

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 2023/02228

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

Date: 27/6/2023

CASE NUMBER: 2023/02228

In the matter between:

YOUNG BAFANA FOOTBALL CLUB

Claimant

and

DR TSIETSI RAMATSEKISA NO

1st Respondent

ZIZWE UNITED FOOTBALL CLUB

2nd Respondent

SOUTH AFRICAN FOOTBALL ASSOCIATION

3rd Respondent

**SOUTH AFRICAN FOOTBALL ASSOCIATION
WESTERN CAPE**

4th Respondent

SIRAAJ WILLIAMS

5th Respondent

SIXOLISIWE MADOLWANA

6th Respondent

REASONS FOR JUDGMENT

[1] This matter came before me in the urgent Court, and I ultimately handed down an order on 5 June 2023 reading as follows:

- “1. That time periods and processes provided for in the Uniform Rules of Court is dispensed with and this matter may be heard on an urgent basis in terms of Uniform Rules of Court 6(12).

2. *The award dated 1 June 2023 ('the award') made by the First Respondent in his official capacity as arbitrator under the auspices of the Third Respondent, is hereby reviewed and set aside.*
3. *It is hereby declared that the award does not preclude the Applicant from qualifying and/or participating in the 2023 ABC Motsepe National Play-Offs, scheduled for 6 to 11 June 2023 in Pietermaritzburg.*
4. *In the circumstances the Application is granted in the terms above with costs.*
5. *The Court's reasons will follow within 20 days from this order."*

[2] Neither party specifically requested reasons but it is clearly incorrect to provide reasons within 20 days after the order. It would appear to be that the correct period within which reasons should be granted is to be calculated in terms of Rule 49 and that is 15 days. I now provide reasons for the above order.

[3] The facts of the matter are simple and straightforward.

[4] For the sake of convenience, the claimant will be referred to as Young Bafana and the Second Respondent as Zizwe United. Young Bafana is an

amateur football club owned by Mr Marcel Scharrighuisen. He is the deponent to the founding affidavit. Zizwe United is also an amateur football club registered with the South African Football Association Western Cape (the 4th Respondent). I will refer to the Claimant and Second Respondent

as Young Bafana and Zizwe United interchangeably. In view of the conclusions I arrived at the Claimant will rather be referred to as the Applicant.

[5] It is apposite to describe the other parties as well. The First Respondent was cited in his capacity as an adult whose full and further particulars are unknown to the Applicant and who was served care of the Third Respondent at SAFA House, 7[...] N[...] Road, Johannesburg, Gauteng. The First Respondent was appointed by the Third Respondent to act as arbitrator in the matter which forms the subject matter of the proceedings before me. It is in this capacity that he was cited. The Third Respondent is described as the South African Football Association, a private organisation of an associative nature and a *universitas* with its principal place of business located at SAFA House, 7[...] N[...] Road, Johannesburg, Gauteng. The Third Respondent is also the national administrative government body that controls and manages the sport of football in the Republic of South Africa. It is governed by *inter alia* the South African Football Association Statutes (*"the SAFA Statutes"*) (as amended from time to time. The SAFA Statutes is a document comprising 54 pages and was not annexed to the application to avoid prolixity. Where necessary in the affidavit reference were made to the articles of the SAFA Statutes and the relevant pages were attached.

[6] The Fourth Respondent is the South African Football Association Western Cape, the provincial administrative governing body that controls and manages the sport of football in the Western Cape with its principal place

of business located at Athlone Stadion, Cnr Klipfontein and Cross Boulevard Street, Cape Town, Western Cape.

[7] The Fifth Respondent is Siraaj Williams, an adult male that resides at 3[...] P[...] E[...], Mitchells Plain, Western Cape.

[8] The Sixth Respondent is cited as Sixolisiwe Madolwana, an adult male residing at 2[...] P[...] Street, A[...] V[...], Strand, Western Cape.

[9] From the founding affidavit it is clear that the Third Respondent organise and regulates a number of competitions including Leagues (semi-professional, amateur and development). One of the competitions organised, co-ordinated and/or regulated by the Third Respondent is the ABC Motsepe League. It is the third highest ranked football league in South Africa. The Premier Soccer League (in which the likes of Kaizer Chiefs FC and Orlando Pirates FC competes) is the highest rated football league in South Africa, which is followed by the Motsepe Foundation Championship. Both the Premier Soccer League and the Motsepe Foundation Championship are administered by the National Soccer League which is a special member of the Third Respondent.

[10] The ABC Motsepe League is played in each of the nine provinces of the Republic of South Africa. The eventual winners of the respective leagues qualify for participation in the ABC Motsepe National Play-Offs where they compete against each other. At the conclusion of the ABC Motsepe National Play-Offs the finalist in the ABC Motsepe National Play-Offs gain promotion to the Motsepe Foundation Championship. This year,

the 2023 Motsepe National Play-Offs will be held in Pietermaritzburg from 6 to 11 June 2023.

[11] In the Western Cape there were two streams of the ABC Motsepe League. Young Bafana and Zizwe United won the respective streams and to determine which club would qualify for participation in the 2023 ABC Motsepe National Play-Offs the teams played against each other. The first match was played on 23 April 2023 and was won by Zizwe United 1 - 0. The second match was played on 29 April 2023. Young Bafana won that match 1 - 0 during regular time. As the aggregate result between the two teams was 1 – 1 over the two matches, the second match went to penalties which Young Bafana won, thereby qualifying for the 2023 ABC Motsepe National Play-Offs.

[12] In letters dated 3 May 2023 and 4 May 2023 respectively, Zizwe United filed complaints with the South African Football Association Western Cape regarding the participation of Siraaj Williams and Sixolisiwe Madolwana. The basis of the complaints was that their participation in the second match was irregular. In a letter dated 8 May 2023 the Fourth Respondent dismissed the complaints for want of compliance with Rule 19.6 of the SAFA Uniform Rules. These rules are of general application to the various competitions organised and regulated by the South African Football Association. A full set of the rules is annexed as annexure “**MS5**” to the founding papers.

[13] Zizwe United submitted a statement of claim dated 10 May 2023. It is unknown to the deponent of the founding affidavit when exactly the statement of claim was filed given that he is not in possession of the covering email. A copy of the statement of claim is attached marked “**MS6**” to the founding papers.

[14] This statement has two peculiar features. Firstly, it cites the Applicant as the Second Respondent and the Fifth and Sixth Respondents as the Third and Fourth Respondents. The statement was never served on the Applicant or the Fifth or Sixth Respondents. The relief sought by the Second Respondent in that application in the statement of claim was:

“23.1 The setting aside of the dismissal;

23.2 That the matter be heard de novo by the arbitrator;

23.3 Further and/or alternative relief; and

23.4 costs of suit.”

[15] In an award dated 1 June 2023 the First Respondent held *inter alia* that:

“24.1 the complaints dismissal is reviewed and set aside;

24.2 the complaints, respectively, complied with the provisions of Rule 19;

24.3 the Applicant was found to have fielded two improperly registered players (ie the Fifth and Sixth Respondents in this application) lacking valid clearance documents in the match played on 29 April 2023; and

24.4 three points are to be dropped/deducted from the Applicant from the match against the Second Respondent played on 29 April 2023.”

A copy of the award is annexed as “**MS7**” to the founding papers.

[16] The Applicant sought to review and set aside the award in terms of the provisions of Promotion of Administration of Justice Act, 3 of 2000 (“PAJA”), the common law, section 33 of the Constitution of South Africa, 108 of 1996 and/or the principle of legality. The award allegedly constituted administrative action for purposes of PAJA.

[17] In the alternative the Applicant sought an order that it be declared that the award does not have the effect of the Applicant being precluded, disqualified and/or not participating in the 2023 ABC Motsepe National Play-Offs.

[18] The Court’s jurisdiction allegedly arises from the fact that the “*arbitration proceedings*” conducted by the First Respondent in his official capacity under the auspices of the Second Respondent which is located in the jurisdiction of this Court. It is also alleged that this Court has jurisdiction on the basis of the doctrine of convenience.

[19] From the founding affidavit it was clear at the commencement of the 2022/2023 season that the participants in the ABC Motsepe League were informed that it would be governed by *inter alia* the SAFA Uniform Rules. These rules are of general application to the various competition organised and regulated by the South African Football Association.

[20] Given that the “award” stems from the complaints and consideration of Rule 19 of the SAFA Uniform Rules, same are of cardinal importance.

Rule 19 states the following complaints:

- “19.1 A team that has not lodged a protest in respect of a game in which it participated, may lodge a complaint with the league in respect of any act of misconduct/offence allegedly committed. No third party complaint shall be accepted.*
- 19.2 The complaint must be lodged, in writing within seven (7) days of the incident, and accompanied by a complaint fee, as determined in the Competition Rules and/or SAFA Schedules. The CEO/Designated SAFA Official shall dismiss any complaint submitted which does not comply with this/her Rule;*
- 19.3 The written complaint must set out the full facts on which it is based and refer to the Article and/or Rule and Regulation allegedly contravened by the offending party.*
- 19.4 The complaint must not be in respect of a protest based on facts substantially similar to a grievance that has been complained of and has been entertained by SAFA and/or the SAFA Disciplinary Committee.*
- 19.5 The complaint must not be made against the referee's and/or assistant referee's decisions connected with play in any game, except if the complaint contains an allegation of corruption.*
- 19.6 The onus is on the complainant to ensure that the provisions of Rules 19.2, 19.3, 19.4 and 19.5 above are complied with. Should the complaint not comply with said provisions, the complaint fee shall be returned to the complainant.*
- 19.7 Upon receipt of a complaint, the Designated SAFA Official shall:*
 - 19.7.1 Call for any further written information and documentation from the complainant; and*
 - 19.7.2 Forward to the alleged offending party the documentation received from the complainant and advises the alleged offending party of the nature*

of the complaint and asks such party for a written explanation, but warning such party, that such explanation may be later used in evidence against the said party.

19.8 Upon receipt of the replies asked for, or if no replies be received within 5 (five) days of the Designated SAFA Official making the requests in terms of Rule 19.3 above, the matter shall be referred to the Disciplinary Committee and the matter shall be heard within 14 days.

19.9 Any charge(s) instituted by SAFA in terms of Rule 19.8 shall be heard by the relevant SAFA Disciplinary Committee in accordance with the SAFA Constitution and these Rules and Regulations.

19.10 The complainant shall have the right to be present or give evidence before the Disciplinary Committee hearing the charges against the offending party. SAFA may subpoena the complainant to present or give evidence or produce any book, paper or document in the hearing.

19.11 The hearing of any charges instituted by SAFA in terms of Rule 19.8 shall be heard by the relevant SAFA Disciplinary Committee in accordance with the SAFA Constitution and these Rules and Regulations, except that any sentence imposed by the Disciplinary Committee shall be limited to the following sentences or combination of sentences: ...”

[21] It was further stated that Rules 19.7, 19.8 and 19.9 sets in motion a specific procedure for the manner in which complaints are to be dealt with, which culminates in the referral of the matter to the Disciplinary Committee of the 4th Respondent where the offending parties will face charges relating to the complaint. In terms of Rule 19.10 of the SAFA Uniform Rules the complainant has the right to be present or give evidence before

the Disciplinary Committee hearing the charges against the offending party.

[22] These rules are geared towards ensuring procedural fairness for the benefit of both the offending party and the complainant when a complaint is dealt with. Procedural fairness in the form of the *audi alterem partem* which is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance to influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants but is also likely to improve the quality and rationality of administrative decision-making and enhance its legitimacy.

[23] It is further asserted that coupled with the *audi alterem partem*-principle, the legitimate expectation doctrine also seeks to safeguard procedural rights of parties affected by administrative decisions. It was also asserted that this doctrine is underscored by the provisions of section 3(1) of PAJA.

[24] Thus, before the award could be made, the Applicant and the Fifth and Sixth Respondents had a right, in terms of the *audi alterem partem* - principle and the legitimate expectation doctrine, to be heard even if only on the basis of making representations.

[25] Given that the award was made by the First Respondent as an arbitrator and not the Disciplinary Committee, it would follow that such arbitration proceedings could only have been conducted in terms of Article 81

of the SAFA Disciplinary Code. A copy of Article 81 was annexed as “**MS8**”.

Article 81 reads as follows:

- “1. *All disputes with the decisions of the Appeal Board shall be submitted to the Association for arbitration within seventy-two (72) hours of the decision being made known to the parties in writing, provided that the Arbitrator may, on good cause shown, condone non-compliance with this time limit. Such request for arbitration, or a request for direct arbitration in terms of article 33 of the constitution, shall be accompanied by a deposit as specified in the Schedule of Fees.*
2. *A party requesting arbitration (“the requestor”) shall file with his/her request a Notice of Dispute which shall set out fully the grounds of dispute, and which shall be served by fax or delivered to all other relevant parties within a day of the date of filing the Notice of Dispute, or within such later period as may, on good cause be shown, be condoned by the Arbitrator.*
3. *The parties to the arbitration shall be the requestor and any other relevant parties who may have an interest in the matter, and who have within 3 days of receipt of the Notice of Dispute, or such later period as may, on good cause shown, be condoned by the Arbitrator, given notice to the requestor and to the SAFA Chief Executive Officer of their intention to participate in the arbitration.*
4. *On receipt of a request for arbitration, the CEO shall provide a list of three names of possible arbitrators from which one person shall be chosen by mutual consent of the parties involved in the dispute, as the arbitrator. In matters relating to the affairs of the Premier League, the arbitrator shall be a Senior Counsel. If the parties are not able to agree on an arbitrator, the CEO shall appoint the arbitrator, and such appointment shall be final.*
5. *Within two (2) days of the appointment of the arbitrator, the parties shall sign a submission to arbitration which shall set out the disputes between the parties and shall confirm that the arbitration is to be held in accordance with the provisions of the Rule.*
6. *The date and time for the arbitration shall be fixed by the CEO in consultation with the arbitrator having due regard to*

the needs both for fairness and for speedy finalisation of disciplinary disputes.

7. *The parties in the arbitration shall be entitled to attend the arbitration, and may be represented by members of the Legal profession.*
8. *The venue of the arbitration shall be decided by the arbitrator.*
9. *The arbitration shall be carried out informally and in a summary manner. It will not be necessary to observe strict rules of evidence or procedure.*
10. *The arbitrator shall not be confined to the record before the Appeals Board and shall have the right to call for any papers, records or other evidence as s/he may deem necessary to reach his finding. The chairpersons of previous Disciplinary Committees of the Appeal Board may be called to explain their decisions, at the sole discretion of the arbitrator.*
11. *Notwithstanding anything contained in these Rules, the powers of the arbitrator shall be wide and shall be determined by the arbitrator at his sole discretion.*
12. *The arbitrator shall have the power to award costs to any party, and shall decide what portion, if any, of the deposit shall be refunded. Should the cost to SAFA of the arbitration exceed the deposit, the arbitrator shall decide who is responsible for such costs. Failing a decision of the arbitrator in this regard, the parties and the arbitrator shall be jointly and severally liable to SAFA for such costs.*
13. *The arbitrator's decision shall be final and binding on all parties."*

[26] It is emphasised that Rule 81.5 provides that within two days of the appointment of the arbitrator, the parties shall sign a submission to arbitration which shall set out the disputes between the parties and shall confirm that the arbitration is to be held in accordance with the provisions of the Rule.

[27] Article 81.7 also emphasise that the parties to the arbitration shall be entitled to attend the arbitration, and may be represented by members of the Legal profession.

[28] As with Rule 19.7, 19.8 and 19.9 and 19.10 of the SAFA Uniform Rules, Article 81.5 and 81.7 is geared towards the procedural fairness for the benefit of both the offending party and the complainant and their expectations when the complaint is dealt with.

[29] Thus, before the award could be made, presumably following an arbitration process conducted in terms of Article 81 the Applicant and the Fifth and Sixth Respondents had a right in terms of the *audi alterem*-principle and the legitimate expectation doctrine to be heard- even if only on the basis of making written representations.

[30] It was further submitted that the provisions of Article 81 and particular 81.11 does not allow an arbitrator to curtail the right of a party to its rights to procedural fairness in the form of the *audi alterem*-principle and the legitimate expectation doctrine.

[31] Furthermore, in relation to the type of sentence that may be imposed following charges flowing from a complaint, a Disciplinary Committee and an arbitrator is limited to those sentences, or combination of sentences listed in Rules 19.11.1 to 19.11.8 of the Uniform Rules.

[32] On 29 May 2023 Mr Scharrighuisen attended to the official draw for the 2023 ABC Motsepe Play-Offs at the Third Respondent's office in

Johannesburg. The fixtures for the 2023 ABC Motsepe National Play-Offs were determined with Young Bafana set to be playing matches on 6 and 7 June 2023 hence the urgent need for the determination in the matter by no later than 5 June 2023.

[33] On 30 May 2023 Mr Scharrighuisen became aware of a letter purportedly issued by SAFA on 29 May 2023 circulating on social media. He saw the letter on Facebook and a copy of the letter is annexed as “**MS9**” to the founding papers. Comments on the social medial platform intimated that the latter had something to do with the matches played between the Young Bafana and the Zizwe United. However, it can be seen from its contents, no reference was directly made in this letter to the Applicant. Reference was only made to the Second and Fourth Respondents. Mr Scharrighuisen nevertheless on the same day sent an email to Tankiso Modipa, the chairman of the Fourth Respondent asking whether the letter he obtained from social media was legitimate and asked him why if the Applicant was an affected party, they have received no notification of the matter. A copy of this letter is annexed to the founding papers as “**MS10**”. On the same day Mr Modipa responded by email and assured him that it was not the Applicant but rather the Fourth Respondent that was cited and that the Applicant should focus on preparing for the 2023 ABC Motsepe National Play-Offs. A copy of this email is annexed as “**MS11**”.

[34] On the morning of 31 May 2023 at approximately 10h26 Mr Scharrighuisen received a phone call from a lady who introduced herself

as Rachel Mkhonto and who advised him that she was calling from SAFA and enquired whether the Applicant would be present at the arbitration. He allegedly informed her that he was unaware of the Applicant being a party to any arbitration and that it was not notified of any such arbitration. She acknowledged what he had said and ended the call.

[35] He further states that it should be reiterated that at that stage no documents relating to the arbitration had been served on the Applicant or on the Fifth and Sixth Respondents or either the Second or Third Respondents and if any of the aforesaid were served with papers the Applicant would have acted positively and proactively to defend the arbitration. There was however no reason to suspect that the Applicant would *“soon be the subject of an egregious injustice”*.

[36] On the morning of 1 June Mr Scharrighuisen received a copy of the award from Siyabonga Tyhawana the deputy chairman of the Fourth Respondent by a WhatsApp at 12h20. He states that this was the first occasion that the Applicant had been made aware of any arbitration award relating to proceedings in which it was one of the parties. I infer that this was an instance of a request for a direct arbitration in terms Section 33 of the Constitution,

[37] Shortly after receiving the award he consulted his legal representatives who immediately dispatched a letter to SAFA copying the Second and Fourth Respondents, requesting clarity as to whether the Applicant will be participating in the 2023 ABC Motsepe National Play-Offs. He also

requested reasons for the award and a copy of the recording of the proceedings. A copy of this demand is annexed marked “**MS12**” to the founding papers.

[38] At the time of signing the founding affidavit no response to the aforesaid had been received by the Applicant except for two recordings of proceedings (other arbitrations held by the third respondent) being made available to the Applicant’s legal representatives.

[39] The recordings received consisted of approximately 10 hours of audio and at the time of deposing to the affidavit the Applicant has finally been able to reach the part of the audio where the arbitration was dealt with. The first 15 minutes of the proceedings are telling in support of the Applicant’s case and the Applicant stated that he would seek leave of the Court to play the recording or to hand a transcribed copy thereof to the Court.

[40] Just before he deposed to the founding affidavit, he received the document “*Reasons Arbitration Award*” prepared by the first respondent. A copy of the reasons was attached marked “**MS17**” to the founding papers. The deponent did not have time to study and deal with the reasons given the urgency of the matter and the fact that he was about to depose to affidavits. However, from a quick perusal of the reasons he noted that the first respondent claims that an official of the third respondent contacted him and alleged that he indicated he could not join the proceedings due to other commitments. Mr Scharrighuisen denied this

and as already indicated earlier, Mkhonto called him, and he informed her that he was not aware of the proceedings to which the Applicant was a party and the discussion ended there. According to the “*Reasons for the Award*” the official who had contacted him indicated to the Arbitrator that he could not join them due to other commitments.

[41] The deponent emphasised that the Applicant was denied to be heard in violation of the *audi alterem*-principle. The Applicant did not elect to not participate in the proceedings. Given the rights and interests of the Applicant and the adverse and material effect the Arbitration could have on the Applicant, it would have attended the proceedings to protect its rights and interests had it been notified of the arbitration proceedings.

[42] The Applicant stated that it is still studying the reasons and reserved the right to file a supplementary affidavit regarding the reasons. No such affidavit was filed. The grounds of review are stated as follows:

1.1 The award was made in breach of the rights afforded to the Applicant and the Fifth and Sixth respondents in terms of the *audi alterem*-principle and the legitimate expectation doctrine. The award was made in a manner that was procedurally unfair and provoking the provisions of section 33 of the Constitution and PAJA and particularly sections 3(1), 3(2)(a) and (b) and 3(8) thereof.

1.2 Before the award was made the Applicant and the Fifth and Sixth Respondent had a right in terms of the *audi alterem*-

principle and the legitimate expectation doctrine to be heard - even if only in writing or on the basis of making written representations. In addition, an award was made in breach of the rights afforded the Applicant and the Fifth and Sixth Respondents in terms of the *audi alterem*-principle and the legitimate expectation doctrine.

1.3 Accordingly the Applicant contended that the award is liable to be impugned on the grounds of sections 6(2)(a)(i), (b), (c), (d), (e)(i), (e)(ii), (e)(iii), (e)(iv), (e)(v), (e)(vi), (f)(i), (f)(ii), (h) and (i) of PAJA, alternatively the common law, further alternatively on the basis that it breached the principle of legality, further alternatively that it breached section 33 of the Constitution.

1.4 In addition, it is contended that the award also goes further and grants relief that was not sought by the second respondent in the arbitration. In fact the relief granted i.e. that the Applicant is deducted three points is incompetent and illogical in context of all the facts. Hence it was submitted all the more reason why the award should be set aside.

[43] The deponent further stated that it is entitled to declaratory relief and that the requirements therefore are twofold:

[43.1] that the Court must be satisfied that the Applicant has an interest in an existing, future or contingent right or obligation; and

[43.2] once a Court is so satisfied it must be considered whether or not the order should be granted.

[44] The deponent submitted that the first requirement is self-evidently satisfied, and that the Applicant had a right in relation to the manner in which her complaints are adjudicated upon under the auspices of the Third Respondent. That right included the right not to be subjected to sentences that are not authorised in terms of Rule 19.11.1 - Rule 19.11.8 of the SAFA Uniform Rules.

[45] Secondly it was submitted that the provisions of Rule 19.11.1 to 19.11.8 of the SAFA Uniform Rules was not applicable to the Play-Off between the Young Bafana and Zizwe United. The two-match Play-Off did not entail the accumulation of points; it was a knockout. Accordingly, the order in the award that “*Three points are to be dropped/deducted from the Young Bafana Football Club from the match against the Requestor played on 29 April 2023*” does not have the effect of precluding the Applicant of participating in the 2023 ABC Motsepe National Play-Offs.

[46] It is contended that the award was made in breach of the rights afforded to the Applicant and the Fifth and Sixth Respondents in terms of the *audi alterem*-principle and the legitimate expectation doctrine. The award was made in a manner that was procedurally unfair thereby breaching the provisions of section 33 of the Constitution and PAJA and in particular sections 3(1), 3(2)(a) and (b), and 3(3).

[47] Mr Scharrighuisen also addressed the essence of the complaints of Second Respondent i.e. the alleged fielding by the Applicant of supposedly ineligible players by the Fifth and Sixth Respondent in the fixture between the First and Second Respondents on 29 April 2023.

[48] In the first complaint, MS2, the Second Respondent contends that contrary to Rule 11.1 and 11.6 as well as 14 the Applicant was fielding an ineligible player. This is denied by the Applicant and the Fifth Respondent. The Fifth Respondent was registered by the Applicant on the MYSAFA platform on 30 September 2022. The registration history of the Fifth Respondent on the MYSAFA platform is attached to the founding papers as “**MS13**”. It is clear from this that he last played for Norway Parks Magic FC. The registration documents and clearance from Norway Parks FC submitted by the Applicant in respect of the Fifth Respondent is also annexed to the founding papers as Annexure “**MS14**”. It was therefore submitted that the contention that the Fifth Respondent was improperly registered is false. Furthermore, the Second Respondent relied on information obtained off a database used by the SAFA Cape Town Local Football Association. This platform used for registration by SAFA Cape Town is not recognised by the Third or Fourth Respondent (or FIFA for that matter) and is effectively meaningless in the context of the present matter. The Applicant reserved its rights to submit further legal argument on this aspect.

[49] In respect of the second complaint, annexure MS3, attached to the founding papers hereto, the Second Respondent contended that the

Applicant fielded an alleged ineligible player i.e., the Sixth Respondent who was allegedly improperly registered, due to the fact that he is currently registered with Helderberg Local Football Club. This is also denied by the Applicant and the Sixth Respondent. Once again, the information utilised by the Second Respondent was obtained from a platform utilised by SAFA Cape Town. The MYSABA records annexed as Annexure “**MS15**” demonstrates that the Sixth Respondent was previously registered to the Cape Town City FC. As stated before the information on the platform utilised by SAFA Cape Town is regarded as meaningless and not recognised. The Applicant also utilised the registration documents annexed as Annexure “**MS16**” when registering the Sixth Respondent.

[50] In the circumstances the Applicant submitted that Fifth and Sixth Respondents were properly registered with the Applicant and that the reliance on the registration information on an unrecognised platform base is without merit. The Applicant also reserved its rights to address further legal argument during the hearing of the matter.

[51] Further grounds for the urgency of the matter were stated to be the fact that the ABC Motsepe National Play-Offs is scheduled for 5 to 11 June 2023 in Pietermaritzburg and after the Applicant was declared winners of the Western Cape ABC Motsepe League it commenced preparation to travel with its team, which consists of more than 30 players and staff members. The team was scheduled to depart Somerset West on 3 June 2023 arriving in Pietermaritzburg on 4 June 2023. The official check in and registration for the 2023 ABC Motsepe National Play-Offs was

scheduled to take place on 5 June 2023 and hence it was argued that the matter has to be adjudicated on an urgent basis and that the Applicant cannot obtain substantial redress in due course.

[52] Under the rubric of urgency it was further contended that it would also be highly prejudicial for the 2023 ABC Motsepe National Play-Offs to be interdicted. There would be no way to recoup the associated wasted cost for the various teams participating and the Third Respondent, should this be done. The Applicant also submitted that it acted with reasonable expedition in launching the application and maintained that the urgency is not self-created.

[53] The submission was also made that the Applicant worked very hard to achieve its goal and qualify for the 2023 ABC Motsepe National Play-Offs and that to qualify for the 2023 ABC Motsepe National Play-Offs is a significant achievement for any football club. It gives a club the opportunity to compete against the best teams of other provinces. The two best teams will win R1 million and R500 000 respectively. They will also be promoted to the professional ranks of South African football and play in the Motsepe Foundation Championship, the second highest tier of South African professional football, one level below the prestigious Premier Soccer League.

[54] Such a promotion would also increase the value of a club from approximately R500 000 to R10 million. These estimates are based on the recently reported values placed in the media.

[55] The founding affidavit was signed on 2 June 2023. SAFA initially filed a Notice of Intention to Oppose and shortly thereafter withdrew same on 3 June 2023. Thereafter it filed a notice to abide.

[56] I interpose here to point out that PAJA as a review remedy cannot be used where the so-called “administrative decision” is made by a private entity. I rely in this regard on Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another.¹ In this matter Nugent JA writing for the majority stated as follows:

“[18] In their notice of motion the appellants sought orders setting aside the council's decision not to appoint any of the initial bidders, its decision to exclude the appellants when identifying alternative providers, and its decision to appoint Careworks. I

[19] The decisions of the council are susceptible to review at the instance of the appellants only if they constitute 'administrative action' as contemplated by PAJA, which is defined as much by the nature of the decision concerned (or the failure to make a decision) as by its source. In that respect it constitutes 'administrative action' only if, amongst other things, it was made by -

*'(a) **an organ of State when -***

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

*(b) **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 . . .'***

[20] PAJA provides that an 'organ of State' bears the 'meaning assigned to it in s 239 of the Constitution' - and that section defines the term to mean -

¹ See 2010(5) SA 457 (SCA)

'(a)any department of State or administration in the national, provincial or local sphere of government; or

(b)any other functionary or institution - ~~exercising a power or performing a function in terms of the Constitution or a provincial constitution; or~~

(ii)

exercising a public power or performing a public function in terms of any legislation. . . '.

[21] It will be readily apparent that once that definition is inserted in PAJA's definition of 'administrative action' much of the latter definition is tautologous. Had the term been defined in PAJA to mean 'a decision taken (or any failure to take a decision) by an institution or functionary exercising a public power or performing a public function', it would have covered much the same ground. Once the definition is stripped of its superfluity the enquiry in the present case really comes down to whether the council, in making the decisions that are sought to be impugned, was 'exercising a public power or performing a public function'.

[57] He commented on the fact that some recent decisions "...of the High Courts in this country reflect a more expansive approach, but they are not always consistent. The question whether the conduct of a political party is susceptible to review evoked varying responses in *Marais v Democratic Alliance*; *Van Zyl v New National Party and Others*; and *Max v Independent Democrats and Others*. In *Cronje v United Cricket Board of South Africa* it was held, consistent with decisions in England, that the United Cricket Board did not perform a public function. Kirk-Cohen J expressed his reasons for that conclusion as follows

A *'The respondent is not a public body. It is a voluntary association wholly unconnected to the State. It has its origin in contract and not in statute. Its powers are contractual and not statutory. Its functions are private and not public. It is privately and not publicly funded. The applicant, indeed, makes the point that it has no statutory recognition or any 'official' responsibility for the game of cricket in South Africa.'*

B *[36] On the other hand, in *Tirfu Raiders Rugby Club v SA Rugby Union and Others* Yekiso J held that the SA Rugby Union exercised public powers and performed a public function, principally, it seems, because the matters in which it engages are matters of public interest. I have considerable doubt whether a body can be said to exercise 'public powers' or perform a 'public function' only because the public has an interest in the manner in which its powers are exercised or its functions are performed, and I find no support for that approach in other cases in this country or abroad." (my underlining)*

[58] The views above were also accepted in Hendricks v The Church of the Province of Southern Africa, Diocese of Free State²

[59] This leaves Youth Bafana as per its own contention with the common law, a possible breach of the principle of legality alternatively a breach of section 33 of the Constitution.

[60] I now turn to Zizwe United's affidavit and defences. Two points *in limine* are raised. The first is that the attorney for the Applicant is situated in Roodepoort, more than 30 kilometres from the seat of the court and that the case was issued without case number. These points were not pursued during argument and given that the matter is urgent I am of the view that both are condonable and are hereby condoned, I have also noticed that the papers were served on the Second Respondent a second time on 3 June 2023 by WhatsApp at 09h00.

[61] The bulk of the content of its affidavit is devoted to noting the contents of the Youth Bafana affidavit. There are, however, several aspects where Zizwe United raises disputes of fact. The central dispute is whether Youth Bafana knew of the review. The deponent contends that Youth Bafana knew about the arbitration mostly because Ms Mkhonto contacted Mr Scharrighuisen and, on that basis, takes the view that it consciously left the arbitrator to his own devices.

² (108/2021) [2022] ZASCA 95 (20 June 2022)

[62] The deponent also maintains throughout that the notion that the MYSAFA platform is the only relevant one is incorrect and takes issue with the notion that the Fifth and Sixth Respondents were regularly fielded. The original "Complaints", which were ultimately the subject matter of arbitration, are persisted in and the findings of the arbitrator are eventually supported.

[63] The Applicant did not file a replying affidavit to formally join issue with the Second Respondent. In my view it is not fatal for the Applicant given the fact that no issue is ever taken by the Second Respondent that the Applicant never agreed to an arbitration. An arbitration can be requested to deal with complaints but in such an event SAFA rule 81 applies. The parties must agree to an arbitrator (three names are put forward by SAFA) and if they cannot agree the CEO appoints the arbitrator.

[64] The Second Respondent's response hereto is to merely note the aforesaid procedures. It is never alleged that within 2 days of the appointment of the arbitrator the parties signed a submission to arbitration setting out the disputes between the parties confirming that the arbitration is to be held in accordance with the provision of the rule. As a minimum I would have expected that the Second Respondent who requested the arbitration would have set these details out in his answering affidavit and also indicate whether the arbitrator was agreed upon or appointed by the CEO. Safa's initial response to oppose the relief sought by the applicant and thereafter to withdraw its notice of intention to oppose and then to abide by the decision of this Court is also of some interest. To the extent

that it facilitated the arbitration I would have expected it to at least indicate whether Rule 81 was complied with.

[65] In the circumstances I am left with no choice but to find that no arbitration was agreed upon by the Applicant. Despite the Second Respondent's protestations that the Applicant knew about the arbitration due to the facts set out in paragraphs 15-19 of the Answering Affidavit and the conduct of SAFA Western Cape and the conduct of the coach, the affidavit does not deal with a submission to arbitration as required by Rule 81.

[66] On the basis of the Second Respondent failing to plead this essential component of its case I am not convinced that the arbitrator ever had any jurisdiction to hear the complaints. Hence the call made to Mr Scharrighuisen by Ms Mkhonto is also of no assistance.

[67] For the reasons set out above I made the order as handed down on 5 June 2023.

S VAN NIEUWENHUIZEN AJ

27 June 2023