

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/6731

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

H. LOUW 24 May 2024

In the matter between:

JAVED MALIK

Applicant

And

**SOUTH AFRICA CHAPTER OF THE BRICKS
BUSINESS COUNCIL**

First Respondent

**MINISTER OF TRADE, INDUSTRY AND
COMPETITION**

Second Respondent

BUSISIWE MABUZA

Third Respondent

AYANDA NTSALUBA

Fourth Respondent

BRIDGETTE RADEBE

Fifth Respondent

ELIAS MONAGE

Sixth Respondent

STAVROS NICOLAOU

Seventh Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on May 2024

JUDGMENT

LOUW H AJ:

Introduction

- [1] This application has its origin in a decision by the first respondent to remove and terminate the membership of the applicant as a member of its Aviation Working Group on 12 March 2020 (“the Decision”), the Aviation Working Group falling within the structure of the first respondent, the South Africa Chapter of the BRICKS Business Council (“SABBC”).
- [2] The Applicant seeks an order declaring the Decision ultra vires, unlawful and inconsistent with the Constitution of the SABBC, alternatively the review of the Decision in terms of Section 6(1) of the Promotion of Administrative Justice Act (“PAJA”)¹ or the common law, in circumstances where it alleges that the decision was illegal and ultra vires, alternatively stands to be reviewed on the basis that it was both procedurally unfair and not rationally connected to the facts.

BRICKS Business Council and South Africa Chapter of the BRICS Business Council

- [3] The BRICS Business Council was established in 2013 during the 5th BRICS Summit by way of a “*Declaration on the establishment of the BRICS Business Council*”² (“the Declaration”) as part of a global alliance of business leaders with the common objective to strengthen and promote economic, trade, business and investment ties between business communities of the BRICS countries, BRICS being a government-two-government formation.
- [4] The BRICS Business Council is an associated “*workstream*” comprising of 25 nominated members with five members from each member country or chapter, the five members usually representing business associations and chambers in each country.

¹ Act 3 of 2000

² Annexure BM 6.1 Declaration dated and signed At Durban on 27 March 2013 by the then five-member country representatives

- [5] The BRICS Business Council discharges its mandate through nine Working Groups which includes aviation, with each country or chapter Working Group having a chair and secretariate, with a global Working Group Chair.
- [6] The SABBC was not constituted in terms of legislation and does not have a statutory framework, it originating from the 5th BRICS Summit pursuant to the Declaration,³ it being an unincorporated voluntary association of business people working to promote and strengthen trade, business and investment ties between South Africa and other BRICS nations, with the additional objectives of providing advice to the South African government on policies and regulations to promote, facilitate, diversify and strengthen trade, business and investment relations amongst the BRICS countries with the trade-related economic areas falling under the Department of Trade, Industry and Competition (“the Department”).
- [7] The focus of the SABBC and the Department are aligned requiring close collaboration with it seeking approval or endorsement of its proposed Council members from the Minister of Trade, Industry and Competition (“the Minister”) which the Minister entertains, it not being assigned to the Minister by either legislation nor the Declaration, the SABBC Terms of Reference⁴ confirming that its nominee to the Council must be approved by the Minister in office at the time of appointment, the council members being nominated by Business Unity of South Africa and the Black Business Council.
- [8] Neither of the members of the SABBC nor the members of the Working Groups are remunerated with SABBC obtaining its resources through financial and other support from interested role players with government not making any direct financial contribution to it.
- [9] The SABBC created its own governance structure by way of the “*South African Chapter of the BRICS Business Council (SABBC) Terms of Reference*” (“Terms of Reference”),⁵ described by the applicant as its Constitution and by the first respondent as a set of guidelines to define the purpose and structure of the SABBC,

³ Annexure BM6.1

⁴ Annexure FA 1 clause 3.1.5

⁵ BRICS Business Council - South African Chapter of the BRICS Business Council (SABBC) Terms of Reference clause 1, Annexure FA1

to facilitate the co-operation of the various structures to reach common goals, and to provide a general framework and binding document to guide the SABBC work program in circumstances where the Minister was not a party to the Terms of Reference.

- [10] The Preamble⁶ to the Terms of Reference records the SABBC being established as a platform to promote and strengthen business, trade and investment ties amongst the business communities of the BRICS countries with regular dialogue between the business communities of the BRICS countries and the Governments of BRICS countries, also to identify problems and bottlenecks to ensure greater economic, trade and investment ties among BRICS countries and to recommend solutions accordingly, it being accountable to the Department.
- [11] The Terms of Reference further identified the main objectives⁷ of the SABBC to i) facilitate and expedite business-to-business interactions to support increased trade, investment and business engagement, ii) raise requisites funding for the Council, iii) encourage and support SMME participation and new business, contributing to an inclusive economy, iv) foster alignment between Government and business communities in relation to commercial opportunities offered by the BRICS relationship, v) promote business opportunities for South African businesses within BRICS countries, vi) ensure that the working group programs and activities are strategically aligned and relevant to, and support the advancement of business interests, and vii) ensure that the working groups further the trade and investment objectives of South Africa.
- [12] Clause 3 of the Terms of Reference provided for the Constitution⁸ of the SABBC (akin to composition), it being made up of five members with extensive business experience both locally and internationally requiring them to meet once each quarter with its members nominated and appointed by Business Unity South Africa and the Black Business Council, those nominees to be approved by the Minister in office, they serving for one term of three years.

⁶ Annexure FA 1 clause 1

⁷ Annexure FA 1 clause 3

⁸ Annexure FA 1 clause 3.1

- [13] Clause 3.2 provides for their Cessation of Office and clause 3.3 for the Authority of the SA BRICS Business Council, the business and affairs of the SABBC to be managed and directed by the Council members in consultation with the Minister, they to meet with the Minister at least twice a year and also to meet with the Deputy Director-General of Trade and Investment at least every quarter of each year. The Duties of the Council members were further provided for in clause 3.4 which include the obligation to establish Working Groups, directing the actions of the working groups and eliciting the report-backs from the Working Groups.
- [14] The Terms of Reference further provided for the Working Groups⁹ to be established by the SABBC with specific areas of work and with its main objectives to facilitate interaction among businesses with a view to better understand the market opportunities and build synergies based on their respective competitive strengths and to promote industrial development and job creation. The SABBC could from time to time establish sub-committees within the Working Groups to address specific issues and/or objectives, these Workings Groups not independent bodies of SABBC and are not decision-making bodies independent of SABBC and all deliberations, discussions and decisions of the Working Groups are subject to the SABBC's approval.¹⁰
- [15] The composition of the Working Groups was provided for in clause 4.2 of the Terms of Reference with nominees for appointment to the Working Groups to be received by the SABBC and it at its sole discretion making final appointments.¹¹
- [16] The Working Group-Cessation of Office¹² provisions are provided for in clause 4.3, the following relevant hereto; *"clause 4.3.1 he/she becomes ineligible or*

⁹ Annexure FA 1 clause 4

¹⁰ Terms of Reference Clause 4.1 to 4.8

¹¹ Annexure FA 1 Terms of Reference Clause 4.2.2

¹² Annexure FA 1 Terms of Reference Clause 4.3; *"clause 4.3.1 he/she becomes ineligible or disqualified for an event of violating corporate governance, generally, in terms of the principles of the company And/or the King IV Code; clause 4.3.2 Members of the SABBC elect (by a majority consensus) to remove him/her on the basis that he/she has done an action which threatens to or which has brought the SABCC to disrepute, subject to having obtained the written consent of the Minister; clause 4.3.3 he/she has or acquires, at any time, any personal interest, in a service provider or any entity which enters into or conducts any commercial agreement with the SABBC; clause 4.3.4 he/she dies; clause 4.3.5 he/she resigns by giving thirty (30) days' written notice to the SABBC; clause 4.3.6 he/she is declared delinquent by a court, or placed*

disqualified for an event of violating corporate governance, generally, in terms of the principles of the company And/or the King IV Code; clause 4.3.2 Members of the SABBC elect (by a majority consensus) to remove him/her on the basis that he/she has done an action which threatens to or which has brought the SABCC to disrepute, subject to having obtained the written consent of the Minister; clause 4.3.7 he/she is otherwise removed in accordance with any provisions of these Terms of Reference,” clause 4.3.7 also including the clause 11 “Code of Conduct of the SABBC and its Working Groups” provisions.¹³

[17] Clause 5, Reimbursement/Renumeration further provided that no remuneration or fees shall be payable to SABBC members, the chairperson or members of the Working Groups.

[18] Clause 11 of the Terms of Reference provide for the Code of Conduct of the SABBC and its Working Groups to which members of both the Council and the Working Groups were to adhere, which included the obligation to participate in good faith and pursue the national interests of the business community of South Africa, to act with honesty and integrity at all times, to adhere to all decisions made by the SABBC and Working Groups once adopted and to observe and comply with all the SABBC rules, policies and directives.¹⁴

on probation under conditions that are inconsistent with the continuation to be a member of the SABBC; *clause 4.3.7 he/she is otherwise removed in accordance with any provisions of these Terms of Reference.”*

¹³ Clause 11: Code of Conduct of the SABBC and its Working Groups

11.1 All SABBC members and working groups shall adhere to the following principles:

11.1.1 to participate in good faith and pursue the national interests of the business community in South Africa

11.1.2 to act with honesty and integrity at all times

11.1.3 to maintain confidentiality regarding confidential matters raised

11.1.4 to act as a representative of Business South Africa and of the South African Chapter when mandated

11.1.5 to ensure that the SABBC’s rules of diplomacy and courtesy are maintained at all times

11.1.6 to adhere to all decisions that are made by the SABBC and the working groups once adopted

11.1.7 to report to the constituencies as mandated by the SABBC

11.1.8 to serve and comply with all the SABBC’s rule, policies and directives

11.1.9 to participate in all training requirements set by SABBC

11.1.10 only to engage with the media and public through formally mandated representatives

11.1.11 it is specifically noted that the chairperson of the SABBC is the sole right of contact for interaction with the media and the public (including the working groups) unless the chairperson specifically delegates this duty to another person

¹⁴ Annexure FA 1 Terms of Reference Clause 11.1.6

Factual Matrix.

- [19] During and prior to July 2019 the applicant lead the Aviation Working Group which leadership was criticized resulting in the SABBC resolving during July 2019 to appoint June Crawford as the new Chair which was conveyed to the applicant on Monday, 22 July 2019 with the applicant being reluctant to be removed and expressing the view that he was being personally targeted.¹⁵
- [20] Various projects with key outcomes were determined by the Aviation Working Group with the applicant being assigned to the air connectivity sub-committee. On 13 February 2020 at an Aviation Working Group meeting not attended by the applicant, he was re-assigned to the knowledge sharing sub-committee.
- [21] The applicants took issue with his re-assignment and his approach was described by Crawford as disrespectful in an email dated 20 February 2020,¹⁶ the applicant admitting to have reacted in a seemingly authoritarian manner. On 21 February 2020 a telephonic discussion occurred between the applicant and Crawford, the applicant insisting that he be allocated to the air connectivity sub-committee which call left her feeling disturbed and concerned resulting in her contacting the core members of the Aviation Working Group and discussing the matter with the third respondent, Busisiwe Mabuza ("Mabuza"), the Chairperson of SABBC.
- [22] On 23 February 2020 Crawford addressed a formal letter of complaint to Mabuza,¹⁷ she writing on behalf of the Aviation Working Group and four of its members. Crawford penned the letter because of the unsatisfactory exchange between herself and the applicant on 21 February 2020, expressing the view that the core membership of the Aviation Working Group unanimously requested the removal of the applicant form the Aviation Working Group with immediate effect.

¹⁵ Annexure BM7

¹⁶ Annexure BM12

¹⁷ Annexure FA2

- [23] Crawford advised that the applicant added *“no value, does not respond to emails or meeting requests, gives no input other than to denigrate, interrogate, humiliate, insult and patronise members of the group. He is destructive and consistently thwarts the progress of the group preferring to be regressive in his attempt to remind us of his past Chairmanship and experience. We can no longer tolerate this unacceptable behaviour. In the interest of both the Council and the Aviation Working Group we request Mr Malik be removed immediately. This is to prevent what is already and untenable situation continuing and, in particular, when we meet for the first time with the 20-strong newly appointed members on 19th March 2020 should he be present. Our professionalism would be called into question. We thank you for your urgent consideration the intervention in this matter.”*
- [24] This resulted in the SABBC discussing the complaint on 2 March 2020 and mandating a sub-committee of Council members led by Mabuza to follow a process to understand the gravity of the complaint and to take the required action, the sub-committee consisting of Mabuza and Bridget Motsepe and Elias Monage.
- [25] On 2 March 2020 Mabuza addressed correspondence¹⁸ to the applicant, also copying the various members of the BRICS Business Council, informing him that it was brought to their attention that there was some discord between him and Crawford relating to the allocation of members to a sub-committee of the Aviation Working Group. It was further stated that the Applicant presented challenges to the functionality of the Aviation Working Group by, inter alia not responding to emails, not responding to meeting requests, providing no input other than to denigrate, interrogate, humiliate, insult and patronize other members of the Aviation Working Group.
- [26] The applicant was further informed that the SABBC had resolved to provide him with the opportunity to provide a response in writing and the Council was also to meet with him to discuss the allegations put forward and thus provide him with a platform to respond, also informing him that the SABBC had decided to withdraw him from the Aviation Working Group until the matter was investigated and finalize by the Council, further requesting him to refrain from participating in any meetings of the Aviation

¹⁸ Annexure FA3

Working Group until the matter had been resolved. This was arranged in circumstances where the Council did not have any specific dispute resolution or disciplinary procedure as appears from the Terms of Reference.

- [27] The Applicant elected to participate in the process and provided a written response on 6 March 2020¹⁹ on the allegations of not responding the emails and meeting requests, he further electing not to provide a written response on the allegation that he provided no input to the Aviation Working Group other than to denigrate, interrogate, humiliate, insult and patronize other members of the Aviation Working Group.
- [28] The applicant attended the meeting on 9 March 2022 at a neutral venue where he, on his version was presented with an opportunity to merely verbalised his 6 March 2020 written submissions. However, from the meeting notes²⁰ it is apparent that the proceedings went further than that, the applicant expressing his dissatisfaction in Crawford's leadership, the manner in which she treated him, he denying the allegations against him and he took issue with being re-allocated from one sub-committee to another.
- [29] Crawford and three other members of the Aviation Working Group were also presented with the opportunity to address the sub-committee with Messrs. Phenyane and Rammopo dialling in. Mabuza indicated that the common thread of the submissions to the sub-committee, with which the applicant took issue, was that the applicant was aggrieved by having been removed as Chair of the Aviation Working Group, his engagement with the Crawford as Chair was offensive and disrespectful and his relationship with the rest of the Group was poor, the applicant being disruptive during meetings with his conduct creating tension and being negative, the applicant not contributing to the value of the Group and attempts to change his behaviour was unsuccessful with the members of the Group not wanting him to be part of the Group, requesting his removal.

¹⁹ Annexure FA4

²⁰ Annexure BM13.1

- [30] The dispute between the parties was not resolved notwithstanding the applicant being specifically requested to provide a solution, he electing not to do so. Consequently, the BRICS Business Council concluded that the dispute could not be resolved.
- [31] On 9 March 2020 the sub-committee tasked with the Aviation Working Group Dispute Resolution process issued a *“Report on Aviation Working Group Dispute Resolution”* with recommendations to the SABBC that; *“After considering the contribution of all roleplayers of the Working Group, the Sub Committee recommends that Mr Malik be removed from all structures of the BRICS Council, with immediate effect.”* As part of the *“Action by Sub Committee”* the report was to be submitted to the broader SABBC with the recommendations of the sub-committee.²¹
- [32] The applicant was informed on 12 March 2020 by way of correspondence²² headed *“TERMINATION OF YOUR PARTICIPATION IN THE BRICKS BUSINESS COUNCIL STRUCTURES”*, thanking him for his written submissions and in-person contribution in response to the complaint against him regarding his conduct as a member of the Aviation Working Group. He was further informed that the Council had gone through a process of consultation with him, the Chair of the Working Group as well as other role-players and following careful consideration of all inputs the SABBC unanimously concluded to terminate the applicant’s participation in the Aviation Working Group as well as the SABBC at large, formally requesting him to abstain from attending any meeting or activity of the SABBC or any of its Working Groups (“the Decision”).
- [33] Thereafter and on 20 March 2020 the applicant represented by Ramulifho attorneys requested reasons for the decision, he being invited on 23 March 2020 to commence with litigation and he threatening legal action in the event of reasons not being provided on or about 27 March 2020,²³ with the Covid-19 pandemic coming to the fore.
- [34] Towards the end of 2020 the applicant was advised to compel the first respondent to provide reasons for the decision, he not having finances do so. During the second quarter of 2021, more than 12 months after the Decision and after his financial position

²¹ Annexure FA9.2

²² Annexure FA5

²³ Annexure FA6

improved, the applicant approached his current attorneys of record for advice, being informed that reasons had to be requested prior to proceeding to compel in order to save unnecessary costs being incurred, which request was addressed to the first respondent on 16 July 2021, requiring it to provide the requested documentation within 7 days with the threat of an application to the High Court.²⁴

[35] In the absence of the documents being provided, further correspondence was addressed to the first respondent on 29 July 2021 and 10 August 2021 with telephonic interaction on 17 August 2021 to obtain reasons, with various documents and reasons being presented on 2 September 2021,²⁵ the applicant also demanding through his legal representatives to be reinstated, which was rejected whereafter the applicant launched this application on 18 February 2022 with service on the respondents on 1 March 2022.

Applicant's Submissions

[36] The applicant seeks a declaratory order that the Decision of 12 March 2020 he declared unlawful, *ultra vires* and inconsistent with the first respondent's Constitution (Terms of Reference) and be set aside, in the *alternative* that the Decision be reviewed in terms of section 6 (1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") *alternatively*, the common law and be rescinded and set aside, with costs.

[37] It was argued on behalf of the applicant that the SABBC owes its existence as well as its powers because of the Terms of Reference²⁶ also being described as a comprehensive Constitution setting out its administrative functions, objectives, mandates and specific procedures described in the execution functions to which the first respondent and its members are bound, including the clause 4.3 "*Working Group-Cessation of Office*" provisions.

[38] The applicant claims that on a proper interpretation of the events that may give rise to the termination of membership of the Working Group with reference to clauses 4.3.1 to

²⁴ Annexure FA7.1

²⁵ Annexures FA8.1 to 9.2

²⁶ Annexure FA 1 Terms of Reference Clause

4.3.7, the termination and removal would be automatic with mere notification being sufficient, but for clauses 4.3.2 and 4.3.7,²⁷ clause 4.3.2 containing a peremptory provision that the decision of cessation must be supported by the written consent of the Minister which had not been obtained. Consequently, the Decision being *ultra vires* for going beyond the powers conferred on the first respondent.²⁸ In addition, the applicant expressed the view that the first respondent should not be allowed to also rely on the clause 4.3.1 and 4.3.7 provisions which were expressed as an afterthought in that the first respondent had recorded the reasons for termination premised on clause 4.3.2 only.

[39] In support of these contentions the applicant referred me to the Decision / letter of termination dated 12 March 2020²⁹ and the reasons provided on 2 September 2021 by the SABBC legal representatives by way of “*without prejudice*” correspondence included in the papers, its inclusion and referral not being objected to.³⁰

[40] In the alternative the applicant seeks to review the Decision in terms of the provisions of section 6 (1) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”),³¹ *alternatively* the common law on the basis that the Decision was administrative in

²⁷ clause 4.3.1 he/she becomes ineligible or disqualified for an event of violating corporate governance, generally, in terms of the principles of the company And/or the King IV Code; clause 4.3.2 Members of the SABBC elect (by a majority consensus) to remove him/her on the basis that he/she has done an action which threatens to or which has brought the SABCC to disrepute, subject to having obtained the written consent of the Minister; clause 4.3.7 he/she is otherwise removed in accordance with any provisions of these Terms of Reference

²⁸ President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) At [65]

²⁹ Annexure FA5: “Thank you for your written submissions as well as your in-person contribution in response to the complaint relating to your conduct is a member of the Aviation Working Group. The Council has gone through a process of consultation with yourself, Chair of the Working Group as well as other role-players in this regard. Following careful consideration of all inputs, the Council has unanimously concluded to terminate, with immediate effect, your participation in the Aviation Working Group as well as the BRICS business Council at large. We hereby therefore formally request you to abstain from attending any meetings or activities of the BRICS Business Council or any of its Working Groups.”

³⁰ Annexure FA9.1 “Our clients terminated your client's position as Chairperson of the Aviation Working Group and as a member of the Council in that your client breached the Terms of Reference applicable to our client, which is the governing document of our client and which is attached as ease of reference. Your client was furnished with the findings and attached hereto find the relevant correspondence between your client and our client's report, from which you will note that your client breached his fiduciary duties as a detailed in the Terms of Reference, which together with the principles of the Companies Act 71 of 2008 Particular reference to section 76 of the Companies Act and the principles of King IV Code.”

³¹ Section 6. “Judicial review of administrative action: (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.”

nature³² and procedurally unfair, arbitrary or capricious, the Decision not authorized by the empowering provisions and it not rationally connected to the reasons given by the first respondent.

- [41] The applicant described the first respondent as having a public function receiving its powers and delegation from the second respondent, the Minister and being aligned with the Department under whose guidance and authority it acts, acting in the interest of the public as a dominant body both nationally and internationally, requiring it to exercise its decisions within the strict rules of national justice as its activities fall within the public interest domain, it being an unincorporated voluntary association³³ in which the public at large has an interest, and in circumstances where the first respondent's discipline of its members, or working group members are in the public's interest and member of the first respondent is a prestigious position impacting on the good name of a member.
- [42] The Decision was to be held procedurally unfair in that the 2 March 2020 notice failed to inform the applicant that he could be removed as a member of the Aviation Working Group³⁴ and although he was given an opportunity to respond to the allegations he

³² *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 (2) SA 1 (CC) at [141] "In section 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising."

³³ *Coetzee v Comitis & Others* 2001 (1) SA 1254 (C) at [17.8]; *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at [45] "*The SCA relied on the fact that the memorandum of association empowered the Council to adopt its own rules for concluding that the Council was a mere private entity. This conclusion puts form above substance and disregards the nature of the function that the Council must perform. It ignores the reality of almost absolute ministerial control over the Council's functions. The provisions of the memorandum and articles of association fade into insignificance as an indicator of the nature of the Council in light of the overwhelming evidence of the true nature of the Council's functions. The fundamental difference between a private company registered in terms of the Companies Act and the Council is that the private company, while it has to comply with the law, is autonomous in the sense that the company itself decides what its objectives and functions are and how it fulfils them. The Council's composition and mandate show that although its legal form is that of a private company, its functions are essentially regulatory of an industry. These functions are closely circumscribed by the ministerial notice. I strain to find any characteristic of autonomy in the functions of the Council equivalent to that of an enterprise of a private nature. The Council regulates in the public interest and in the performance of a public duty. Its decisions and Rules are subject to constitutional control. The Council is subject to the principle of legality and the privacy protection of our Constitution. The SCA's decision therefore cannot be upheld.*"

³⁴ PAJA Section 3(2)(b)(i): "(2)(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
(i)adequate notice of the nature and purpose of the proposed administrative action;"

could not consider any witness statements, he was unaware of such statements, nor the identity of those that presented statements, he not having reasonable opportunity make representations.³⁵

[43] In addition, the 9 March 2020 termination notice was unclear, it merely referring to an “*unanimous*” decision,³⁶ he not being informed of his right to review or any internal appeal procedures,³⁷ he not receiving notice of a right to request reasons³⁸ in circumstances where the common cause Terms of Reference did not provide for these issues raised. The applicant further stated that there was no reasonable nor justifiable circumstances for the first respondent to depart from the requirements of section 3(2) of PAJA³⁹ and despite a written request for reasons, the first respondent failed to provide it within the 90 days period.⁴⁰

[44] It was further argued that there was a disconnect between the charges and the Decision reached by the first respondent in that there were no facts on which the conclusion could have been based, there also being no breach of the Terms of Reference, the Decision thus being rationally disconnected with the absence of facts.⁴¹

[45] Consequently, the applicant argued that the Decision stands to be declared invalid and inconsistent with the first respondent’s Constitution, or Terms of Reference, be set aside, alternatively to be reviewed in terms of either PAJA or the common law.

[46] The applicant further argued that that there was no undue nor unreasonable delay in the launch of the review proceedings, it to be instituted without unreasonable delay and

³⁵ PAJA Section 3(2) (b)(ii) “*a reasonable opportunity to make representations*”

³⁶ PAJA Section 3(2) (b)(iii) “*a clear statement of the administrative action;*”

³⁷ PAJA Section 3(2) (b)(iv) “*adequate notice of any right of review or internal appeal, where applicable;*”

³⁸ PAJA Section 3(2) (b)(v) “*adequate notice of the right to request reasons in terms of section 5*”

³⁹ PAJA Section 3(2) (4)

⁴⁰ PAJA Section 5(2)

⁴¹ Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at [45] “*What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.*”

not later than 180 days after he was informed of the administrative action, or became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and the reasons, the commencement date of the 180 days on his version being 2 September 2021 when he was provided with reasons.⁴²

First Respondent Submissions

[47] The first respondent raised three *In Limine* issues; i) applicant's unreasonable delay, ii) applicant's reliance on PAJA excludes reliance on the common law and, iii) applicant's reliance on PAJA is misplaced.

[48] The first respondent argued that the Decision was taken on 12 March 2020 with the applicant being informed thereof on the same day, the applicant seeking reasons on 20 March 2020 (some 8 days later), the application being invited on 23 March 2020 to launch an application⁴³ and the applicant threatening legal action in the event of reasons not being received on or about 27 March 2020 (some 15 days later).⁴⁴

[49] On 16 July 2021⁴⁵ (some 16 months after the Decision and being advised to proceed with legal action) reasons were requested which were provided on 2 September 2021⁴⁶ (some 18 months later) with the issue of the application on 18 February 2022 and the service thereof on 2 March 2022 (some 23 months after the Decision and 181 days after reasons were provided), the delay causing prejudice.

⁴² PAJA Section 7 Procedure for judicial review “(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date— (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”; Fines 4 U (Pty) Ltd and another v Amos and others [2017] 2 All SA 571 (GP) at [54] “Counsel for the applicants argued, correctly in my view, that the dates of the alleged transgressions between December 2008 and August 2013, are irrelevant for purposes of deciding this issue. On a proper reading of PAJA, it is the date on which the applicants were informed of the reasons for the rejection of the representations which is relevant.”

⁴³ Annexure BM15

⁴⁴ Annexure FA6

⁴⁵ Annexure FA7.1

⁴⁶ Annexures FA9-9.2

- [50] The prejudice claimed has its origin in the Council members and Aviation Working Group members no longer being in office, Crawford having retired with the application being moot because the term of office of the Council and Chairpersons of the Working Groups came to an end with new appointments on and after 14 April 2022 with Rammopo (one of the members requesting the applicant to be removed for his problematic, unprofessional and disrespectful stance) being an interim Chair, and with a summons being served on Crawford on 5 July 2022 by the applicant, seeking defamatory damages in the amount of R 1,000,000.00.
- [51] Further, it was submitted that is trite that if it is the applicant's case that the decision constitutes an administrative action it must be made in terms of PAJA which excludes the common law. Further, reliance on PAJA was misplaced in that the SABBC was not constituted terms of legislation and it did not have any statutory framework, it originating because of the Declaration,⁴⁷ the SABBC being an unincorporated voluntary association with members not being remunerated and being nominated to sit on Working Groups with the acceptance of the nomination falling within the sole discretion of the Council.
- [52] The applicant did not having a right to membership of the Aviation Working Group, his rights not being adversely affected by the termination of his membership with the Decision only affecting the applicant and not the public, the Decision to remove him thus not constituting an administrative action and not being subject to PAJA, it also being trite law that a litigant cannot avoid the provisions of PAJA by relying on either section 33 of the Constitution, or the common law with decisions constituting administrative action falling within the ambit of PAJA.
- [53] In addition, it was argued that the decision to terminate the applicant's membership does not constitute an administrative action and that the principles of natural justice do not form part of the contractual Terms of Reference governing the relation between the parties, principles of natural justice not forming part of the Terms of Reference preventing the applicant from insisting that a particular procedure was to be followed in

⁴⁷ Annexure BM6.1 dated 27 March 2013

the dispute resolution process in determining and resolving the dispute on whether or not his membership could be terminated.⁴⁸

- [54] The Crawford complaint resulted in a sub-committee being established to investigate the complaint and to take the required action, and because of a lack of process in the Terms of Reference the Council designed a process to deal with the complaint which it deemed to be fair and transparent with the issue of a notice of complaint containing allegations and allowing for both written and oral participation in the workings of the sub-committee with the applicant requested to make suggestions on a solution, which he could not do.
- [55] In addition, the three members of the Aviation Working Group also participated in the process with an outcome formulated in a Report⁴⁹ with recommendations, the Decision by the unincorporated voluntary association not falling under PAJA because of non-compliance with the definitional elements of administrative action.⁵⁰
- [56] The first respondent also argued that the provision in clause 4.3.2 of the Terms of Reference requiring the Minister to approve the removal of the Working Group member was to be ignored in that reference to the Minister was included in that clause because of an error in that clause 3.3.2 with reference to Council members were incorrectly copied and inserted, the Minister having no responsibility with reference to the Working Groups.
- [57] The first respondent further argued that the **SABBC** is neither state owned nor state-funded and is not aimed to facilitate interactions between BRICS countries and it does not representing the countries, acting in an advisory capacity relating to BRICS matters with the Minister not being beholden to, it not exercising public powers with its members being nominated and elected, they neither representing South Africa nor the public in

⁴⁸ *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at pages 54 and further, *Mullin (Pty) Ltd* 1952 1 SA 211 (AD) at page 214; *Transman (Pty) Ltd v Dick and another* [2009] JOL 23374 (SCA) at [30]

⁴⁹ Annexure "FA9.2" Report on Aviation Working Group Dispute Resolution dated 9 March 2020

⁵⁰ *Minister of Defense and Military Veterans v Motao and others* 2014 (5) SA 69 (CC) at [33]; *Diko and others v Nobongoza and others* 2006 (3) SA 126 (C) at pages 132-133; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at [144]

and elected capacity, or otherwise in circumstances where decision to expel a member from a voluntary association is not an administrative action or decision.

Considerations

Unreasonable delay

[58] Applications for review, under either PAJA or the common law must take cognizance of the principle of the delay rule⁵¹ having its origin in common law and also in section 7(1) of PAJA:

“1. Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a). . .

(b). . . on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”

[59] Section 9(1) provides that the 180-day period *“may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal, on application by the person or administrator concerned”* and section 9(2) provides that *such an application may be granted ‘where the interests of justice so require’*.

[60] It is important for the efficient functioning of public bodies, or bodies to be subjected to review by way of a challenge to the validity of their decisions, for judicial review proceedings to be initiated without undue delay. The rationale for the undue delay rule appears to be twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.⁵²

[61] The public interest element in finality reflects on the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for

⁵¹ *Beweging vir Christelik Volkseie Onderwys and others v Minister of Education and others* [2012] 2 All SA 462 (SCA) para 44

⁵² *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA) paras 22-23

refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that may even be decisive where the delay has been relatively slight.⁵³

[62] The common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned⁵⁴ with section 7(1) of PAJA requiring the same two stage approach, but for the legislature's determination of a delay exceeding 180 days as *per se* unreasonable, and it follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9 of PAJA. In the absence of such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters in that the decision has been '*validated*' by the delay, the applicant being obliged to seek condonation and an extension.⁵⁵

[63] The two year delay was not fully explained by the applicant but for reference to the commencement of Covid and financial constraints suffered during some period in time. The applicant did not provide an explanation as to why he did not commence with review proceedings after 23 March 2020 when he was requested to do so, nor why he did not do so after he threatened to institute legal proceedings on 27 March 2020, in circumstances where the Constitution / Terms of Reference on which he relies does not create a procedure as alleged by him with reference to the obtaining of reasons for review, nor notifications as referred to in the applicant's submissions.

[64] Despite the aforementioned difficulties, the application was eventually launched 181 days after the reasons were provided, the matter falling within the legislature's determination of a delay exceeding 180 days *per se* being unreasonable and the court

⁵³ Opposition to Urban Tolling Alliance v SA National Roads Agency 2013 4 All SA 639 SCA at [25]

⁵⁴ Associated Institutions Pension Fund and others v Van Zyl and others 2005 (2) SA 302 (SCA) para 47; Opposition to Urban Tolling Alliance v SA National Roads Agency at [26]

⁵⁵ Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 All SA 519 (SCA) para 54; Opposition to Urban Tolling Alliance v South African National Roads Agency Limited [2013] 4 All SA 639 (SCA) at para 26 Brand JA stated that the "*delay exceeding 180 days is determined to be per se unreasonable, but a delay of less than 180 days may also be unreasonable and require condonation*". The court held that in the "*circumstances, and given the obvious widespread prejudice that would be caused by any delay, [4 Africa's] institution of the review application [after the lapse of time] was plainly unreasonable and is not in the interests of justice*"

then only being empowered to entertain the review application if the interest of justice dictates an extension, there being no request for either condonation nor an extension, the court then having no authority to entertain the review application in the event of the Decision falling within the ambit of PAJA, it being dismissed on this ground alone, with costs on the party-party scale.

The Decision inconsistent with the first respondent's Constitution / Terms of Reference

[65] The Working Group-Cessation of Office⁵⁶ provisions relevant to the Dispute, the “*Report on Aviation Working Group Dispute Resolution*”,⁵⁷ the 12 March 2020 Decision⁵⁸ headed “*TERMINATION OF YOUR PARTICIPATION IN THE BRICKS BUSINESS COUNCIL STRUCTURES*” and the first respondents legal representatives letter dated 2 September 2021⁵⁹ reflect various breach occurrences of the Terms of Reference as read with the principles of the Companies Act 71 of 2008,⁶⁰ the principles of King IV Code and clause 11⁶¹ three provisions of clause 4.3 being relevant hereto; *clause 4.3.1, clause 4.3.2, clause 4.3.7* which included clause 11.⁶²

⁵⁶ Annexure FA 1 Terms of Reference

⁵⁷ Annexure FA9.2

⁵⁸ Annexure FA5

⁵⁹ Annexure FA9.1

⁶⁰ Section 76: Standards of directors conduct

⁶¹ Clause 11: Code of Conduct of the SABBC and its Working Groups

⁶² Clause 11: Code of Conduct of the SABBC and its Working Groups

11.1 All SABBC members and working groups shall adhere to the following principles:

11.1.1 to participate in good faith and pursue the national interests of the business community in South Africa

11.1.2 to act with honesty and integrity at all times

11.1.3 to maintain confidentiality regarding confidential matters raised

11.1.4 to act as a representative of Business South Africa and of the South African Chapter when mandated

11.1.5 to ensure that the SABBC's rules of diplomacy and courtesy are maintained at all times

11.1.6 to adhere to all decisions that are made by the SABBC and the working groups once adopted

11.1.7 to report to the constituencies as mandated by the SABBC

11.1.8 to serve and comply with all the SABBC's rule, policies and directives

11.1.9 to participate in all training requirements set by SABBC

11.1.10 only to engage with the media and public through formally mandated representatives

11.1.11 it is specifically noted that the chairperson of the SABBC is the sole right of contact for interaction with the media and the public (including the working groups) unless the chairperson specifically delegates this duty to another person

- [66] Only clause 4.3.2 requires third party supervision in the Cessation process by majority consent, the Minister having to provide written consent, it being common cause that clause 4.3.1 does not require supervision. The applicant argued that clause 4.3.7 also require supervision, but on a simple reading of clause 4.3 only clause 4.3.2 requires the intervention of a third-party granting consent to the removal, by way of the Minister.
- [67] The applicant further argued that on a reading of the content of the termination notice⁶³ the finding by the first respondent was limited to clause 4.3.2 in removing him on the basis that he has done an action which threatened, or which brought the SA BRICS Business Council to disrepute, that not appearing from a reading of the Report and the termination notice; *“Thank you for your written submissions as well as your in-person contribution in response to the complaint relating to your conduct is a member of the Aviation Working Group. The Council has gone through a process of consultation with yourself, Chair of the Working Group as well as other role-players in this regard. Following careful consideration of all inputs, the Council has unanimously concluded to terminate, with immediate effect, your participation in the Aviation Working Group as well as the BRICS business Council at large. We hereby therefore formally request you to abstain from attending any meetings or activities of the BRICS Business Council or any of its Working Groups.”*
- [68] The *“careful consideration of all inputs”* relating to the decision appears from the Report of the sub-committee with reference to the evidence of the three Working Group members, they expressing the view that the applicant was *“continuously disrespectful of the Chair of the Working Group and its core members, displayed arrogance and was always referring to himself and historical leadership, is disruptive at meetings, relationships between him and the rest of the Working Group members is unsatisfactory. All three members expressed their wish for Mr Malik be removed from the Working Group to move forward.”*
- [69] Crawford *“The Chair of the Working Group unpacked a pattern of disrespect, arrogance and disruption displayed by Mr Malik, since his inclusion in the Working Group, last*

⁶³ Annexure FA5

October” with Crawford also expressing the view that “to ensure that the Working Group moves forward productively, she advocates that Mr. Malik is removed from the Working Group.” The applicant denied all allegations against him and took “grave issue on being reallocated from one WG Sub Committee to another. Mr. Malik shared with the meeting his perception of how he is treated meetings and submitted his assumption of the reason thereto.”

[70] The conduct complained of and investigated by the sub-committee appears not to be limited to clause 4.3.2 doing away with the criticism that the sub-committee and SABBC acted beyond the provisions of the Terms of Reference and powers conferred upon it as a consequence of the Terms of Reference in terminating the membership of the applicant without seeking the approval of the Minister.⁶⁴

[71] SABBC constituted a sub-committee to investigate the allegations which was not a statutory tribunal but rather one created because of contract with its obligations derived from the express or implied terms of the agreement between the parties affected. The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term of the contract, subject to the express terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified.⁶⁵

[72] The Terms of Reference was described by the applicant as a comprehensive Constitution tightly regulating the first respondent, the Terms of Referenced not containing any provisions with reference to an investigation, inquiry and disciplinary process to be followed resulting in the creation of an inclusive process of notification and interaction in the absence of statements and cross-examination, there also being no process nor procedure to rely on internal appeal procedures, nor the right to request reasons. However, once reasons were requested, in the first instance, the applicant was advised to launch his application proceedings, reasons not being given in the absence of a procedure.

⁶⁴ President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) at [65]

⁶⁵ Turner v Jockey Club 1973 (3) SA 633 (A) pages 54-55 read with Mullin (Pty) Ltd v Benade Ltd 1952 1 SAA 211 (80) at pages 214-215

[73] The applicant did not lay a factual basis that the principles of natural justice should apply in this instance resulting in the applicant being entitled to a hearing before the termination of his membership, and in circumstances where it is common cause, and was supported by the applicant's representative that termination of membership would be automatic with reference to the provisions of clause 4.3, with the exclusion of clauses 4.3.2 and 4.3.7, the court already having found that clause 4.3.7 does not require supervision. Consequently, in these circumstances SABBC procedurally afforded the applicant more than he was contractually entitled to.⁶⁶

[74] Consequently, the court cannot find that the first respondent to remove the applicant as a member of the Aviation Working Group on 12 March 2020 acting unlawful and inconsistent with its Constitution / Terms of Reference, the main relief sought being dismissed with costs on the party-party scale.

Application of PAJA

[75] In the **Minister of Defence and Military Veterans v Motau and others**,⁶⁷ on which both parties relied, the Constitutional Court identified seven elements of the definition of administrative action as set out in section 1(i) of PAJA: *"there must be: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects the rights; (f) that has a direct, external legal effect; and (g) that it does not fall under any of the listed exclusions"*.

⁶⁶ *Klein v Dainfern CVollege and Another* 2005 JDR 1177 (T) at [18], [23], [26]-[27]

⁶⁷ 2014 (5) SA 69 (CC) at [33], section 1 (i) of PAJA: *"there must be: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects the rights; (f) that has a direct, external legal effect; and (g) that it does not fall under any of the listed exclusions"*.

- [76] It is further required that a determination of whether or not an action is administrative action, should be decided on a case-by-case basis⁶⁸ with “*the focus of inquiring as to whether conduct is “administered action” is not on the arm of government to which the relevant actor belongs, but on the nature of the power he/she is exercising.*”
- [77] Against this, the SABBC came into existence because of the Declaration⁶⁹ and was not created by legislation, it not having a statutory framework and it being an unincorporated voluntary association neither owned nor funded by Government, with the Minister participating in the appointment of Council members and cessation of membership, as a courtesy.
- [78] The powers of the SABBC are not assigned and delegated by the Minister and does not aim to facilitate interactions between BRICS countries, it operating in accordance with its clause 2 objectives contained in the Terms of Reference, the Minister not being beholden to it and it not being, nor acting in a regulatory capacity.⁷⁰
- [79] The clause 2 main objectives of Terms of Reference⁷¹ of the SABBC, provides for; i) facilitation and expediting business-to-business interactions, ii) to raise funding for the Council, iii) encourage and support SMME participation and new business, contributing to an inclusive economy, iv) to foster alignment between Government and business communities in relation to commercial opportunities offered by the BRICS relationship, v) to promote business opportunities for South African businesses within BRICS countries, vi) to ensure alignment in and support the advancement of business interests, and vii) further the trade and investment objectives of South Africa, providing for alignment, interaction, promotion and furtherance of various interests, also with the Minister and the Department, also providing advice on policies and regulations to promote, facilitate, diversify and strengthen trade, business and investment relations amongst the BRICS countries.

⁶⁸ President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2001 (2) SA 1 (CC) at [141] – [143]

⁶⁹ Annexure BM 6.1 Declaration dated and signed At Durban on 27 March 2013 by the then five-member country representatives

⁷⁰ AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another 2007 (1) SA 343 (CC)

⁷¹ Annexure FA 1 clause 3

- [80] Further, the various Working Groups conduct their functions subject to the oversight of the Council and the Terms of Reference⁷² with specific areas of work and with its main objectives to facilitate interaction action among businesses with a view to better understand the market opportunities and build synergies based on their respective competitive strengths and to promote industrial development and job creation, the Workings Groups not being independent bodies of the SABBC and not being decision-making bodies independent of Council with and all deliberations, discussions and decisions of the working groups are subject to Council's approval.⁷³
- [81] The Working Group members do not represent South Africa nor the public at large, the members forming part of a voluntary association in circumstances where decisions to expel and terminate membership are not administrative decisions.⁷⁴
- [82] The termination of the applicant's membership of the Aviation Working Group does not effect his rights (none being shown as adversely affected), members being voluntarily appointed with no remuneration and he not having a right to membership of the SABBC nor any of its structures, he being appointed at the discretion of the Council in accordance with the mandate of the Working Groups and the main objectives of the Council⁷⁵ to facilitate business interaction with a view to understand the market opportunities and build synergies based upon respective competitive strengths and to promote industrial development and job creation.
- [83] The Decision and the actions and conduct of the SABBC in terminating the membership of the applicant was not in the exercise of public power and did not fall within the definitional elements of administrative action as set out in section 1(i) of PAJA, the applicant being unsuccessful in the alternative review relief sought, it being dismissed with costs.

⁷² Annexure FA 1 clause 4

⁷³ Terms of Reference Clause 4.1 to 4.8

⁷⁴ Diko and others v Nobongoza and others 2006 (3) SA 126 (C) at pages 132-133

⁷⁵ Terms of Reference clause 4.1

Conclusion

[84] In all the circumstances, I have come to the conclusion, and find that there was an unreasonable delay in the launch of the application proceedings, the first respondent did not act unlawful and inconsistent with its Terms of Reference and the Decision does not fall within the ambit of administrative action under the Promotion of Administrative Justice Act 3 of 2000, the Decision not being reviewed.

[85] As to costs, there is no reason why it should not follow the result in terms of the general practice, costs payable by the applicant on the party-party scale.

ORDER

[86] In the result the following order is made:

1. The application is dismissed with costs.



H. LOUW

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 26 March 2024
Judgment:

Appearances

For Applicant: JC Viljoen
Instructed by: Stupel & Berman Inc

For Respondent: HR Fourie SC
Instructed by: Friedland Hart Solomon & Nicolson