IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 11965 / 2021

In the matter between:

MARIO VAN NIEKERK Applicant

and

SOUTH AFRICAN FOOTBALL ASSOCIATION (CAPE TOWN) First Respondent

HEIDEVELD LOCAL FOOTBALL ASSOCIATION Second Respondent

Coram: Wille, J
Heard: 26th of May 2022
Delivered: 3rd June 2022

JUDGMENT

WILLE, J:

Introduction

[1] This is an application for judicial review coupled with certain interdictory relief. The applicant seeks to interdict his suspension and also to review and set aside the

decision by the first respondent which led to his suspension.[1] The applicant charters for a legality review, alternatively, a review in terms of PAJA[2], and he also advances some constitutional challenges.

[2] Initially, the core dispute was in connection with the applicant's repeated allegations that he was not provided with access to the 'legal instruments' which, according to him, formed the basis of the charges preferred against him at his disciplinary inquiry. The first respondent advanced that these legal instruments were non-existent and the applicant was driven to concede that these legal instruments do not exist.

[3] What I am now left with to determine in this opposed application on the papers are the following issues , namely: (a) the applicant's grounds of review as set out in his founding papers; (b) the applicant's failure to exhaust his internal remedies and, (c) the nature of the interdict sought by the applicant.

Relevant Factual Background

[4] The applicant was hauled before an internal disciplinary inquiry before the duly constituted committee of the first respondent. The applicant is an official of the first respondent. This inquiry was initially due to commence on the 28th of October 2020.

[5] The inquiry meeting was postponed for a number of reasons not germane to this judgment. This postponement was at the instance and request of the applicant. The core charges against the applicant are connected with him allegedly bringing the South African Football Association into disrepute.

[6] The main thrust of the 'complaint' was to the effect that certain comments, statements, and posts at the instance of the applicant did not promote the core values and humanitarian objectives of the South African Football Association. The applicant was afforded a fair and equal opportunity to present his case to the inquiry

[1] He was suspended during March 2021
[2] Promotion of Administrative Justice Act, No 3. of 2000.

committee and very early on during the process of the disciplinary inquiry he noted a request for certain documentation in order to pursue his appeal.

[7] In the end result, the first respondent found that the applicant had contravened the first respondent's code of conduct and he was suspended from in any manner participating in football 'activity' for a period of (2) years with effect from the 28th of March 2021. It is against this finding that the applicant launched his review application on the 15th of July 2021. This, without pursuing the internal appeal process available to him. The applicant makes a number of unfortunate allegations about the first respondent in his founding papers. Despite this very little is advanced either in fact or in law, to support the relief he seeks against the first respondent. The second respondent takes no part in this application.

Locus Standi

[8] The applicant advances that the first respondent has no authority over him. This may be dealt with swiftly. The applicant avers that he is an office-bearer of the second respondent.[3] For the applicant to hold such office, he would logically need to be an individual who has been elected or appointed. The election or appointment of an office-bearer is made by a vote of accredited delegates and office-bearers. He is accordingly undoubtedly an official.

[9] Moreover, the term 'official' is defined in the first respondent's code as follows:

'…*any elected or appointed individual who is affiliated to a member and includes all Regional Executive Committee members, committee members, coaches, referees, and attendants as well as any other persons responsible for technical, medical, and administrative matters at the League or Club, SAFA, CAF, and FIFA…'*

[10] The applicant is an official who; (a) is an individual; (b) was elected or appointed and, (c) was affiliated with and to the second respondent. Accordingly, the basis upon which the applicant states that the first respondent lacked authority over him to hold the disciplinary inquiry, is without merit.

[3] He avers that he is the 'President' of the second respondent.

The Applicant's Case

[11] The applicant alleges the following; (a) that the decision to suspend him was taken *mala fide* to further an improper purpose; (b) that the first respondent took into account irrelevant considerations; (c) that the decision of the first respondent was grossly unreasonable and, (d) that the first respondent failed to apply its mind to the decision taken to suspend the applicant.

The Case for the First Respondent

[12] The first respondent makes the powerful point that the applicant failed to state in his founding papers that he had initiated an internal appeal process to the impugned decision. The applicant wisely concedes that he only engages with this issue in reply. The point is also made that the applicant failed to indicate the existence of or follow any alternative internal review process or the arbitration process available to him.

[13] Most significantly, the applicant did not make any application for his exemption from exhausting his internal remedies prior to approaching this court for a judicial review. Rather, he somewhat baldly avers that his internal appeal process was frustrated by the first respondent.

Consideration

[14] It is so that there is no jurisdictional bar precluding a person from applying for the review of an administrative act unless the person has exhausted his or her internal remedies. Section 7(2)(c) of PAJA indicates as follows;

'…*A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice....*'

[15] The following criteria must be met, namely; (a) exceptional circumstances must exist; (b) the exemption must be made on application by the person concerned and, (c) the interests of justice must warrant the exemption in the particular

circumstances of a concrete case. The applicant has made no such application nor does he seek to make out a case for exemption in his founding papers. Instead, the applicant alleges that exceptional circumstances exist due to the first respondent's failure to provide him with the relevant documentation.

[16] Although the courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.[4] It must be so that internal remedies and their exhaustion are vitally important. Also, it is not the proper function of the judiciary to consider these issues before they have been properly ventilated in internal appeal proceedings.[5]

[17] As a general proposition judicial review is always available, provided the matter is not otherwise appealable. It is also available to control the abuse of power, including abusive delay. Fact-specific remedies may be crafted to address wrongs raised in a particular case. That having been said, I find that judicial review is not available on the facts of this case. This is because the applicant's purported sole complaint now is that he was not advised as to how and where the fee for his appeal process was to be paid. The allegations of fact, in this case, do not disclose any reason why it would have been impossible for the applicant to pursue his appeal.

[18] The first respondent is made up of a distinctive statutory and regulatory framework. In its decision to suspend the applicant, the first respondent highlighted the factors relevant to its decision, the nature of the parties' interests, and rendered extensive reasons for its decision. Curiously, the applicant does not allege why the first respondent's decision was unreasonable. Put in another way there is no indication of the unreasonableness of the decision.

[19] Further, absent the papers before me, is no indication of which relevant factors or irrelevant factors were taken into account by the first respondent in reaching the decision to suspend the applicant.

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[4] *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC).
[5] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).

[20] Turning now to the interdictory relief sought by the applicant. The applicant argues that there are grounds for an interdict regarding his suspension. It is difficult to discern on what basis an interdict is sought because once an administrative decision has been set aside, the decision not only ceases to have an effect but is to be treated as if it never existed.[6]

[21] The parties agreed to argue the main application and the argument for the interdictory relief was accordingly nullified, save for any issues connected with the wasted costs occasioned in connection with the interdict proceedings.

[22] In addition, the applicant seeks an order to the effect that the impugned decision be set aside and substituted for an order by this court. Again, no case has been made out for this relief on the papers as presented. The applicant is required to make out a case of exceptional circumstances.[7] In my view the applicant has failed to make out a case for exceptional circumstances and no exceptional circumstances exist.

[23] Where an administrative decision does fall to be set aside, it is only in exceptional cases that a court may substitute that decision. The usual remedy is to remit the matter for reconsideration by the subject administrator, with or without directions for the further conduct of the administrative action. The first respondent was well placed to determine this matter and I can find no exceptional grounds in existence for a substitution of the impugned decision. This is also fortified by the fact that there was no factual evidence of any bias or malice on the part of the first respondent. The case for the applicant was also rendered somewhat defective as the 'complete record' of proceedings before the first respondent was absent from the papers presented to this court.

Conclusion and Order

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[6] *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2020 (1) SA 450 (CC).

[7] Section 8(1)(c)(ii)(aa) of PAJA states that a substitution order can be granted only in exceptional circumstances.

[25] For the reasons set out herein, I find that the applicant has failed to make out a case for the ‘exemption’ as sought and he has also failed to make out a case for judicial review. No exceptional circumstances exist for this court to come to his assistance in this connection.

[26] Further, no case for a legality review has been made out because when assessing the legality of any action it is necessary to establish whether the first respondent acted within the powers accorded to it (*intra vires*) or beyond those powers (*ultra vires*). Also, there are no constitutional grounds that will allow the applicant to exodus the provisions of the decision rendered against him by the first respondent as there has been no violation of his constitutionally enshrined ‘Just Administrative Action’ rights.

[27] In the result the following order is granted, namely;

1. That the application at the instance of the applicant, is dismissed.

2. That the costs of and incidental to these application proceedings shall be paid by the applicant (on the scale as between party and party), as taxed or agreed.

E. D. WILLE
Judge of the High Court
Cape Town