportedly taken on 12 February 2011 are invalid and fall to be set aside for these reasons too.

The right to be heard (*audi alteram partem*):

The applicant further and finally relies on violation of his right to be heard to attack the validity of the decision against him.

It is a fundamental principle of justice that a person affected by a decision should be given an opportunity to be heard or to defend himself or herself before such decision is taken. The corollary of the right to be heard is the right of the affected person to be given reasons, that is, to be informed of the substance of allegations relied upon so that he or she can have an opportunity to controvert such allegations. Without reasons being given the right to be heard may be illusory. See ***Kloppenburg N O v Minister of Justice 1964 (1) SA 813 (D&CLD) at 818B;***

Arepee Industries Ltd v CIR 1993 (2) SA 216 (N) at 220F-I. Put otherwise, the right to be heard entails an opportunity to present a case as well as obtaining all the relevant information to do so. ***See Barkhuizen N O v Independent Communications Authority of South Africa & Another [2002] 1 All SA 469 (E).***

The applicant asserts that according to principles of natural justice he had a right to be heard at the meeting of 12 February 2011. This has been conceded by the respondent.

The only question thus is whether the right has been violated. In my view, it has; and with detrimental or prejudicial effects. Proper invitation to the applicant was required not only to comply with clause 7.5 of the Articles, but also to afford him an opportunity to be heard. He did not receive timeous notice of the meeting. Furthermore, his express written repeated request to be furnished with reasons in advance was simply ignored. While the notice was delivered late, the reasons were never furnished at all. The applicant had also addressed certain correspondence to the respondent in which he set out views in regard to the meeting. Such views were evidently not considered nor distributed at the meeting. This is the very least the respondent could have done. The failure, in the absence of the applicant to distribute and consider the views which he had communicated in

writing, is suggestive of a deliberate intent not to allow any of his views to be known to the members before voting on the motion.

The applicant's right to be heard was violated. The violation was significant, particularly when one has regard to the fact that six (6) of the eleven (11) affiliate representatives (affiliate presidents) who voted on the motion had received open mandates from the bodies they represented to vote on the resolution. The open mandates clearly permitted and required them to hear all representations at the meeting and to make a decision (based thereon) in the best interest of their affiliate bodies and of cricket in South Africa. If the applicant had been heard, the outcome might have been different, particularly having regard to the fact that (a) the motion required two-third majority; and (b) two affiliate representatives in fact already (without hearing him) voted against the motion.

The importance of the right to be heard in the context of this case, for the applicant and for cricket in South Africa, is aptly captured by the applicant in the letter he addressed to his colleagues at CSA on 10 February 2011 when he stated: "After all, an opportunity to at least state your case and hear any adverse evidence is fundamental to our legal system. This was unfortunately not done to the best of my knowledge and I fear ultimately cricket and credible and open cricket administration will suffer."

Finally the respondent argued on the basis of, inter alia, ***Jockey Club of South Africa v Feldman 1942 AD 340 at 355*** and ***Rajah & Rajah (Pty) Ltd & Others v Ventersdorp Municipality & Others 1961 (4) SA 402 (A) at 407H – 408A*** that even if the irregularity may have been established, the court will not grant relief 'if the irregularity caused the party no prejudice' (***Jockey Club*** case) because 'the Court is disinterested in academic situations' (***Rajah & Rajah*** case).

The respondent argued on the basis hereof that the applicant suffered no prejudice, and that this court should accordingly not grant him the relief he seeks. The principle that there has to be prejudice for relief to be granted, as set out in the cases referred to (and followed in others), is indeed correct and is fairly established. See more recently in ***South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board & Others 2001 (2) SA 675 (C) at para 22***. What this court does not accept, however, is that the applicant in this case suffered no prejudice. In my view, the applicant clearly suffered prejudice. He had a right to be heard which is admitted. He was directly affected by the outcome of the resolution. If it was passed, he stood to lose (and did lose) his position both as president and as a director of the respondent. The decision would be made public (as it indeed was); and the public has effectively been told that the respondent had lost confidence in him. These all happened without explaining reasons behind the loss of confidence. It affects his long uninterrupted career as a cricket administrator of approximately thirteen years at provincial, national and international level and in varied fields ranging from medical, human

resources, audit and leadership at national level. The reputation and stature he has earned in that career cannot be insignificant. The respondent has admitted such career as stated in paragraph 9 of the founding affidavit. It should not and ought not to be terminated through unlawful action. The respondent could not legitimately proceed without hearing the applicant in these circumstances. Its actions were unlawful and prejudicial to the applicant and stand to be set aside.

The applicant has argued further that of even greater significance than the applicant's right to be heard according to the ordinary principles of natural justice, is the fact the applicant's right operates for a wider purpose than his own. He refers in that regard to other provisions of the Articles, the provisions of the Companies Act and of the Constitution. The respondent contest the further basis advanced. There is sufficient basis in the legal and factual matrix examined above for the remedy that the applicant seeks. I therefore do not find it necessary to examine the further argument advanced.

It suffices for present purposes to record that this court accepts that there is a public purpose to be served in the protection of the applicant's rights in this matter. This is primarily because of the nature of power that Cricket South Africa exercises, the function it performs and its "*role as custodian of cricket in the Republic and as the national controlling authority for cricket, as well as its new focus on transformation and development of amateur and professional cricket in South Africa*." (See clause 24 of the Articles). The wider purpose is self-evident.

Having regard to the background to the matter and the events that lead to the removal of the applicant from office, it appears to me that the purported removal of the applicant from his position as president and director of the respondent occurred as a consequence of respondent's reluctance to allow a further investigation into the financial management of the affairs of respondent and its failure to pursue breaches of basic principles of corporate governance and transparency. The applicant seeks to ensure that *inter alia* the IPL bonus irregularities are fully investigated and dealt with by the respondent.

> In addition to the main prayers, the applicant seeks an order directing the respondent to furnish him within 10 days with certain information which he requested in annexures "MN26" and "MN28" to the founding affidavit. No reasons were advanced as to why he should not receive such information. He is entitled to receive it.

I accordingly and for reasons already given grant the following order:

> (a) The resolution taken at a special general meeting of the respondent held on 12 February 2011 in terms whereof the applicant was removed from his position as president of the respondent is reviewed and set aside.
>
> (b) The respondent is to reinstate the applicant to the aforesaid position with immediate effect.

(c) The respondent is to reinstate the applicant to the position of the Chairman of the Board of Directors of the respondent with immediate effect.

(d) The respondent is to comply with the applicant's request for information contained in annexures "MN26" and "MN28" to the founding affidavit, within ten (10) days of the date hereof.

(e) The respondent shall pay the costs of this application, which shall include the cost for two counsel.

……
P M MOJAPELO

JUDGE OF HIGH COURT

Counsel for the Applicant: A E Franklin SC and D A Turner

Counsel for the Respondent: P B Hodes SC, M W Collins and D P Borgström

Attorneys for Applicant: McLaren Attorneys, Johannesburg

Attorneys for the Respondent: Dev Maharaj & Associates, Bedfordview