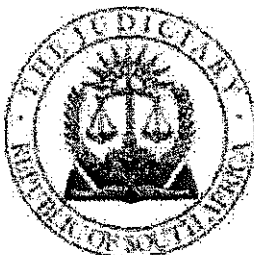
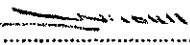


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21/27854

(1) REPORTABLE: YES <input checked="" type="checkbox"/> NO
(2) OF INTEREST TO OTHER JUDGES: YES <input checked="" type="checkbox"/> NO
(3) REVISED.
<div style="display: flex; justify-content: space-between;"> <div>  SIGNATURE </div> <div> 26/7/2021 DATE </div> </div>

In the matter between:

ROYAL AM FOOTBALL CLUB

APPLICANT

and

NATIONAL SOCCER LEAGUE

FIRST RESPONDENT

DOLORES THOKOZILE MADLALA

SECOND RESPONDENT

CHIPPA UNITED FOOTBALL CLUB

THIRD RESPONDENT

RICHARDS BAY FOOTBALL CLUB

FOURTH RESPONDENT

SEKHUKHUNE UNITED FOOTBALL CLUB

FIFTH RESPONDENT

 JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This matter is the latest episode in a long-running court drama involving soccer. The applicant, Royal AM Football Club ("Royal AM"), instituted an urgent application¹ for, amongst other relief, a declarator and a finding of contempt of court against the first respondent, the National Soccer league ("the NSL") and the second respondent, the Acting Chief Executive Officer of the NSL ("the CEO"), respectively. The primary focus of the application, however, is an order reinstating Royal AM to the top of the National First Division log (currently named the GladAfrica Championship), so that it will automatically qualify for promotion to the Premier Division (currently known as the DSTV Premiership).

[2] The NSL is a private association with 32 professional clubs as its members, which conducts its affairs under the name and style of the Premier Soccer League. The NSL is responsible for all aspects of professional football in South Africa, including *inter alia*, the administration, promotion, organisation, control, regulation and governance of all aspects of professional football in South Africa.

[3] The GladAfrica Championship is the second highest division of soccer in South Africa, with the DSTV Premiership the highest. Both leagues are organised by the NSL. At the end of every season, the teams that place second and third in the GladAfrica Championship, and the team that came second last in the DSTV Premiership, have to play a series of playoff promotion/relegation matches ("the playoffs") to determine which team will play in the DSTV Premiership and which two teams will play in the GladAfrica Championship the next season. The team that ends the season in the bottom position on the DSTV Premiership will automatically be

¹ The urgency of the application is not disputed.

relegated to the GladAfrica Championship. The team that ends the season in the top position of the GladAfrica Championship will automatically be promoted to the DSTV Premiership. The winner of the playoffs will participate in the DSTV Premiership in the following season while the other two teams will play in the GladAfrica Championship the following season.

[4] In the 2020/2021 season, which has now ended, the teams in the GladAfrica Championship included Royal AM; the fifth respondent, Sekhukhune United Football Club ("Sekhukhune FC"); and Polokwane City Football Club ("Polokwane City").

[5] The entire controversy in this matter started with an arbitration award granted by Advocate Epstein SC ("the Epstein award"). The effect of the Epstein award was to place Sekhukhune FC at the top of the GladAfrica Championship log and Royal AM, second. Because, as a result of the Epstein award, Royal AM moved from its previous first place position on the log, to the second place position, Royal AM joined the urgent review proceedings before this court, instituted by Polokwane City in May 2021, to set aside Epstein's award.

[6] Before I turn to the urgent review proceedings, it is necessary to take a step back and briefly set out the events that led to review and the current application. On 2 January 2021, a GladAfrica Championship match was played between Polokwane City and Sekhukhune FC. Prior to the game, Sekhukhune FC lodged a protest in terms of the NSL's rules as Polokwane City's team did not include a minimum of 5 players under the age of 23. Polokwane City elected to continue with the match regardless, with only four under 23 players on its team sheet. Polokwane City won the match 1-0. Sekhukhune FC was understandably aggrieved, and followed up the protest with the NSL. As a result, Polokwane City was charged and brought before the Disciplinary

Committee ("the DC"). The hearing before the DC eventually took place on 28 and 29 April 2021. On 7 May 2021, the DC found that Polokwane City had violated Rule 35.2 of the NSL Handbook and imposed what is known as a "deduction of points" and a suspended fine against Polokwane City. The deduction sanction essentially meant that Polokwane City was stripped of the three log points it received from the disputed match.

[7] Sekhukhune FC appealed the sanction on 7 May 2021. An internal appeal against the DC's decision served before an arbitrator appointed by the South African Football Association ("SAFA"), Advocate Hilton Epstein SC. On 19 May 2021, Advocate Epstein SC handed down his award, which confirmed the substantive findings of the DC ("the Epstein award"). But, instead of merely ordering the deduction of points from Polokwane City, the Epstein award declared that Polokwane City had forfeited the disputed match to Sekhukhune FC with a score-line of 3-0. This, in effect, meant that Polokwane City would not only lose the three points they had initially earned from the disputed match on the GladAfrica Championship log, but that Sekhukhune FC would be granted three points on the log.

[8] The Epstein award was not immediately implemented by the NSL as there was uncertainty regarding the powers of its DC and appellate bodies. The final matches of the regular 2020/2021 GladAfrica Championship, however, proceeded on Sunday, 23 May 2021. Royal AM drew its final match 1-1; and Sekhukhune won its match 3-1. After these matches, and without taking into consideration the effect of the Epstein award, the log indicated that Royal AM topped the log, with a total of 51 points; and Sekhukhune FC came second, with a total of 50 points. Polokwane finished the season in twelfth position, well out of the running. But, if the Epstein award were to be

implemented, Sekhukhune FC ended the season at the top of the log, with a total of 53 points, and Royal AM dropped to second position, with a total of 51 points. Polokwane City's position would remain unchanged.

[9] On 23 May 2021, the NSL issued a press statement indicating that it had been threatened with review proceedings and that the GladAfrica Championship trophy handover would be postponed. Sekhukhune FC, on the other hand, demanded that the Epstein award be implemented. On 24 May 2021 Polokwane City launched a review application, on an urgent basis, to challenge the Epstein award and to reinstate the ruling and sanction of the DC. On 25 May 2021, Royal AM sought to intervene as co-applicant and the NSL brought a counter-application raising the legal question of whether the sanction of forfeiture was mandatory or not.

[10] The review application came before Sutherland DJP on 11 June 2021. Polokwane City failed to file further papers or heads of argument as required, and failed to be present in court at the hearing of the matter. On Saturday morning, 12 June 2021, Sutherland DJP granted an order dismissing the challenge to the Epstein award and granted the counter-application ("the Sutherland order"). He indicated that the reasons would follow later. The NSL immediately issued a press release implementing the Epstein award which meant that Sekhukhune FC overtook Royal AM and took the first place on the GladAfrica Championship log. This also meant that Sekhukhune FC would automatically go through to the DSTV Premiership Championships and Royal AM, Chippa United Football Club, and Richards Bay Football Club (the third and the fourth respondents respectively) had to play in the playoffs to determine which team would go through to the DSTV Premiership.

[11] On Sunday, 13 June 2021, Royal AM filed an application for leave to appeal the Sutherland order and also instituted urgent court proceedings to, *inter alia*, suspend the playoffs scheduled for 15 June 2021. The urgent application served before Nyathi AJ on Monday, 14 June 2021. After hearing the parties, Nyathi AJ granted an order, suspending the playoffs pending the outcome of the application for leave to appeal and/or appeal of the Sutherland order and also declared the NSL's conduct "*inconsistent with the Constitution and/or PAJA*² " ("the Nyathi order").

[12] On 15 June 2021, the judgment and reasons for the Sutherland order was made available to the parties. On the same day, the NSL filed an application for leave to appeal against the order of Nyathi AJ, save for the determination of urgency. This application for leave to appeal is still pending.

[13] On Friday, 18 June 2021 the application for leave to appeal against the Sutherland order was heard. Leave to appeal was refused. Royal AM immediately filed a petition to the Supreme Court of Appeal ('the SCA').

[14] The playoffs went ahead on 19 June 2021 and were finalized on 30 June 2021. Royal AM elected not to participate. Chippa United FC was victorious which meant that Chippa United FC, along with Sekhukhune FC, was promoted to the DSTV Premiership.

[15] All of the above happened in the space of one week. It is in this context that Royal AM instituted these urgent court proceedings on 29 June 2021 and set it down for hearing on in the urgent week of 13 July 2021. Royal AM contends that as a result of the Nyathi order and the petition to the SCA against the Sutherland order, the "*status*

² The Promotion of Administrative Justice Act 3 of 2000 (the PAJA).

quo” must be restored (pre-arbitration award) and it should be declared that Royal AM is on top of the log. In other words, it suggests that everything must remain frozen until the SCA can decide the application for leave against Sutherland’s order, and telegraphs its intentions that if that is refused, it will take the matter to the Constitutional Court. The first, second and fifth respondents oppose the current urgent application.

[16] Before I deal with the merits of the current application, there is one preliminary issue that is raised by the applicant. Royal AM set the matter down for hearing in the urgent court on 13 July 2021. In doing so it imposed a deadline for the filing of answering papers of 5 July 2021. Sekhukhune FC did not file its answering affidavit in time, and only filed its papers on 8 July 2021, resulting in a delay of 3 days. Sekhukhune FC applies for condonation for its failure and contends that the delay was as a result of one counsel, who was tasked with drafting the answering papers, being unavailable because of health reasons. It is submitted that the short delay in filing the answering affidavit cannot have caused any party any prejudice.

[17] In determining whether condonation should be granted, the court assesses the reasonableness of the application within the broader framework of considering the length of the delay, explanation for, or cause of the delay, prospects of success for the party seeking condonation, importance of the issues that the matter raises, prejudice to the other parties and the effect of the delay on the administration of justice.³ Taking into consideration that this is urgent court proceedings, in which the time limits have been shortened, involving the same parties as in previous court proceedings, dealing with more or less the same issues, I am satisfied that the explanation advanced for the delay is reasonable. The delay is not long and has not prejudiced Royal AM or any

³ Turnbull-Jackson v Hibiscus Coast Municipality 2014 (11) BCLR 1310 (CC)

of the other parties before this court. Sekhukhune FC has a material interest in the outcome of these proceedings and it should not be deprived of the opportunity to be heard. It is in the interests of justice to condone the late filing of its answering affidavit.

THE CURRENT APPLICATION

[18] The following relief is sought in the notice of motion:

"2. Rescinding and/or varying orders 3 and 4 granted by the Honourable Nyathi AJ to read:

*"3. Granting an interim order pending the final determination of Royal AM's application for leave to appeal **and/or appeal** the commencement of the 2021 GladAfrica Promotion/Relegation Playoffs is suspended'.
(The words and/or appeal were omitted in the written judgment)*

3. Declaring that:

3.1. pending the finalisation of the NSL's application for leave to appeal lodged in terms of section 17(1)(a) of the Superior Courts Act and/or any subsequent appeals and in terms of section 18(1) read with section 18(3) of the Superior Courts Act, paragraph 2 of the Nyathi AJ order to be operational and enforceable;

3.2. pending the finalisation of Royal AM's application for leave to appeal against the Sutherland DJP order, lodged in the Supreme Court of Appeal in terms of section 17(2)(b) of the Superior Courts Act, the NSL's decision to remove Royal AM from the number one spot on the GladAfrica Championship log has continued to remain suspended in terms of section 18(1) read with section 18(3) of the Superior Courts Act and/or the interim order issued by Nyathi AJ; and/or

3.3. the applicant remains the lawful occupant of the first position in the GladAfrica Championship log until lawfully removed; and/or

3.4. the first respondent is in contempt of court in respect of the Honourable Nyathi AJ order.

4. Ordering that the second respondent be committed to imprisonment for a period of 30 days, wholly suspended, on condition that she forthwith gives effect to the orders sought in prayer 3.4 above.

5. In the alternative to prayer 4 above, ordering:

5.1. the second respondent be committed to imprisonment for a period of 30 days, alternatively, for such period as the Court deems appropriate; and/or

5.2. that a warrant of committal is to be issued by the Registrar of this Honourable Court pursuant to an order of this Honourable Court duly granted, on the same papers, and duly supplemented as necessary, in the event of the first or second respondents' failure to purge the contempt of court referred to in prayer 3.4 above.

6. Costs on the attorney and own client scale."

[19] As can be seen from the recourse sought here above, the applicant seeks an array of relief in the notice of motion. In its replying affidavit, Royal AM has proposed a "short cut" and suggests, as a way forward, that the court focusses on certain pertinent "questions".⁴ The issues raised in the questions are, however, much broader than the relief sought in the notice of motion. In my view the dispute between the parties ultimately crystallizes into a more narrow legal issue, namely, the status and effect of three "orders", namely the Nyathi order, the Sutherland order and the Epstein award. To achieve a fair and disciplined hearing, I intend on approaching the matter by analysing the three "orders" and how it impacts Royal AM's urgent application, and then to deal with each of the prayers for relief sought in the notice of motion.

⁴ Paragraph 12.1 What is the automatic legal effect of a declaration of unconstitutionality issued by Nyathi AJ in order 2 and in terms of section 172(1)(a) of the Constitution? 12.2 What is the relationship between the declarator referred to above and the suspension order which was granted by Nyathi AJ in (the varied) order 3? 12.3 Can the effect of the declaration of unconstitutionality and invalidity (order 2) be "resurrected" by the application for leave to appeal against it, which was lodged by the first respondent on 15 June 2021, ie in terms of section 18 of the Superior Courts Act? 12.4 Can the suspension order be "suspended" by the same application for leave to appeal referred to at 12.3 above? 12.5 Does the suspension of a decision envisaged in section 18 of the Act operate immediately and/or retrospectively? Can the NSL escape from its anticipated stance that the Epstein SC order is initiated by material error of law in terms of section 6(2)(d) of PAJA? 12.7 Did the NSL create a legitimate expectation that a hearing would be afforded to Royal AM before it could be removed from the number one spot in the GladAfrica Championship log? What is the correct interpretation of order 3 of the Nyathi AJ order? 12.9 Did the NSL and/or The CEO, separately or in concert, breach or fail to comply with the Nyathi AJ order? 12.10 If so, what are the legal consequences and/or suitable sanctions which must follow?

THE NYATHI ORDER

[20] It is common cause that the application to review the Epstein award was dismissed by Sutherland DJP on Saturday 12 June 2021. Royal AM contends that what followed after the issuing of the Sutherland order and before the issuing of the Nyathi order, lies at the heart of the present application.

[21] On the same day (12 June 2021) and within an hour or two after the Sutherland order was granted, the NSL issued a media statement. It announced that the review against the two SAFA Arbitration Tribunal awards handed down by Advocates Epstein and Cassim SC (the latter award is not relevant to the current proceedings) which impacted the final log standings, were dismissed by Sutherland DJP, *“and as a consequence, Sekhukhune FC has secured automatic promotion to the DSTV Premiership for the next season while Chippa FC, Royal AM and Richards Bay Football Clubs will contest the promotion/relegation playoffs which will commence on the 15th of June 2021...”*

[22] The NSL proceeded to implement the Epstein award by updating the GladAfrica Championship log and relegating Royal AM from the number one spot to the second spot on the log, thereby requiring Royal AM to participate in the playoffs. It also issued a fixture of the playoff games scheduled to commence at 15h00 on Tuesday, 15 June 2021. Royal AM contends that, this resulted in certain “impugned conduct” by NSL.

[23] As a consequence of this, on 13 June 2021, at about 23h00, Royal AM launched an urgent application in which it sought an order: (1) declaring NSL’s conduct “inconsistent with the constitution and/or PAJA”; (2) granting an interim order that pending the final determination of the application for leave to appeal and/or appeal, the commencement of the 2021 GladAfrica promotion/relegation playoffs be

suspended; and (3) that the operation and implementation of the Epstein award is suspended. The NSL, Sekhukhune United FC and Richards Bay FC opposed the application.

[24] On 14 June 2021, Nyathi AJ issued the following order:

"IT IS ORDERED THAT:

2.The first respondent's conduct is inconsistent with the constitution and/or PAJA.

3.An interim order is granted that pending the final determination of the application for leave to appeal/or appeal.

4.The commencement of the 2021 GladAfrica promotion/relegation playoffs is suspended."

[25] On 15 June 2021, the NSL announced that the 15 June 2021 playoff fixture was postponed and released a new fixture in respect of which the playoffs would commence on Thursday, 17 June 2021. On 16 June 2021, Royal AM, through its attorneys addressed a letter to the NSL and its representatives, demanding an undertaking that it will, *inter alia* "refrain from committing any further conduct or issuing statements and/or documents which are in contempt of court; make a public statement indicating that it will comply with the above and the law, and that no playoffs will be played in breach of the Nyathi AJ order."

[26] On 17 June 2021, the NSL, through its attorneys, replied to Royal AM's letter in which it denied that it had breached the Nyathi order, but stated that because of the dispute between the NSL and Royal AM about the correct interpretation of the Nyathi order, the commencement of the 2021 GladAfrica playoff matches between Chippa United FC and Richards Bay FC, scheduled for 15h00 that afternoon, would be postponed. On the same day, the NSL also issued a media statement announcing the

postponement of the 17 June 2021 playoffs. During the evening of Friday, 18 June 2021, Royal AM's application for leave to appeal the Sutherland order was heard. The application for leave to appeal was dismissed. A petition to the SCA was filed immediately.

[27] The playoffs commenced on Saturday, 19 June 2021 and were finalized on 30 June 2021.

[28] Nyathi AJ's written judgment, which included the reasons for his order was delivered on 21 June 2021. Notably, the words "and/or appeal" in paragraph 3 of the original order, were omitted from the order in the written judgment. All the parties are *ad idem* that the Nyathi order must be interpreted by not only having regard to the order granted, but also to the reasons for the order in the written judgment. In the judgment Nyathi AJ held as follows:

"[70] FINDINGS

I am persuaded that the applicant has made out a case for the granting of interim interdict, pending the application before his Lordship Sutherland DJP. I make the following order:

"HAVING read the documents filed of record and having heard the submissions by Counsel:

— IT IS ORDERED THAT:

- 1. The application be heard and determined as one of urgency as contemplated by Rule 6(12) of the Rules of Court.*
- 2. The first respondent's conduct is inconsistent with the constitution and/or PAJA.*
- 3. An interim order is granted that pending the final determination of the application for leave to appeal.*
- 4. The commencement of the 2021 GladAfrica promotion/relegation playoffs is suspended."*

Prayer 3

[29] Royal AM relies on the decision in *National Gambling Board v Premier, Kwa-Zulu Natal and Others*⁵ and contends that paragraph 3 of the order is an interim order, intended to restore the *status quo* before the Sutherland order was made namely, where Royal AM was the automatic qualifier at the top of the GladAfrica Championship log. It is submitted that the intention of the interim order was also to suspend the playoffs, not only until the application for leave to appeal of the Sutherland order was finalized, but until all appeals and the "rights of the parties have finally been determined". It is further submitted that as paragraph 3 of the order is interim, the operation of the interim order was not suspended by merely filing the application for leave to appeal. It is contended that the NSL was required to obtain an order in terms of section 18(2) of the Superior Court's Act prior to proceeding with the playoffs.

[30] It is trite that the wording of an order is not dispositive and that regard must be had to the effect of an order when assessing its true character. In *Metlika Trading v Commissioner, South African Revenue Service*,⁶ the High Court had granted an "interim order" in terms of which one of the appellants was ordered to take all necessary steps to procure the return of an aircraft to South Africa. The SCA held as follows:

"The order that steps be taken to procure the return of the aircraft to South Africa, as well as the other orders relating to the aircraft, were intended to have immediate effect, they will not be reconsidered at the trial and will not be

⁵ 2002 (2) SA 715 (CC)

⁶ 2005 (3) SA 1 (SCA)

reconsidered on the same facts by the court a quo. For these reasons, they are in effect final orders"

[31] Recently in *Minister of COGTA v De Beer*⁷, the SCA reiterated that an order is final if it is not subject to reconsideration by the court.⁸

[32] Paragraph 3 of the order of Nyathi AJ will never be reconsidered by this court. The judgment of Nyathi AJ and paragraph 3 of his order is therefore, in my view, clear. Although framed by Nyathi AJ as being interim, paragraph 3 of the order is a final interdict granted for a limited time.

[33] In the original order the "interim order" was said to apply "pending the final determination of Royal AM's application for leave to appeal and/or appeal". In the written reasons of Nyathi AJ, the "interim order" was said to apply "pending the final determination of Royal AM's application for leave to appeal" (i.e. the words "and/or appeal" do not appear). The order granted by Nyathi AJ was plainly meant as a short-term measure which would suspend the playoffs, until Sutherland DJP could hear Royal AM's application for leave to appeal. The "interim order" therefore came to an end when Sutherland DJP refused leave to appeal on 18 June 2021.

[34] As stated, Nyathi AJ removed the words "or an appeal" in his written judgment. Royal AM attempts to latch onto this, and suggests that if these words are re-introduced, the effect is that the "interim relief" applies until every conceivable application for leave to appeal and/or appeal is exhausted. In other words, it reads the order as a licence for it to stop all professional football for as long as it takes. This was

⁷ [2021] ZASCA 95 (1 July 2021) para 77

⁸ See also *Phillips v NDPP* 2003 (6) SA 447 (SCA) para 20

clearly not the intention of the Nyathi order. The intention could only have been that the relief may have been extended had Sutherland DJP granted leave to appeal – which did not happen. But even if it was intended to extend beyond the application for leave to appeal, as suggested by Royal AM, then the interdict is final in effect – as it will inevitably and completely stop the 2021/2022 football season from commencing. In this event, the NSL's application for leave to appeal against the Nyathi AJ order, suspends the order as it falls within the ambit of section 18(1) of the Superior Courts Act. This means that, when the NSL lodged its application for leave to appeal against the order of Nyathi AJ on 15 June 2021, the operation and execution of paragraph 3 of the order of Nyathi AJ was suspended. It continues to be suspended at the present time.

[35] Nothing of substance, however, turns on the difference in wording between the *ex tempore* order and the written order. It is clear from the terms of either version of the order, read with the reasons, that once Royal AM's application for leave to appeal was dismissed on 18 June 2021 by Sutherland DJP, there was no longer any "interim order" that restrained the commencement of the playoffs. Nyathi AJ made this plain in his reasons when he said that he has "*exercised care not to prejudice the matter that is pending before Deputy Judge President Sutherland. [Royal AM] is apprehensive that if it submits to the [NSL's] instructions, and participate in the playoffs and lose, it may forfeit the right to promotion it had secured. If [Royal AM] were to succeed in the pending matter before the DJP, how will [the NSL] then unscramble the scrambled egg to reverse the decisions it has taken?*"

[36] The relief in paragraph 3, granted in favour of Royal AM, tracked the formulation in Royal AM's notice of motion. Read with the affidavits filed by Royal AM itself, it is

clear that this relief was intended by Royal AM to remain in place only until Sutherland DJP could hear Royal AM's application for leave to appeal against the order of 12 June 2021 and any appeal in the event that leave was granted. The relief proposed by Royal AM in the current application essentially seeks to re-interpret Nyathi AJ's order as a much bolder, braver move, designed to operate for a much longer period, until every conceivable application for leave to appeal to every higher court was exhausted and until any appeal was finalised. Royal AM, by exhausting all applications for leave to appeal to all possible higher courts, or any appeals, would obviously take a considerable amount of time. This relief would prevent the finalisation of the 2020/2021 football season, which would in turn mean that the 2021/2022 season could not start.

[37] Nyathi AJ clearly did not intend any outcome of this kind, which would have far-reaching consequences for all professional football teams in the DSTV Premiership and GladAfrica Championship. It is clear from the judgment that the learned judge was alive to the fact that the substantive issues were serving before Sutherland DJP in a more considered manner and that his role was merely to ensure that nothing irreversible happened before the proceedings before Sutherland DJP were wrapped up. Any other interpretation of the order will mean that Nyathi AJ had established at least a *prima facie* right that would apply even if Sutherland DJP were in due course to find that Royal AM had no prospect of success on appeal. That would have required Nyathi AJ to find that Sutherland DJP would be wrong if he were to refuse leave to appeal. Understandably, this formed no part of the reasoning of Nyathi AJ.

[38] For any of the reasons set out above, the Nyathi AJ order suspended the commencement of the playoffs pending the final determination of the application for

leave to appeal and/or appeal. Therefore, the playoffs that were scheduled for 15 June 2021, could not commence. There was, however, no order interdicting the commencement of the playoffs when the games began on 19 June 2021.

Paragraph 2 of the Nyathi order

[39] In prayer 3.1. to 3.3 of the notice of motion in the current application, Royal AM asks an order in the following terms:

- "1. Paragraph 2 of the Nyathi AJ order to be operational and enforceable pending the finalisation of the NSL's application for leave to appeal against the Nyathi order;*
- 2. That the NSL's decision to remove Royal AM from the number one spot on the GladAfrica Championship log remain suspended, pending the finalisation of Royal AM's application for leave to appeal against the Sutherland DJP order;*
- 3. That the applicant remains the lawful occupant of the first position in the GladAfrica Championship log until lawfully removed."*

[40] The basis for the relief sought in prayer 3 in the notice of motion is essentially paragraph 2 of the Nyathi order. It is therefore necessary to carefully examine the status and effect of paragraph 2 of the Nyathi order, as it is instrumental in determining whether Royal AM is entitled to any of the relief sought.

The effect of paragraph 2

[41] In paragraph 2 of the Nyathi order, the court declares *"conduct of the NSL inconsistent with the constitution and/ or in contravention of PAJA."* The declaratory order is imprecise, but from a perusal of the notice of motion in that matter, in so doing, Nyathi AJ merely adopted the phrasing of the relief sought by Royal AM. Understood

in the context of the pleadings in the proceedings before Nyathi AJ, this relief could only refer to the “impugned actions” (referred to earlier in the judgment) taken by the NSL on 12 June 2021 to implement the Epstein award, following immediately upon the Sutherland order. The “impugned actions” were taken prior to the urgent application before Nyathi AJ was instituted, before Sutherland DJP gave his reasons for the dismissal of the review and before the application for leave to appeal was dismissed.

[42] Royal AM submits that paragraph 2 of the order of Nyathi AJ had the effect of reinstating Royal AM to the top spot in the GladAfrica Championship. Royal AM's reliance on the declaratory order to justify this argument is misconceived.

[43] In terms of section 172(1) of the Constitution, the court has two distinct powers: It must declare conduct which is unlawful to be so (section 172(1)(a)); and it may make a consequential order which is “*just and equitable*” (section 172 (1)(b)). Nyathi AJ was only asked to make a declaratory order, and that is all it did. At most the court found that the actions of the NSL on Saturday, 12 June 2021, was “*inconsistent with the constitution and/ or PAJA*”. It was not asked, and the court did not take the further step of also setting that conduct aside, or even declaring it invalid.

[44] Declaratory relief that specified conduct is unlawful does not automatically translate into a finding that the conduct is set aside. This is clear from section 8(1)(c) of PAJA, which highlights that setting aside a decision is one of several consequential “just and equitable” orders which a court may make. The court has a discretion to allow unlawful conduct to stand. This is done based on the dictates of certainty and justice; where the relief would not have any practical effect; where third parties have based their affairs on the lawfulness of the decision and would be prejudiced if it were set aside; where the relief would cause a financial loss without any potential benefit; where

striking down a decision would have domino-effect on subsequent decisions; or where the administrative “slip” does not justify judicial sanction.⁹ This accords with the approach followed in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*,¹⁰ in which the Constitutional Court highlighted that the power to declare unlawful conduct to be so, was mandatory. It could not be avoided on the basis that it would be inappropriate to grant consequential relief. A declaration of unlawfulness must thus be made first, and thereafter consequential, discretionary relief may (or may not) be considered. But the fact that a declaration of unlawfulness is given does not mean that consequential relief – including relief setting aside the unlawful action – must follow. Consequential relief must be sought and granted, in the discretion of the court. Thus, even if this court pronounces that Nyathi AJ’s declaratory relief still stands and is effective, the fact remains that the NSL’s actions (taken on 12 June 2021) to implement the Epstein award were never actually set aside or declared invalid. On the contrary, Nyathi AJ specifically elected to leave the Epstein award in place, and did not grant the relief sought by Royal AM to suspend the validity and effectiveness of the award pending any further leave to appeal or appeal processes.

[45] But even if one assumes, for the sake of argument, that the NSL’s actions on 12 June 2021 were declared invalid and set aside, the declaratory relief granted by Nyathi AJ, related to the specific action taken by the NSL on 12 June 2021 to implement the Epstein award. The circumstances under which the relief was granted had been superseded by subsequent events. The application for leave to appeal was heard and

⁹ *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) at para 21.

¹⁰ 2011 (4) SA 113 (CC) at para 84

dismissed by Sutherland DJP; the NSL subsequently took new action thereafter to implement the Epstein award, **and** the playoffs were finalized on 30 June 2021.

[46] Based on the declaratory relief granted by Nyathi AJ, Royal AM now seeks extended relief (particularly that in paragraphs 3.2 and 3.3 of the notice of motion) which is aimed at holding in place the GladAfrica Championship log positions as they would have been if the Epstein award is ignored (pending processes to challenge the Epstein award). But this is plainly not what the limited relief granted by Nyathi AJ required, or what it sought to achieve.

The status of paragraph 2

[47] All the parties are in agreement that the relief granted by Nyathi AJ in paragraph 2 is a final order. The NSL filed an application for leave to appeal against the Nyathi order and contends that the order is automatically suspended in terms of section 18(1) of the Superiors Court Act. Royal AM disagrees. It contends that it is not legally tenable to argue that that institution of the application for leave to appeal somehow “breathed” life back into and “resurrected the nullity that was the unlawful removal or eviction” of Royal AM from the number one spot. More so because the alleged resurrection was still performed without a hearing and in breach of all the other constitutional rights which had been invoked before Nyathi AJ and underlied the declaration of unconstitutionality and/or invalidity.

[48] Royal AM’s submission in this regard is misconceived. The order in paragraph 2 is a final order. I have no doubt that NSL’s application for leave to appeal suspends the Nyathi order in this regard.

THE SUTHERLAND ORDER

[49] Sutherland DJP dismissed the application to review and set aside the Epstein award. The subsequent application for leave to appeal was also dismissed. It is common cause that Royal AM has now petitioned the SCA.

[50] Royal AM contends that when it applied to the High Court for leave to appeal against the Sutherland order and subsequently petitioned the SCA for leave to appeal, it had, as a matter of law and in terms of section 18 of the Superior Courts Act, the effect of "suspending the implementation of the Epstein award" and "reinstating Royal AM to the top of the GladAfrica Championship".

[51] Relying on the judgment in *Department of Transport and Others v Tasima (Pty) Ltd; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others*,¹¹ and *Ntlemeza v Helen Suzman Foundation and Another*,¹² Royal AM contends that section 18(1) reiterates the common law position to the effect that the operation or execution of a judgment is suspended when there is an application for leave to appeal or an appeal. What ultimately happens to the suspended operation or execution of a judgment subject to an appeal process would be determined by the outcome of the appeal. If the appeal is unsuccessful the suspension would cease, unless of course, "a further application for leave to appeal is made". It is submitted that *Tasima* made it clear that the purpose of the section 18 regime was to ensure that it would only fall away "once no further application for leave to appeal is made or all appeal avenues have been exhausted."

¹¹ [2018] ZACC 21; 2018 (9) BCLR 1067 (CC) para [52].

¹² 2017 (5) SA 402 SCA para [28].

[52] The facts in *Tasima* and *Ntlemenza* referred to above, are wholly distinguishable from the facts in the current application. The matter of *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd*¹³, however, is applicable and relevant to the current application. In *Snow Delta*, the SCA dealt with the implication of an appeal against the dismissal of an application. Harms JA held "*that an order of absolution from the instance or dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied*" (emphasis added).¹⁴ More recently, Opperman J, in the matter of *Cotty v Registrar of the Council for Medical Schemes*,¹⁵ held that it is not possible to "restore what never was" and stated as follows:

"... the result in *Resolution Health* is consistent with the common-law rule and the application of section 18(1) of the Superior Courts Act 10 of 2013 to appeals against the refusal to confirm a rule nisi or grant an order conferring some benefit. An appeal cannot give rise to a confirmation of the rule nor to an order confer in the benefit. An appeal cannot restore what never was."

[53] Royal AM submits that as far as the respondents rely on the "*inapplicable and distinguishable principles set out in the MV Snow Delta case*" this court should rather adopt "*the more recent and preferable approach*" adopted in the *Uitzig Secondary School Governing Body and Another v MEC for Education, Western Cape*¹⁶ judgment, in which Masuku AJ took a different approach. The court in *Uitzig* considered section 18(1) and held that an application for leave to appeal did suspend the decision which

¹³ 2000 (4) SA 746 (SCA).

¹⁴ Confirmed by the SCA in *National Director of Public Prosecutions v Rautenbach and Others* 2005 (4) SA 603 (SCA) para 12

¹⁵ [2021] All SA 793 (GP) para 58

¹⁶ 2020 (4) SA 618 (WCC).

was unsuccessfully sought to be reviewed.¹⁷ It is argued that the approach in *Uitzig* accords better with the real purpose of section 18 (read with sections 9 and 34 of the Constitution), which is to give maximum protection to appellants and would-be appellants, failing which their right of appeal may ring hollow. To that extent, the court is required to grant the declarator sought at payer 3.2 in terms of section 21(1)(c) of the Superior Courts Act.

[54] In other words, this court must find that, despite the fact that Sutherland DJP had dismissed its review of the Epstein award, Royal AM's application for leave to appeal had nonetheless somehow given Royal AM the relief it sought in the review, namely, that the Epstein award would not operate? This argument, and the judgment in *Uitzig*, is directly at odds with the binding authority of the SCA in *Snow Delta*, and would have the effect that the dismissal of the review application would somehow confer some benefit to Royal AM, in this instance to get Royal AM to where it wants to be, namely, at the top of the GladAfrica Championship.

[55] I do not intend to follow the decision in *Uitzig*. Sutherland DJP had dismissed the application to review the award of Epstein SC. There was accordingly nothing that could be "suspended" by Royal AM's application for leave to appeal against the order of Sutherland DJP. It follows that Royal AM's petition for leave to appeal against the order of Sutherland DJP also does not entitle it to the declaratory relief it seeks in the current application, namely reinstating it as the "*lawful occupant of the first position in the GladAfrica Championship until lawfully removed.*"

[56] It must be kept in mind that Nyathi AJ did not grant the suspension of the Epstein

¹⁷ At paras 12, 13 and 17a.

Award. That is fatal to the case now advanced by Royal AM.

THE EPSTEIN AWARD

[57] At the heart of the current application is an attempt by Royal AM to compel the NSL to ignore the sanction imposed in the Epstein award.

[58] As held in *Ndoro and Another v South African Football Association and Others*,¹⁸ the Epstein award is an exercise of “administrative action” as defined in the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). As such the well-established principle applies that the Epstein award must be respected, and treated as valid, unless and until it is set aside. The NSL has no discretion in implementing the Epstein award. Its role is merely one of implementation.

[59] This is akin to the situation in *Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others*¹⁹. In that case a statutory Commission made a final decision (regarding the identity of the rightful king of a traditional community), which had to be implemented by the President. The question arose whether any further procedure was required by the President before he implemented the decision. The Constitutional Court noted that implementation meant putting a decision into effect and held as follows with regard to the President’s implementation role:

“This necessarily means that it is not envisaged that anybody or functionary will have any role to play or any decision or step to take between the time when the decision reaches the President and the time when it is implemented by the President. As long as the decision of the Commission stands, the President

¹⁸ 2018 (5) SA 630 (GJ)

¹⁹ 2018 (12) BCLR 1525 (CC) 12 at para 25.

may also not do anything inconsistent with the notion of 'immediate implementation' of the decision of the Commission."

[60] The Epstein award remained in place, as a final and binding determination, which had to be respected by all parties. The NSL had no discretion to refuse to implement the award. As such, the sanction it imposed (including the award of log points to Sekhukhune FC) remained in place, and had to be implemented.

THE RULE 42(1)(b) APPLICATION (PRAYER 2)

[61] On 14 June 2021, Nyathi AJ granted an ex-tempore order that mimicked the relief sought by Royal AM in prayers 1, 2 and 3.1 of its notice of motion. On 21 June 2021, Nyathi AJ handed down the written judgment and order. The order contained therein is different from the order granted *ex tempore* on 14 June 2021, in that the words "and/or appeal" was omitted.

[62] Royal AM seeks an order rescinding and/or varying orders 3 and 4 granted by Nyathi AJ to read:

*"3. Granting an interim order pending the final determination of Royal AM's application for leave to appeal **and/or appeal** the commencement of the 2021 GladAfrica Promotion/Relegation Playoffs is suspended".*

[63] Rule 42(1)(b) provides that the court may rescind or vary an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. The purpose of the rule is "*to correct expeditiously an obviously wrong judgment or order*".²⁰ In *Firestone South Africa (Pty) Ltd v*

²⁰ *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471 E-F.

*Gentiruco AG*²¹, the court dealt with its power to supplement or amend its findings in contradistinction to its orders:

"The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. . . . This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance."

[64] In *West Rand Estates Ltd v New Zealand Insurance Co Ltd*,²² Kotzé JA stated:

"The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced."

[65] The court has a discretion whether or not to grant an application for variation. Royal AM contends that this court should exercise its discretion in favour of the variation for the *"obvious reason that there is a patent error in the order"*.

[66] There is no opposition by any of the respondents to this relief being granted. As alluded to above, it makes no material difference to the outcome whether the first or the second version of the interdict of the Nyathi order is found to be the correct formulation. However, Royal AM must still persuade this court that it is entitled to the relief sought in prayer 2.

[67] The founding affidavit does not make out a case in support of the bald averment that this was a *"patent error"* (founding affidavit para 92) and an *"actionable ambiguity"*

²¹ 1977 (4) SA 298 (A) at 307C--G

²² 1926 AD 173 at 186--7.

(founding affidavit para 92). Indeed, Royal AM itself appears to harbour doubts on this score, since the founding affidavit contends that Nyathi AJ had no “jurisdiction” to alter his *ex tempore* order in circumstances where he was “*functus officio*” (founding affidavit para 94). The contention that Nyathi AJ sought to amend his earlier order in circumstances where he had no competence to do so, is inconsistent with the contention that the change in wording was a “patent error”, within the meaning of Rule 42(1)(b).

[68] In the result the allegations that the error was “patent” or that there was an “actionable ambiguity” are not supported by any facts. The applicant failed to make out a case for the amendment of the order.

EXECUTION OF DECLARATORY ORDER (PRAYER 3.1)

[69] In prayer 3.1 of the notice of motion, Royal AM seeks an order “declaring” that “pending the finalisation of the NSL’s application for leave to appeal lodged in terms of section 17(1)(a) of the Superior Courts Act and/or any subsequent appeals and in terms of section 18(1) read with section 18(3) of the Superior Courts Act, paragraph 2 of the Nyathi AJ order to be operational and enforceable [sic]”.

[70] As stated above, paragraph 2 of the Nyathi order does not give any relief consequential upon the declarator. Royal AM’s submission that if prayer 3.1 were to be granted, this would in some mysterious way have the effect of restoring Royal AM to the top spot of the GladAfrica Championship, is therefore misconceived. For this reason alone, the relief sought in prayer 3.1 should be dismissed.

[71] But there is in any event no basis for the relief sought in prayer 3.1, because Royal AM failed to meet the requirements for such relief. In *University of the Free State v*

*Afriforum and Another*²³, the SCA stated that the requirements introduced by sections 18(1) and (3) are more onerous than those of the common law. In comparing the present position with the previous one, Fourie AJA held as follows:

“Apart from the requirement of ‘exceptional circumstances’ in s 18(1), s 18(3) requires the applicant ‘in addition’ to prove on a balance of probabilities that he or she ‘will’ suffer irreparable harm if the order is not made, and that the other party ‘will not’ suffer irreparable harm if the order is not made. The application of rule 49(11) required a weighing-up of the potentiality irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted.”

Exceptional circumstances

[72] Section 18(1) of the Superior Courts Act requires Royal AM to prove the existence of “exceptional circumstances”. It is trite that each case has to be decided on its own facts and that it is not possible to lay down precise circumstances that are to be regarded as exceptional.²⁴

[73] The following factors have been cited by Royal AM as exceptional circumstances warranting the envisaged order of execution:

²³ 2018 (3) SA 428 (SCA)

²⁴ In *Avnit v First Rand Bank Limited* [2014] ZASCA 132

1. The declaration of unconstitutionality in paragraph 2 of the Nyathi order. Royal AM contends that if this was to be ignored, Royal AM would be prejudiced due to the fact that at the end of the season (on 30 June 2021), the ultimate winner will be promoted to the DSTV Premiership while the “court has specifically declared the demotion to be unconstitutional and consequently unlawful.” Should the incorrect club be automatically promoted this will have a devastating impact not only on the correct club but on the entire league and the season. The ripple effects of this will be catastrophic and incalculable on people’s lives and livelihoods.

2. If the dispute is not adjudicated, it will spill over into the intended start of the next 2021/2022 season scheduled for 14 August 2021. Royal AM submits that this dispute poses a threat not only to the direct parties, but the season cannot start until the identities of all 16 participating clubs has been finally determined. It is submitted that the “self-evident impact of the present impasse” will therefore affect all professional players, their relevant clubs and the millions of football loving supporters countrywide.

3. The matter “raises very weighty constitutional issues and the dignity of the judiciary”. Royal AM states that football is a multibillion-dollar industry ultimately controlled by FIFA, and the matter implicates the “golden rule” that football should be won on the pitch, not in the courts.

4. The economic impact on all the stakeholders of Royal AM. Royal AM states that difference between playing in the *“First Division and the Premier League is like chalk and cheese”*.

[74] None of these reasons give rise to any exceptional circumstances that warrant Royal AM (rather than Sekhukhune FC) being placed at the top of the GladAfrica Championship. The high watermark of Royal AM's case is that unless the order is granted, then *"at the end of the season (on 30 June 2021), the ultimate winner will be promoted to the DSTV Premiership"*. But the season has ended with Sekhukhune FC at the top of the log. Royal AM also states that the matter implicates the *"golden rule"* that football should be won on the pitch, not in the courts. This suggestion is difficult to understand because Royal AM itself is seeking to defend a protest that Sekhukhune FC raised against a game played between Sekhukhune FC and Polokwane City. Ironically, Polokwane City, the club actually involved in that match, has abandoned its review of the Epstein award.

Irreparable Harm to Royal AM

[75] Section 18(3) of the Superior Courts Act requires Royal AM to prove on a balance of probabilities that it will suffer irreparable harm in the absence of the relief sought in prayer 3.1. Royal AM deals with irreparable harm in two short paragraphs of its founding affidavit (paras 108 and 109). The allegations in these two paragraphs are denied. The founding affidavit makes no attempt to identify any other harm that would be suffered by Royal AM if the declaratory order were not put into effect.

[76] Royal AM states that the most devastating harm it will suffer is that any success on appeal in respect of the judicial review and setting aside of the Epstein award will be a hollow and meaningless victory. It is submitted that if paragraph 2 of the Nyathi order is not executed and the season starts with the wrong club participating therein, the harm to Royal AM will be practically irreversible and incurable.

[77] Royal AM would suffer no irreparable harm if it were not given leave to execute paragraph 2 of the order of Nyathi AJ, because paragraph 2 of the order of Nyathi AJ is a declarator with no consequential effect. Since paragraph 2 of the order of Nyathi AJ does not restore Royal AM to the top position of the GladAfrica Championship, there would be no irreparable harm to Royal AM if this order were not carried into immediate effect.

[78] Royal AM further submit that it will suffer irreparable harm if it *“will be required to compete for a spot in the DSTV Premiership under circumstances where it had acquired automatic promotion. This is a violation of its Constitutional rights which is inherently unreparable.”* I agree with the respondents that the “irreparable harm” now complained of (i.e. the fact that Royal AM will not be promoted to the DSTV Premiership) might have been avoided if Royal AM had participated in the playoff games. Royal AM would then have had a one-in-three chance of winning the playoffs and being promoted to the DSTV Premiership. Having spurned that opportunity, Royal AM cannot now say that it is the failure to implement the declaratory order of Nyathi AJ that would cause it to suffer “irreparable harm”. Having been reduced to second position in the 2020/2021 Championship competition, Royal AM could still have achieved promotion to the DSTV Premiership by participating in the end-of-season promotion/relegation matches. As the team ending the season in second position on the GladAfrica Championship log, it had this right and obligation. For reasons of its own, Royal AM elected to not participate in those matches.

[79] It is therefore difficult to understand how the squandering of a potential benefit can be said to constitute “irreparable harm”. If Royal AM’s review were ultimately to be upheld on appeal, then the appeal court would have a wide discretion to make a just and equitable remedy that ensured that Royal AM does not suffer harm.

Irreparable harm to the NSL

[80] In terms of Section 18(3) of the Superior Courts Act, Royal AM must prove, on a balance of probabilities, that there will not be irreparable harm to the NSL if the relief in prayer 3.1 were to be granted. If Royal AM fails to do so, then a jurisdictional requirement is not satisfied. In *Knoop v Gupta*²⁵, the SCA explained it as follows:

“Section 18(3) requires the applicant for an execution order to establish that the respondent will not suffer irreparable harm if the order is granted. ... [T]he requirements of irreparable harm to the applicant and no irreparable harm to the respondent, unlike the common-law position, do not involve a balancing exercise between the two, but must both be established on a balance of probabilities. If the applicant cannot show that the respondent will not suffer irreparable harm by the grant of the execution order that is fatal.”

[81] As repeatedly stated, paragraph 2 of the Nyathi order does not restore Royal AM to the top spot of the GladAfrica Championship log. However, if it were to be assumed for the sake of argument that Royal AM is correct, that this is the effect of paragraph 2 of the Nyathi order, and if Royal AM were given leave to execute paragraph 2 on this basis, then this would cause irreparable harm to the NSL because it is likely to delay the commencement of the DSTV Premiership season indefinitely. That harm would be gargantuan. Not only for the NSL, but for soccer and all professional football teams. The reasons are fully set out in NSL's answering affidavit. It would also cause irreparable harm to Sekhukhune FC and all the other teams that participated in the playoffs. Sekhukhune FC, unlike Royal AM, was not afforded an opportunity to participate in the playoffs. Sekhukhune FC would be clearly prejudiced if the new

²⁵ *Knoop and Another NNO v Gupta (Tayob intervening)* [2021] 1 All SA 17 (SCA) para 48

2021/2022 season starts with the fiction in place that Royal AM ended the 2020/2021 GladAfrica Championship on the top of the log. Sekhukhune FC would be deprived of its position on the top of the log, and of its right to automatic promotion. Additionally, Sekhukhune FC would also be deprived of the right to participate in the playoffs, which it should have had if it was to be treated as the team which ended second on the log. To use the words of Nyathi AJ: “ *how would that scrambled egg be unscrambled?*”.

[82] As noted, the relief sought by Royal AM must meet the requirements for immediate implementation under section 18 of the Superior Courts Act, including a finding that there would be no prejudice to the NSL. Royal AM cannot do so. The relief sought by Royal AM would have radiating effects, touching everyone employed in football, or in the industries supporting football. It is clear from the affidavits filed on behalf of the respondents, that even a short delay in the start of the new DSTV Premiership season would have catastrophic consequences for everyone involved.

No reasonable prospect of success on appeal

[83] Royal AM contends that there are no reasonable prospects that the Nyathi order will be overturned on appeal. It contends that the declaration of unconstitutionality of NSL’s conduct is still operational and the NSL has failed to convince Nyathi AJ that their actions did not fall under the Constitution and/or PAJA. It could not do so, so it is argued, because PAJA applies to the decisions of the NSL, which have an external legal effect and are made in terms of the empowering provision (i.e. the NSL Handbook). It is submitted that the declaratory relief of unconstitutional conduct was based on the obvious breaches of the players’ right to dignity and the owners’ rights to economic activity in terms of sections 10 and 22 of the Constitution respectively. It is submitted that the conduct of the NSL seeks to undermine Royal AM’s right of

appeal and its retention of the application for leave to appeal against the Nyathi order is not genuine but a tactical stratagem to justify its breach of the relevant court order. Finally, Royal AM contends that the NSL had made a prior decision to retain Royal AM on the top of the log for several weeks in spite of the Epstein award. This clearly created a legitimate expectation on the part of Royal AM that if a different decision were to be taken, it would be afforded a hearing at the barest minimum.

[84] I am not convinced that there are no reasonable prospects of success on appeal. The most obvious reason for this is that paragraph 2 of the order of Nyathi AJ is unfortunately so vague that it has no meaningful content. The SCA has recently affirmed the well-established principle that, since an order of court binds all those to whom it applies, it must be “written in a clear and accessible manner”. That is because “litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with clarity what is required of them”. Paragraph 2 of the order of Nyathi AJ does not satisfy these requirements. It does not indicate what conduct of the NSL is found to be inconsistent with “the constitution and/or PAJA”, and it does not indicate which provisions of “the constitution and/or PAJA” have been contravened.

[85] In *Minister of Water and Environmental Affairs v Kloof Conservancy* the court held that:

“... the order is indeterminate, open ended and irredeemably vague. For, it seems impossible for the Minister to know with any measure of confidence what she is obliged by the order of court to do. Here, the court offers the Minister no guidance as to when she is required to step in. Litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do

not, must know with clarity what is required of them . . . Courts are entitled to operate on the assumption that government will comply with orders of court . . . But, in order to do that, it has to know where its obligations start and end. It does seem to me to be difficult in the extreme for the Minister to know with any measure of confidence precisely what steps she is required to take to comply with the order of the high court.”

[86] The only provision of the Constitution that is referred to in the reasons of Nyathi AJ, is section 33 (administrative justice). To the extent that Nyathi AJ found that the conduct of the NSL was inconsistent with section 33 of the Constitution, such a finding was foreclosed by the principle of subsidiarity. The principle of constitutional subsidiarity means that “where legislation is enacted to give effect to a constitutional right, a litigant may not by-pass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard”. To the extent that the Nyathi order declares that the conduct of the NSL is inconsistent with section 33 of the Constitution, it did not take the principle of subsidiarity into consideration.

[87] There is also a reasonable prospect that the declaratory order of Nyathi AJ would be overturned on appeal insofar as it refers to PAJA. That is because it is doubtful whether the conduct of the NSL in giving effect to the Epstein award, was subject to PAJA, let alone inconsistent with section 3 of PAJA. The parties (including the NSL) were bound by an arbitration process that had led to the Epstein award. In recognizing the effect of the final and binding arbitration award it is doubtful whether it was required

from the NSL to “engage with” Royal AM. The reasons for this were explained by Lewis JA in *Nedbank Ltd v Mendelow NO and Another*.²⁶

“[24] As I said in Kuzwayo v Estate Late Masilela, not ‘every act of an official amounts to administrative action that is reviewable under PAJA or otherwise’. I found there that the act of signing a declaration by a Director-General of the Department of Housing to the effect that a site permit be converted into the right of ownership, and the signing of the deed of transfer giving effect to that declaration, were simply clerical acts.

[25] Administrative action entails a decision, or a failure to make a decision, by a functionary, and which has a direct legal effect on an individual. A decision must entail some form of choice or evaluation. Thus while both the Master and the Registrar of Deeds may perform administrative acts in the course of their statutory duties, where they have no decision-making function but perform acts that are purely clerical and which they are required to do in terms of the statute that so empowers them, they are not performing administrative acts within the definition of the PAJA or even under the common law. As Nugent JA said in Grey’s Marine ‘[w]hether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so . . .’.

[26] A distinction must thus be drawn between discretionary powers and mechanical powers. Professor Hoexter points out that a mechanical power involves no choice on the part of the holder of the power. A discretionary power, on the other hand, does impose such a choice....”

²⁶ 2013 (6) SA 139 (SCA).

[88] If PAJA applied in the present circumstances, it would mean that the NSL has to give a hearing to all other teams in the league before it awards points to the winning team at the end of every football match. That would be absurd. In any event, a legitimate expectation arises "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue". The affidavits of Royal AM do not refer to any promise or practice on the part of the NSL. If it were to be assumed for the sake of argument that section 3 of PAJA applied, then the hearing before Sutherland DJP in any event afforded Royal AM a reasonable opportunity to make representations regarding the effect of the award of Epstein SC, within the meaning of section 3(2)(b)(ii) of PAJA.

[89] The court in *University of the Free State (supra)* held that it has now been settled that in satisfying the onus, an applicant must establish that he or she has strong prospects of success on appeal before the extraordinary and exceptional relief contained in section 18 can be granted. Royal AM has not discharged the onus. For all the reasons set out above, the relief in prayer 3.1 is dismissed.

THE NSL'S DECISION HAS NOT BEEN SUSPENDED (PRAYER 3.2)

[90] In prayer 3.2 of the notice of motion, Royal AM seeks an order declaring that *"pending the finalisation of Royal AM's application for leave to appeal against the Sutherland DJP order, lodged in the Supreme Court of Appeal in terms of section 17(2)(b) of the Superior Courts Act, the NSL's decision to remove Royal AM from the number one spot of the GladAfrica Championship log has continued to remain suspended in terms of section 18(1) read with section 18(3) of the Superior Courts Act and/or the interim order issued by Nyathi AJ"*.

[91] It is difficult to discern the basis for this relief from the founding affidavit. Sutherland DJP dismissed the application by Royal AM to review the award of Epstein SC. When Royal AM petitioned the SCA for leave to appeal against this order, there was nothing that could be “suspended”. Furthermore, the Nyathi order ceased to operate once the application for leave to appeal was refused. In any event, paragraph 3 of the order of Nyathi AJ did not “suspend” the NSL’s decision to remove Royal AM from the number one spot. There is accordingly no basis for the relief sought in prayer 3.2.

RETROSPECTIVE REINSTATEMENT OF ROYAL AM TO FIRST POSITION ON THE LOG (PRAYER 3.3)

[92] In prayer 3.3 of the notice of motion, Royal AM contends that paragraph 2 of the order of Nyathi AJ means that *“Royal AM had ... been ipso facto reinstated into the number one spot on the log by operation of law”*. It seeks an order declaring that Royal AM *“remains the lawful occupant of the first position in the GladAfrica Championship log until lawfully removed”*.

[93] Royal AM seeks this relief only in the alternative and only in the event that the section 18(1) application is not granted. In its heads of argument it is, however, contended that the relief claimed under this prayer is also “self-standing”. It is contended that the declaratory order of Nyathi AJ means that the NSL’s conduct of updating the GladAfrica Championship Log, removing Royal AM from the number one spot and organising/conducting the playoffs is void *ab initio* and of no force and effect.

[94] As discussed above, paragraph 2 order of the Nyathi order did not have the effect Royal AM contends for. In any event, as the relief in prayer 3.1 is not granted, it would

mean that paragraph 2 of the order of Nyathi AJ is suspended by the NSL's application for leave to appeal. It follows axiomatically that, in terms of section 18(1) of the Superior Courts Act, paragraph 2 of the order of Nyathi AJ was suspended when the NSL applied for leave to appeal. Although Royal AM denies that this is the case, it offers no real basis for its denial. It would then be logically impossible for Royal AM to get the relief it asks for in prayer 3.3. It follows that the relief in prayer 3.3 should be dismissed for this reason alone.

THE DECLARATORY RELIEF: IN CONCLUSION

[95] To the extent that there are declaratory orders sought by Royal AM which are based on section 21(1)(c) of the Superior Courts Act, the court has a discretion following a two-legged enquiry. The court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, whether the case is a proper one for the exercise of its discretion.²⁷

[96] In *Minister of Finance v Oakbay Investments (Pty) Ltd and Others*²⁸, the court considered the factors our courts have taken into account to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief. These include the existence or absence of a dispute; the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties; whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought; considerations of public policy,

²⁷ See *Durban City Council v Association of Building Societies* 1942 AD 27 at para 32 and confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at para 15 to 17.

²⁸ 2018 (3) SA 515 (GP) para [59].

justice and convenience; the practical significance of the order; and the availability of other remedies.

[97] In my view it is abundantly clear, from all the reasons already set out in this judgment, that this is not an appropriate case in which to grant any declaratory relief.

CONTEMPT OF COURT (PRAYERS 3.4, 4 AND 5)

[98] Royal AM seeks an order declaring the NSL and the CEO to be in breach and wilful contempt of the Nyathi order, as well as an order committing the CEO to prison if she fails to purge the contempt.

[99] There are four requirements that must be satisfied.²⁹ First: that a court order was granted against the respondent. Second: that the respondent was served with the order or was informed of its contents. Third: that the respondent did not comply with the court order. Fourth: that the non-compliance was wilful or *mala fide*. Once the first three elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the non-compliant party (known as the contemnor) fail to discharge this burden, contempt will have been established.³⁰

[100] The rationale for the mechanism of contempt of court allows a private litigant, who has obtained a court order requiring an opponent to do or not do something, to approach the court again, in the event of non-compliance, for a further order declaring the contemnor to be in contempt of court and imposing a sanction (emphasis added).

²⁹ *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 2 SA 517 (C) at 522; *Wright v St Mary's Hospital, Melmoth* 1993 2 SA 226 (D) at 227I-228A; *Uncedo Taxi Service Association v Maninjwa* 1998 3 SA 417 (E) at 425G-H; *Mjeni v Min of Health & Welfare, Eastern Cape* 2000 4 SA 446 (Tk) at 454H; *Phoko v Ekurhuleni City* 2015 5 SA 601 (CC) at para 32.

³⁰ *Secretary of the Judicial Commission of Inquiry into State Capture v Jacob Zuma* (CCT 52/21) at para 37.

The sanction usually has the object of inducing the contemnor to fulfil the terms of the previous order. Contempt orders are designed to vindicate the rule of law, but, “are not there for the asking”.³¹ Such an order should only be issued after the court is satisfied that there has been a wilful and *mala fide* refusal to comply with an order of the court. Even a deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe herself to have been entitled to act in the way claimed to constitute the contempt. In such a case, good faith means that no contempt has taken place. In the context of suspended court orders, the SCA has held that where an alleged contemnor has acted on legal advice that the operation and execution of a court order has been suspended because an application for leave to appeal has been lodged, it will be impossible to infer that the court order was intentionally or wilfully flouted.³² Contempt of court is therefore committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent. Thus even a refusal to comply that is objectively unreasonable may nonetheless be *bona fide*.

[101] Because of the criminal consequences of contempt, the criminal burden of proof applies to the current contempt proceedings. This means that Royal AM must show that the order was breached and that the breach was both wilful and *mala fide*. If no breach of an order of this court is established, then that will be the end of the matter. If there has been a breach, but the CEO has presented evidence raising a reasonable doubt whether she acted wilfully or *mala fide* then contempt will not have been established and the application should be dismissed.

³¹ *Maccsand CC v Macassar Land Claim Committee* (2005) JDR 0107 (SCA) at para 23.

³² *Maccsand* at paras 26 and 27

[102] The first question is if the NSL and the CEO breached any order of this court? In order to answer this question, it is again necessary to have regard to the events as they unfolded over the last month in order to assess the conduct of the NSL and the CEO.

Relevant facts

[103] In her answering affidavit the CEO explains that the various court applications created logistical challenges for the NSL because they were brought very close to the end of the season and completing the season by 30 June 2021 was extremely important for several reasons³³. The NSL therefore had to find a way to manage the flurry of litigation at the end of May 2021 in a manner that would facilitate the proper adjudication of the matters and enable the playoffs to be completed before the end of June 2021. The NSL therefore took the lead in trying to ensure a workable timetable for all the matters to be heard before the urgent court and in order to facilitate the hosting of the playoffs in the light of whatever determination was made by the court. A timetable for managing the reviews was therefore put in place with the input of all parties. It was decided that the matters would be heard in the urgent court before Sutherland DJP on 11 June 2021; an order would be handed down on 12 June; if the order required the arbitrators to reconsider their awards, they would be urgently convened for that purpose on 13 June 2021; and the playoffs would begin on 15 June 2021 either on the basis of the court order (if the reviews were dismissed) or on the basis of any new decisions handed down by the arbitrators (if the reviews were successful). The CEO states that this agreed timetable is very important because it refutes Royal AM's allegation throughout the court litigation that it has not been given an opportunity to be heard and the allegation that the NSL's conduct after the

³³ Set out in the first and second respondents' answering affidavits

Sutherland order was in breach of its legitimate expectations to be heard before it was “evicted” from the top of the log.

[104] She states that all the participants in the review proceedings before Sutherland DJP therefore knew exactly what was going to follow his judgment. If Royal AM was successful in its review and the Epstein’s award was set aside, there would be an arbitrator on standby to give a new award on Sunday 13 June 2021 and whatever the outcome of that decision would then determine who contested the playoffs on Tuesday, 15 June 2021. If Royal AM was unsuccessful in its review, then Sekhukhune FC would be at the top of the log, and would be automatically promoted to the DSTV Premiership, and Royal AM would have to contest the playoffs. So, when Sutherland DJP dismissed Royal AM’s review, this meant that the Epstein award stood and Sekhukhune was at the top of the log. After receiving the Sutherland order on 12 June 2021, the NSL therefore prepared the fixtures for the playoffs that would commence on 15 June 2021 and sent this out to the various clubs.

[105] Later that same day, Royal AM brought an application for leave to appeal against the Sutherland order and contended that the effect of this application for leave to appeal was to suspend the Epstein award and would therefore not operate. The NSL took legal advice, and based on that advice, they sent a letter to Royal AM’s attorneys explaining that the playoffs would proceed on the basis that the Epstein award was in place and Royal AM therefore needed to contest the playoffs.

[106] When the Nyathi order was delivered on 14 June 2021 (prohibiting the payoffs pending the outcome for the application for leave to appeal against the Sutherland order), and after the NSL had lodged an appeal against the Nyathi order, the NSL, after seeking legal advice, notified the clubs that the Nyathi order had been suspended

as a result of the application for leave to appeal and that the playoffs would go ahead on Thursday, 17 June 2021. Correspondence between the parties continued to be exchanged. It was clear from the correspondence that there was a real dispute between the NSL and Royal AM as to the proper construction of the Nyathi order. As a result, the NSL, and its CEO, took further legal advice and decided to delay the playoffs scheduled for 17 June 2021. The NSL issued a media statement explaining this development to all the clubs.

[107] Sutherland DJP agreed to hear the application for leave to appeal during the evening of Friday, 18 June 2021. The NSL Executive Committee therefore scheduled a meeting for 9am the following morning so that it could decide on the next step following whatever order Sutherland DJP granted on Friday evening. Sutherland DJP dismissed Royal AM's application for leave to appeal later on Friday evening and the Executive Committee convened for its meeting on Saturday morning, 19 June 2021, at 9am. When the Executive Committee convened for a virtual meeting on the morning of Saturday, 19 June 2021, it was addressed by both the NSL's internal and external lawyers. The CEO explains in her answering affidavit that the Executive Committee considered the advice it had been given and the considerable hardship that would result if it did not manage to complete the playoffs before the end of June. After weighing all these considerations, the NSL decided to proceed with the playoffs.

Did Royal AM discharge its onus?

[108] The short answer is no. Firstly, the Nyathi order is the subject of a pending application for leave to appeal. If leave to appeal were to be granted and if the appeal were to succeed, the Nyathi order would be set aside with retrospective effect. It is premature for Royal AM to seek committal in circumstances where the order that is

alleged to have been breached, is the subject of a pending application for leave to appeal. For this reason alone, the relief in prayer 3.4 is misconceived.

[109] Secondly, the CEO states that when the order was handed down by Sutherland DJP on 12 June 2021, there was no indication that the order would be appealed until the next day (13 June 2021). Thus, by the time Royal AM lodged its application for leave to appeal, the Epstein award had already been implemented on 12 June 2021, given the urgent need for the playoffs to begin on 15 June 2021. The day after Nyathi AJ handed down his order, the NSL brought an application for leave to appeal against his order. This had two consequences: In so far as the declaration of invalidity was concerned, there was no dispute between the parties that that relief was final. The effect of the application for leave to appeal was therefore to suspend the declaration of invalidity pending the appeal. In so far as the interdict prohibiting the commencement of the playoffs was concerned, there was a dispute between the parties about whether it was interim or final in effect. As a result, the NSL delayed the commencement of the playoffs until Sutherland DJP had decided Royal AM's application for leave to appeal. Once Sutherland DJP had dismissed the application for leave to appeal, Nyathi AJ's interdict came to an end and therefore scheduling the playoffs was not in breach of the order. In its replying affidavit, Royal AM appears to try to broaden its case for contempt by referring to the print-out of a fixtures list and a charge that has been laid against Royal AM for failing to contest the playoffs. These were no part of its founding case for relief. They also bear no relation to the relief sought in the notice of motion.

[110] Thirdly, because the declaratory order is vague and imprecise, the NSL and the CEO could not be said to have acted in breach of it. In *Minister of Home Affairs and*

Others v Scalabrini Centre, Cape Town and Others,³⁴ the SCA held that litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with clarity what is required of them. The CEO contended in her answering affidavit that the relief sought did not make sense, was not capable of being implemented and was therefore incompetent. There has been no response to this from Royal AM. It does not even address this issue in its replying affidavit. The need for court orders to be precise in circumstances when contempt of court is alleged, was highlighted in the matter of *Kebble v The Minister of Water Affairs and Forestry*.³⁵ In this matter a mining company was accused of contempt of court for failing to comply with a court order concerning certain environmental remediation around a mine. The directors of the company contended that the court order was so lacking in clarity that it was incapable of enforcement. The SCA agreed and held that they could not be found in contempt because they could not have known precisely what steps should have been taken to comply with the order. Royal AM's relief in this case does not identify the conduct that is required from the CEO to "purge" her alleged contempt and it is unclear what is required of her. The relief sought is therefore incapable of enforcement. The same difficulty arises in relation to the alternative relief sought in the notice of motion. The alternative relief is that the CEO be committed directly to prison or that the Registrar issue a warrant of committal on duly supplemented papers in the event that the NSL and the CEO fail to "purge the contempt of court referred to in prayer 3.4 of the notice of motion". But once again, because prayer 3.4 does not specify any conduct that is required to be performed, it is not possible to identify what must be done to purge the contempt.

³⁴ 2013 (6) SA 421 (SCA) at para 77.

³⁵ (2007) JDR 0872 (SCA) paras 20 to 22

[111] Fourthly, even if Royal AM has established a breach (which it did not), the CEO, together with her fellow Executive Committee members, at all material times, acted on the advice of internal and external lawyers. As has been set out in the answering affidavits, the advice was based on settled case law from the highest courts. The CEO was advised of the effect of the various applications for leave to appeal and what they meant for the legal rights and obligations of the NSL. The CEO, and her fellow committee members, were cautious in the face of this advice because, when it appeared that there may be a real dispute about the proper characterization of Nyathi AJ's interdictory order, the NSL delayed the playoffs so that certainty could be obtained. This is not the conduct of a party intent on wilfully flouting court orders.

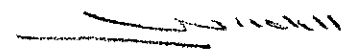
[112] For all of the reasons set out above, there is no basis for the relief sought in prayer 3.4.

CONCLUSION

[113] The relief Royal AM seeks runs contrary to the previous findings of this court and is not supported by the facts or the law. The interdictory relief granted by Nyathi AJ in paragraph 3 came to an end when Sutherland DJP refused leave to appeal on 18 June 2021. Paragraph 2 of the order of Nyathi AJ did not have the effect of reinstating Royal AM to the top of the GladAfrica Championship and has been suspended by the NSL's application for leave to appeal. The Epstein award is binding and Royal AM's application for leave against the dismissal of the review did not have the effect of suspending the Epstein award.

[114] Royal AM's application is without merit and must be dismissed. In the result the following order is made:

1. The application is dismissed with costs, including the costs of two counsel where so employed.



L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 July 2021.

APPEARANCES

Attorneys for the applicant:	Mabuza Attorneys
Counsel for the applicant:	Advocate D.C. Mpofu SC
	Advocate T. Motloenya
Attorneys for the first respondent:	Webber Wentzel Attorneys
Counsel for the first respondent:	Advocate A. Cockrell SC
	Advocate S. Scott
	Advocate T. Ngakane
Attorneys for second respondent:	DMS Attorneys
Counsel for second respondent:	Advocate K Hofmeyr SC

Attorneys for fifth respondent: Tshabuse Attorneys

Counsel for fifth respondent: Advocate N. Arendse SC

Advocate D. Borgström SC

Date of hearing: 14 July 2021

Date of judgment: 26 July 2021