***FORM A***
**FILING SHEET FOR EASTERN CAPE JUDGMENT**

ECJ NO: 018/2006

PARTIES: Monwabiso Arther Yako and Border Rugby Football Union & 9 others

REFERENCE NUMBERS -

- Registrar: 3177/05

DATE HEARD: 12/01/2006

DATE DELIVERED: 20/01/2006

JUDGE(S): Froneman J

LEGAL REPRESENTATIVES -
*Appearances:*

- for the State/Applicant(s)/Appellant(s): NM Arendse SC & DP Borgstöm
- for the accused/respondent(s): IJ Smuts SC

*Instructing attorneys:*

- Applicant(s)/Appellant(s): Netteltons
- Respondent(s): Neville Borman & Botha

**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE DIVISION**

**CASE NO 3177/2005**

**In the matter between**

**MONWABISO ARTHUR YAKO** **Applicant**
**and**

**BORDER RUGBY FOOTBALL UNION** **First Respondent**
**and**
**NINE OTHERS** **Second to Tenth Respondents**

**JUDGMENT**

**Froneman J.**

[1] For avid supporters of South African rugby the administration of the sport on national and provincial level has become an embarrassment. The perception, of which I think I may legitimately take judicial notice, is that many involved in the administration of the game are more concerned with their own personal interests than with the good of the sport in general. This application will do nothing to dispel that perception. Fortunately, however, the players and the sport still thrives, despite (and not necessarily because of) these kind of disputes at the higher levels of the administration of the sport.

[2] In February 2005 the applicant was elected as the president of the Border Rugby Football Union, the first respondent ('the Union'). That meant, initially, that he would serve in that position for two years, until the Union's annual general meeting in the beginning of 2007. In July 2005, however, the Union's constitution ('the constitution') was amended so that elections for that position, as well as that of the executive committee of the Union, would only be held every three years. That meant that the applicant and the executive committee elected in 2005 were ensconced in their positions until early 2008, or so they thought.

[3] At a general meeting of the Union held on 23 October 2005 a motion of no confidence was passed in the executive committee, and an interim committee was appointed with the task of running the affairs of the Union until a new executive committee could properly be elected at a properly constituted annual general meeting in early 2006. The first respondent contends that the effect of this was that the then executive committee resigned from their posts, or were effectively relieved from those positions by the motion of no confidence. This, it alleges, was accepted by all concerned on the executive committee, and accordingly the interim committee called for an annual general meeting to be held on 29 January where an election will be held to fill the vacancies on the executive committee.

[4] The applicant disputes what actually happened at the meeting on 23 October 2005 and contends that, in any event, the Union's constitution does not provide for removal of the executive committee by way of a motion of no confidence as occurred on 23 October 2005. He denies that he at any time resigned from his post as president, and three of the executive committee members support him in this, alleging that they never resigned and still consider them to be members of the executive committee. The other elected members of the executive concede that they have resigned and they do

not contest the validity of the fresh election of an executive committee at the annual general meeting to be held on 29 January 2005.

[5] As a result the applicant launched the present application in which he seeks two distinct forms of relief. In part A of the notice of motion he seeks interim relief pending a final determination of the relief sought in part B of the notice of motion. In part B he seeks the review and setting aside of the decisions taken by the Union at the meeting of 23 October 2005. This judgment is concerned only with the interim relief sought in part A of the notice of motion. Only the first respondent formally opposes the application, although it is clear that the other respondents do not support the application.

[6] The interim relief that the applicant initially sought was fourfold in nature, namely (1) to prevent the annual general meeting on 29 January 2005 from holding any election to appoint a president or members to the executive committee in the place of the applicant and the three members of the executive who deny that they have resigned their posts; (2) to declare that they remain in those posts; (3) to declare that the applicant remains a director of the second respondent; and (4) to interdict the first to seventh respondents from doing anything to interfere with the applicant or any other office bearer of the Union from fulfilling their duties.

The declaratory orders sought under (2) and (3) were clearly not temporary relief and I understood Mr. Arendse, who appeared with Mr. Borgstrőm for the applicant, to concede that they were not competent orders to be claimed as interim relief.

What thus remained in issue was whether the applicant had made out a case for the temporary relief under (1) and (4) above.

[7] At this stage I wish to emphasize the nature of interim relief in court proceedings such as the present. I do so because Mr. Arendse in his address submitted at various stages that a refusal of relief in favour of the applicant would be “irresponsible”, and “condoning” mob rule. I consider those submissions as unhelpful and ill-considered,

*but Mr. Arendse, to his credit, unconditionally withdrew those comments when I commented on them during argument.*[1] The refusal or granting of interim relief in applications such as the present do not depend on considerations of responsibility, or of condoning mob rule, or otherwise. Interim relief is granted or refused on the basis of compliance or non-compliance by the applicant of the well known requirements for such relief, namely (1) the existence of a prima facie right in favour of the applicant; (2) the reasonable apprehension of irreparable harm to the applicant if interim relief is refused and it is found that ultimately the applicant was entitled to the relief sought; (3) that the balance of convenience favours the applicant; and (4) that the applicant has no alternative remedy. If those requirements are met, or not met, a presiding judicial official is duty bound to give a decision in accordance with those findings irrespective of whether some would characterize it as 'irresponsible' or 'condoning' some alleged mob rule or not. I would have expected this to be obvious to all concerned but to the extent that it may not be it is necessary to spell out explicitly what this judgment does <u>not</u> decide.

I am called upon to determine, firstly, whether the applicant on the papers before me has established a prima facie right that he and three other members of the executive committee were unlawfully deprived of their elected posts at the meeting on 23 October 2005. Such a prima facie finding is not final and binding on anyone because the final determination of that issue will only be done in the review application dealt with in part B of the notice of motion. So, to put it bluntly, if anyone ( either the applicant or the respondents) seeks to rely on my finding on this issue in the present application as a final vindication of the effect of the meeting of 23 October 2005 they would be wrong to do so.

Furthermore, the existence of a prima facie right in applications for interim relief is only one of the hurdles that an applicant has to clear before he or she is entitled to such relief. The other three requirements mentioned above must also be met. They are very practical in nature and geared to ensure the most practical way of keeping things

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going temporarily, without undue prejudice to any party, until the real dispute between the parties is finally determined.

This matter has generated much heat and passion. All the parties must understand that the present application is primarily geared to find a practical and fair temporary solution to enable the effective continuation of the Union's business until the disputes between the parties can finally be determined rationally in accordance with what the law requires. If that is understood by rugby administrators it may follow that those they serve, the players and supporters, will regain their trust in those who run and administer the game.

*Prima facie right*

[8] There is some dispute about what actually occurred at the meeting on 23 October 2005. The original minute of the special general meeting reads as follows:

"On opening the meeting Mr. Yako asked members to explain to him the meaning of a 'Vote of no confidence" in the Executive Committee and asked whether this was covered in the Constitution of the BRFU. After a lengthy debate it was stated that this was covered by clause 31 of the Constitution. Mr Yako replied that this clause referred to the 'Termination of Union' and not the Executive Committee. The General Council could dissolve the Union but not the Executive Committee.

Mr Yako stated that the members could not vote against the Constitution unless *all* members were in agreement.
A further discussion took place and it was agreed that even though the 'Vote of no confidence' was not covered by the Constitution, members would go ahead and vote for the removal of the Executive en bloc and their resignation with immediate effect.

By a show of hands 42 members were in favour of the 'vote of no confidence' and 16 were against.
Mr Yako stated that it was the prerogative of Executive Members not to stand down.
Executive members S Laubscher, S Darke, G Lowry, Ms Nyawombi, C Pringle and M Sohopu then left the meeting.
Mr M Yako, Mr Z Yibe, Mr I Harry and Mr Mavela remained seated.
Mr Yako declared the meeting closed at 10h55."

A later (disputed) correction of the minutes noted that:

"Executive Members present voted in the show of hands for and against the 'vote of no confidence'.

The General Council of the BRFU resolved that members of the Executive Committee in whom such vote of no confidence was passed, shall resign with immediate effect from all positions within Border Rugby.
Delete the last sentence [the closing of the meeting] as Mr Yako had no power to close the meeting as he was no longer in office."

[9] The first respondent contends that the general meeting called for in addition to the aforesaid special general meeting then continued and at that meeting the interim committee of which the third to eighth respondents are members was appointed to run the Union's affairs until new elections for the Executive Committee were to be held in the new year. It also alleges that the applicant subsequently made it clear that he wanted nothing further to do with the running of the affairs of the union, in confirmation of the first respondent's contention that he and the other members had earlier vacated their posts. Applicant denies this. Three other executive members, Messrs. Yibe, Harry and Mavela, filed affidavits in support of the applicant, denying that they resigned and asserting that they are still members of the Executive Committee.

[10] The issue of a *prima facie* right, namely whether the applicant was unlawfully deprived of his post as president, thus involves both a disputed legal aspect (the proper interpretation of the Constitution), as well as disputed factual aspects (what actually occurred at the meeting and whether the applicant and the executive committee resigned or not). The final resolution of both these disputed aspects needs to be dealt with in the review application – part B of the notice of motion – and because of this I should be circumspect and brief in my assessment of this issue so as not to prejudge the issue finally.

With this in mind I find that the applicant has satisfied this requirement. 'Private' judicial review, of holding voluntary associations to the terms of their constitutions, is an established and accepted part of our law. For present purposes I do not need to determine this type of review's exact fit within our new constitutional dispensation. The first respondent's constitution contains no express provision for removal of the executive committee in the manner done at the meeting on 23 October 2005. It may be, as Mr Smuts argued on behalf of the first respondent, that such a power must be implied from the avowed democratic commitment of the constitution, or read into the provisions of clause 28 (2), but on the other hand it may well be that democratic institutions must also abide by their own chosen explicit rules and if not satisfied by

those rules change or amend them properly before acting upon them. All that however must be determined at the review hearing. For the moment I find that the applicant has made out a sufficient preliminary case that he was unlawfully dismissed from his post.

*Irreparable harm and alternative remedies*

[11] The applicant has not suffered any irreparable harm in the sense that he cannot be reinstated if the review application succeeds. The perceived affront to his dignity and reputation may also be dealt with in an action for damages. But what he will not be able to regain if he succeeds in the review application is the fact that he will have been deprived of the responsibilities that goes with being president of the Union. I emphasize the responsibilities of the office, and not the perks that some may perceive to be attached to the post. The responsibilities relate to serving the good of rugby in the region, not his personal interest. If the applicant does not fully appreciate this he would be wise to ponder why a vote of no confidence was passed in him and his executive in the first place.

*Balance of convenience*

[12] It is apparent that there is a genuine dispute between the parties about whether the applicant and the other three members of the executive mentioned in para. [9] above still retain the posts to which they were earlier elected. It would, I think, have been much better had the parties involved themselves agreed how to run the affairs of the Union efficiently and properly until that dispute had been finalised or sorted out. But now I have to make the assessment on the basis of the papers before me. The applicant wants to prevent an election at the meeting on 29 January 2005 for the posts that are disputed (prayer 2.1 of the notice of motion), but he also wants an order effectively allowing him and the other three members to continue in their posts (prayer 2.4 of the notice of motion).

The former appears to me to be sensible, practical and convenient. If an election to the disputed posts is now allowed, and the review application succeeds in due course, then a great deal of confusion and inconvenience will arise with two sets of elected officials having to change roles at that stage. Better to await the outcome of the review application to determine how those posts are to be filled and to leave them suspended until then. Clause 17 of the constitution appears to provide for the effective running of the Union's affairs even if all the posts in the executive are not immediately filled. The interim committee appears to have done so adequately until now and there appears to be no reason why an elected executive committee, albeit with temporarily less members, cannot do the same.

It would, however, not be proper in my view to grant applicant the relief sought in prayer 2.4 of the notice of motion. Although I have found a *prima facie* right in his favour in respect of the unlawful dismissal from his post, the order sought would effectively indicate a final determination in his favour, something which I have been at pains to emphasize I am not called upon or justified in making. In addition, given the recent history and obvious dissatisfaction with his performance and that of the executive committee it seems clear to me that such an order will undermine and not enhance the proper running of the affairs of the Union.

*Urgency*

[13] Mr.Smuts submitted in argument that there was sufficient reason on record to dismiss the application for, in effect, an abuse of the rules and practices relating to urgent applications in this division. There is much merit in what he said. The applicant has given no proper reason for at least the delay of two weeks in the first part of December in bringing the application. Similarly, there is no proper explanation why the application could not have been heard next week in allocated term time for opposed matters and why, at great inconvenience to the first respondent's legal representatives, the matter had to be argued yesterday without proper time for the

filing of heads of argument, affidavits and preparation. I think dismissal on those grounds will be too drastic but I am aware that some of my colleagues would not agree with that sentiment. Nevertheless, in my view the applicant has improperly manipulated the rules and practices relating to urgent matters and this justifies some censure in the form of a costs order. Mr. Arendse submitted that at most I should make no order as to costs. I intend doing so. I make the added comment, however, which will not form part of the court order, that if the insistence on prematurely setting the opposed matter down in recess was at the insistence and for the convenience of the applicant's legal representatives and not the applicant himself, the applicant should be made aware of that fact.

*Order*

[14] The following order is made:

1. Pending the final determination of PART B of this application:
1.1 The Border Rugby Football Union is interdicted and prohibited from holding any election to appoint a President of the Union or to appoint members to the Executive Committee to replace Messrs. Yibe, Harry and Mavela on that committee;
1.2 The aforesaid posts will be suspended.

2. No order as to the costs of this application is made.

J.C.Froneman

Judge of the High Court of South Africa.

ADDENDUM: 9 February 2006.02.09
I draw attention to the fact that I have added, in italicised form, certain words to a sentence in para [7} of the judgment. The reason for doing so is explained in the footnote thereto.