IN THE HIGH COURT OF SOUTH AFRIC

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 15468/11

DATE: 4 NOVEMBER 2011

In the matter between:

DOMINIQUE DANIELS AND OTHERS Applicants

and

WP RUGBY AND ANOTHER Respondents

J U D G M E N T

DAVIS, J

This is an application of an order reviewing setting aside the finding of a disciplinary tribunal, and the appeal tribunal, constituted by the first respondent together with certain ancillary relief related thereto.

The disciplinary proceedings related to the conduct of the first applicant at a rugby match between the second applicant and False Bay RFC which took place on 6 June 2009.

The first applicant was found guilty of contravening the bylaws and the counsel of the WPRFU ("the Bylaws") for offences which includes eye-gouging of an opponent, physical abusive of the match, official and accordingly he was suspended from rugby for an effective period of five years.

It is important to tease out these facts a little bit more fully. Disciplinary proceedings were instituted against the first applicant in respect of his conduct during a match which took place on 6 June 2009 at the Daljosafat stadium in Paarl.

First Applicant had received a red card during the match for eye-gouging an opponent. Subsequently to his being sent off, he then ran onto the field again to confront another player from the opposing team. This led to a further, as a result of which, the referee had no alternative but to call off the match. By now tempers were running high and match officials had to be escorted off the field by the management of Second Respondent. The referee, as he was being escorted off the field, was then struck in the face by a water bottle which had been thrown at him by the First Applicant.

Given that this conduct which even by the standards of the robust game of rugby, fell far outside of anything that could be expected by, what might tentatively may be called the

reasonable rugby player, first applicant charged with contravening a series of the bylaws including:

1. Involvement in action which was detrimental to the best the interests of the First Respondent and the game of rugby.

2. General misconduct against an opposing player.

3. Physical abuse of the match, referee.

4. Physical abuse of an opposing team official.

On 11 June 2009 a disciplinary hearing was conducted by a Tribunal which was chaired by Mr Justice Henney. Mr Justice Henney found first applicant guilty of the first three offences, but applicant was acquitted on the charge of physical abuse of an opposing match official.

He was suspended from rugby for five years. Pursuant this decision, he and Second Applicant appealed. The appeal hearing was heard by an appeal of tribunal chaired by Mr Allan Butler on 11 November 2009.

It appears that when the matter got to the appeal tribunal the record was not available or had not been sufficiently reduced

to writing to enable a proper appeal to be prosecuted, heard and therefore decided. The appeals tribunal, understandably, ordered that the disciplinary hearing must had to be heard *de novo*, as permitted in terms of Bylaw 17.11.5, because of these difficulties, to which I have alluded.

A second disciplinary hearing was then conducted on 2 December 2009, chaired by Ms Elinza Reynolds. First Applicant was again found guilty on the three offences of which he had been found guilty in the first case and was suspended for five years.

First and Second Applicants appealed against these findings and an appeal was then heard by an appeals tribunal chaired by Mr K Kiewietz on 23 June 2010. On 27 July 2010 this tribunal confirmed the findings of the second disciplinary tribunal together with the sanction to be imposed by the latter body.

The applicants have not been immune from further controversy. It appears that following a complaint by another club, that the second applicant had fielded first applicant despite his suspension. The second applicant was charged in July 2011 with contravention of bylaw 16.6.9 for playing a suspended player in club matches during the 2011 rugby

season.

A disciplinary enquiry was due to be held in this regard, but this particular dispute, I should stress, is not before this court. It is about the first set of offences and the subsequent hearings that the present dispute turns.

These proceedings culminated in an application by the applicant for a review and setting aside of the findings of disciplinary tribunals and appeal tribunal and was launched on 2 August 2011.

The application

It is regrettable that this dispute has been made all the more complex as a result of a founding affidavit which is truly in an appalling state and, which in significant part, is almost incomprehensible. To the extent that it is possible to parse the affidavit, applicants' case can be distilled as follows:

Although the first respondent can in terms of bylaw 17.1.1: "order that the matter be heard *de novo*", in the present case the applicants contend:

"The Appeals Committee, the first respondent, despite the provisions contained in Bylaw 17.1.1, decided without

consulting the applicants to order that a new disciplinary hearing on the same facts be held and a new disciplinary hearing was subsequently held on 2 December 2009 (even that date is incorrect in the affidavit for it states 2 December 2011)"

A further claim in this affidavit, was that at the second hearing the chair, Ms Reynolds, and her deputy, Mr Arendse, should have recused themselves and accordingly the second set of proceedings stands to be set aside.

The argument regarding the recusal of Ms Reynolds was not raised by Mr Filand, who appeared on behalf of the Applicants during argument, although he continued, albeit very softly, to contend that the recusal of Mr Arendse was justified.

The basis of the Application.

A new application, it is argued in the ordinary course, should be brought under Rule 53 of the Uniform Rules of Court unless it can be contended that the matter is covered by the Promotion of Administration of Justice Act, 3 of 2000 ('PAJA').

It appears that the applicants did not invoke Rule 53 nor did they follow the procedures prescribed therein. As noted, they

have hardly set out their case with any clarity in the founding affidavit in terms of which a specific legal basis for the application has been laid.

Ms van Huyssteen, who appeared on behalf the respondents, submitted that in this particular case, the decisions of the respondent could not constitute administrative action for the purposes of PAJA and the review application cannot be brought in terms of PAJA. Accordingly, the application was not subject to the requirement that it must be brought within 180 days in terms of Section 7 of PAJA. However, she submitted that the application for review had to be brought within a reasonable period and that the 180 day period contained in PAJA was indicative of what constituted a reasonable period.

In this regard it is clear, that were this application brought in terms of Rule 53, it could not be brought in circumstances where there had been an unreasonable delay in the prosecution thereof. See Wolgroeiers Afslaer (Edms) Bpk v Munisipaliteit van Kaapstad 1978(1) SA 13 (A) and Lion Match Ltd v Paper Printing Wood and Allied Workers Union and Others 2001(4) SA 149 (SCA) at para 25.

There is no explanation proffered by the applicants for the delay in the bringing of this particular application, where all

the relevant events took place in 2009 and 2010, beyond the bald allegation they could not bring their application at an earlier stage as the first respondent "did not co-operate to have the review finalised earlier."

I am unclear as to the meaning of this particular averment within the context of this dispute.

Ms van Huyssteen submitted the review application was prompted by the decision of first respondent to institute disciplinary proceedings against second respondent for fielding a suspended player, i.e. the disputed disciplinary hearing which is not before this court. Accordingly, in her view, the review application is being brought with the ulterior motive of derailing these later disciplinary proceedings. For reasons which will become apparent, it is unnecessary for me to examine this particular line of argument.

Leaving aside the question of delay, I turn to the other grounds for review in the present case.

The basis for such a review application.

In National Horse Racing Authority of Southern Africa v Naidoo and Another 2010(3) SA 182 (N), the majority of the court held

that the review of proceeding of a domestic disciplinary tribunal does not constitute administrative action for the purpose of PAJA. These proceedings are rather to be reviewed in accordance with the principles established in what the court in that case referred to as the "quartet of jockey club cases". See Marlon v Durban Turf Club and Others 1942 AD 112; Jockey Club of South Africa and others v Feldman 1942 AD 340, Turner v Jockey Club of South Africa 1974(3) SA 633 (A) and Jockey Club of South Africa v Forbes 1993(1) SA 649 (A).

If this submission is correct, then the *dictum* in Turners case, supra, must have application:

> "The principles of natural justice do not require a domestic tribunal to follow the procedures and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt procedure which would afford the person charged a proper hearing by the tribunal and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him ... The tribunal required to listen fairly to both sides and to observe 'the principles of fair play'. In addition to what may be described as the procedural requirements

the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially ....[t]he tribunal's finding of the facts on which its decision is to be based shall be 'fair and *bone fide*'... It is in other words 'under an obligation to act honestly and in good faith'." At 646 F-I."

It therefore matters for the resolution of this dispute whether this review application falls under this regime or under PAJA , for if it falls under the latter, one then must locate the grounds of review in the appropriate sections of PAJA.

In the National Horse Racing case, supra, Wallis J (as he then was) held, in a carefully considered minority judgment, that a body such as the applicant performed a public function. Thus:

"I can find nothing in the general language of the definition of administrative action in PAJA that demonstrates a clear intention to exclude sporting bodies that regulate their sport in terms of a constitution or rules. No such exclusion appears from the language itself which profound a different test of exercising a public power or performing a public function. Sport has a substantial influence in our society and can involve substantial sums of money as well as exercising control

over who may earn their living from involving in sporting activities. Sport raises important public issues as is apparent from the fact that present seem fit to appoint commissions of enquiry into both rugby and cricket." para 22.

Although Wallis, J appeared to decline the invitation to determine the question of the applicability of PAJA in the context of this kind of dispute, he did offer a series of *dicta* that eloquently indicated his preferred approach. Thus:

"I have sketched above the directions of the appellant. There seems to be much to be said for the proposition that those are public functions and involve the exercise of public powers, albeit by a private body, at least in so far as they impinge upon the right of individuals to participate in horse racing and to earn their living from it. This case is concerned only with the question of the exercise of disciplinary powers and not with other matters under the aegis of the appellant and nothing that I have said should be construed of suggesting every decision by appellant constitutes administrative action reviewable under PAJA any more than every decision by an organ of State constitutes administrative action" para 27.

By contrast, the majority judgment of Levinsohn DJP, as noted above, adopted the opposite stance. The learned Deputy Judge President said thus:

> "I am not sure that the size of the sporting body and the extent of its commercial enterprise should be the yardstick to determine whether its exercises a public function or not. Persons who are members of less visible sporting bodies could justifiably claim that there would be a lurking inequality if that should be the law's approach in domestic disciplinary tribunals. In my view, it is in the public interest that there be uniformity in the laws approached by these tribunals. In my opinion, it is doubtful whether the frameworks of the Constitution and the legislature in an activity PAJA intended to bring such domestic tribunals under its umbrella. It may well be an aspect which needs to be dealt with in the future by the legislature." paras 5-6.

The viewpoint of Wallis J is, however, supported by a judgment in this Court of Tifu Raiders Rugby Club v South African Rugby Union [2006](2) ALLSA 549 (C), (which is somehow not mentioned in the National Horseracing case) in which Yekiso J said:

"The Provincial Unions and the clubs affiliated to these these unions in turn have stakeholders with substantial interest in their very existence. These stakeholders would be the sponsers who would have had an interest through their sponsorship programmes, members of the clubs affiliated to these unions and the rugby loving public. The public interest in these organisations cannot be over emphasised. There is, in my view, a significant public interest element involved in these organisations to constitute a need to act in a manner that affects or concerns the public as observed by Van Reenen J, in Van Zyl v New National Party and Others ... I am making these observations mindful of what this Court said in Marais v Democratic Alliance ... at para 51 in which Van Zyl J made a point that mere public interest in the decision does not make it an exercise of public power or performance of a public function." para 28.

What this *dictum* grasps, in my view, is that the demarcation between public and private can no longer be resolved simply on the basis that public power is sourced in a state organ. Private organisations, which exercise significant power and, whose decisions hold important implications for members of the public or significant segments of the community, must within the prism of a transformed *jurisprudence* which does

not simply see public as conflated with the State, find that the public interest should be given the extended meaning of the kind which is expressed in the *dictum* of Yekiso J, supra.

This approach finds some traction in English Law where courts have examined the nature of a body's powers and upon such examination have concluded from time to time that they are public in nature. See in this connection De Smith's Judicial Review (6th Edition) at 3.042 and the cases collected in footnotes 169 – 176.

In my view therefore, this review falls within the context of PAJA in that the decisions which the applicants seek to impugn and which have been made by first respondent constitute decisions which, in terms of Section 1 of PAJA, are decisions taken by "a natural or juristic person other than an organ of State when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct external legal effect."

This interpretation means the provisions of PAJA must be examined to determine the merits of this case. It is to those that I now turn.

Evaluation

In the present case on the basis of the averments made out in the founding affidavit, to which I have already made reference, there is no basis by which these disciplinary hearings have violated any of the principles of natural justice and are captured in Section 3 of PAJA. Indeed, if the common law was to be applied, there would be no difference in the conclusion.

It appears from the facts, as I have set them out, that first respondent was fastidious in ensuring that first applicant receive a proper and fair hearing; hence the opportunity to present his version of events, the referral by the first appeal tribunal to a second tribunal and the opportunity to appeal yet again.

The applicants' primary argument, as set out in their affidavit, and on the basis of the argument presented by Mr Filand, turned on the proceedings before the first appeal tribunal, namely, that the decision to refer the matter to a second disciplinary tribunal for a hearing *de novo* because there was not a record on which they could base the decision should have been set aside.

It is however accepted by the applicants that Bylaw 17.11.5

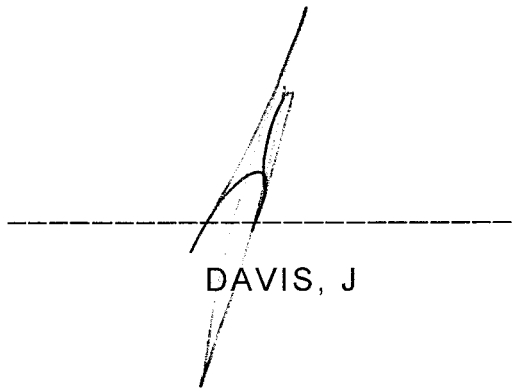
explicitly provides that an appeal tribunal may order that the matter be heard *de novo*. No case was made out as to what rights were then violated when the decision was taken to reconstitute a disciplinary tribunal. Nothing on the record, which is attached to these papers, indicates that any objection at the time was taken when the matter was prosecuted for a second time.

There is, in short, no case made out in terms of PAJA (or if I am incorrect in this regard on the basis of the common law as set out in the quartet of Jockey Club cases) to sustain this review application.

As to the argument with regard to recusal, the only point which was raised with regard to Mr Arendse, was that he happened to be an office bearer of a club which had also been threatened by relegation (i.e. like second applicant). Somehow it was suggested that this was going to cloud his judgment; without more hardly sufficient to justify the application as brought in this case, particularly, when there was no suggestion of any such difficulty when the second hearing was so heard.

In my view, there is no basis for this application and it stands to be dismissed. In the result, the application is **DISMISSED**

WITH COSTS.



DAVIS, J