IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

- REPORTABLE -

DATE: 12 APRIL 2010

Case number: 24939/2009

In the matter between:

SWD RUGBYVOETBALUNIE EN EEN ANDER Applicants

and

HENNIE BAARTMAN 1st Respondent

JOHN BRUINERS 2nd Respondent

VIRGIO BRAAFF 3rd Respondent

Case Number: 25870/2009

In the matter between:

SWD RUGBYVOETBALUNIE Applicant

and

DANIEL LODEVICUS CRONJE Respondent

Case Number: 25876/2009

In the matter between:

SWD RUGBYVOETBALUNIE 1st Applicant

DANIEL LODEVICUS CRONJE 2nd Applicant

and

MOGAMAT FARIED STEMMET 1st Respondent

JOHN NORTJE 2nd Respondent

EDWARD JACKSON 3rd Respondent

WILLEM SMALL 4th Respondent

SOUTH AFRICAN RUGBY UNION 5th Respondent

Case Number: 24939/2009(A)

In die saak tussen:

EAGLES RUGBY (EDMS) BEPERK Applicant

and

MOGAMAT FARIED STEMMET 1ST Respondent

JOHN NORTJE 2nd Respondent

EDWARD JACKSON 3rd Respondent

WILLEM SMALL 4th Respondent

SOUTH AFRICAN RUGBY UNION 5th Respondent

Case Number: 1900/2010

In the matter between:

DANIEL LODEVICUS CRONJE	Applicant
and	
MOGAMAT FARIED STEMMET	1st Respondent
JOHN NORTJE	2nd Respondent
EDWARD JACKSON	3rd Respondent
WILLEM SMALL	4th Respondent
SOUTH AFRICAN RUGBY UNION	5th Respondent

J U D G M E N T

LE GRANGE, J:

The South Western District Rugby Football Union, also known as SWD, is a voluntary association, and governed by a constitution. As a result of a dispute amongst its members, the executive committee, of which Mr D L Cronje (Cronje) was elected the president was voted out before the expiry of his term of office. This resulted in the present applications, launched by the respective parties in this division. Two *rules nisi* were issued, covering the same subject matter, at different dates. The first by Davis J and the second by Desai, J. This is a return date of the rules issued.

The factual matrix underpinning all these applications are largely not in dispute. Briefly stated, the facts are the following. In October 2009 five rugby club members of SWD requested a special general meeting in terms of Clause 9.3.1 of the constitution, to consider passing a motion of no confidence against the following office bearers of the club, namely the president, Cronje, the senior vice-president, the junior vice-president, the president's club representatives, the premier club's representatives and that they stand down immediately from their positions. Furthermore, a vote that Messrs Baartman, Bruiners and Braaff be nominated for appointment as president, senior vice-president and junior vice-president respectively, whose terms of office will be for an interim period until the next annual general meeting to be held in November 2010 when the term of office of those persons removed, would expire.

A special annual general meeting was convened on 21 November 2009. At the meeting a motion of no confidence was passed and the presidency and six members of the executive committee were removed from their positions. Cronje was not present at the special meeting and a new presidency was elected. It was also resolved at the meeting to hold over the election of the other six members of the executive committee until the annual general meeting, which was

scheduled to take place on 28 November 2009.

On 27 November 2009, SWD and Cronje, in his capacity as serving president of SWD and in his personal capacity, launched an urgent application in this court, seeking interim relief against the new elected presidency. This is the first application. Davis, J, on the same day, granted the interim relief sought with the return dates in the following terms:

> *"The decisions taken at the special general meeting on 21 November 2009, in terms whereof the presidency and the members of the executive committee were removed from office and replaced by Mr Baartman, Bruiners and Braaff as an interim presidency, were declared invalid and set aside. Mr Baartman, Bruiners and Braaff were prohibited from representing to any person that they served as the presidency or executive committee of SWD, or that they were elected as such."*

SWD then held their annual general meeting on 28 November 2009. At that meeting the motion of no confidence was again tabled and voted on. The motion was carried by 33 votes in favour and 19 votes against. On Cronje's version, the motion was carried by 32 votes in favour and 19 votes against. Nothing materially turns on this, having regard to the fundamental issues for consideration in this case. It appears

that Cronje then left the meeting.

As a result of the interdict in place against the new presidency, it was decided by the meeting to appoint an interim committee to run the affairs of SWD pending this Court's final decision regarding the decisions taken at the special general meeting on 21 November 2009. Mr Mogamat Faried Stemmet (Stemmet) was elected as interim chairman. As a result of the time constraints, the business of the meeting was adjourned. On the next date, a new executive committee of SWD was voted in, comprising of 13 members. Stemmet, John Nortje and Edward Jackson, were authorised to act as the presidency in the interim.

SWD then launched an application, the second application, seeking this Court's approval of the decisions it took at the annual general meeting held on 28 November and on 5 December 2009. SWD also sought certain interim interdictory relief against Cronje. A competing application, the third application, was then launched by Cronje for an order to declare the decisions taken at the annual general meeting held in November and December 2009 to be invalid and to be set aside.

Eagles Rugby (Pty) Limited, of which Cronje is the managing director, also launched an application against SWD and other

respondents, seeking certain relief, the fourth application. This application was, however, on the day of this hearing withdrawn by the applicant and cost was tendered. The fifth application in this saga was launched by Cronje, seeking essentially for an order declaring that the pending disciplinary proceedings or any decision taken against him by SWD, be invalid and set aside.

The fifth application was, however, postponed by agreement, pending the outcome of the first three applications between the parties. The second and third applications were argued before Desai, J on an urgent bases on 11 December 2009. On 14 December 2009, Desai, J granted an order in favour of SWD with the same return date as the first application in the following terms:

> *"The decisions taken at the AGM on 28 November 2009 and 5 December 2009, were declared to have been validly and constitutionally taken. Cronje was interdicted from representing to any person that he is the president of SWD. Cronje was prohibited from representing to anyone that he had not been removed from his position as president of SWD. Cronje was interdicted from interfering in the operational activities, including the personal affairs of SWD. Cronje was interdicted from interfering or performing any acts with*

regard to SWD's bank accounts and/or finances. Cronje was interdicted from instituting or proceeding with any legal proceedings on behalf of SWD."

The issues for determination are, therefore, firstly whether the election on 21 November 2009 of Messrs Baartman, Bruiners and Braaff as president, senior vice-president, and junior vice-president respectively, which was the first application, was constitutionally valid and secondly, whether the election of the new executive committee of SWD, comprising of 13 members, of which Stemmet is the president, that will be the second and third applications, were constitutionally valid.

The constitution of SWD provides that the president be elected at an AGM for a term of three years. Clause 7.2 of the constitution reads as follows:

"7.2 President en Vise-President:

7.2.1 'n President soos op die algemene jaarvergadering verkies vir 'n termyn van die jaar.

7.2.2 Twee vise-presidente, een as 'n senior vise-president en een as junior vise-president, verkies vir 'n termyn van drie jaar.

7.2.3 Tensy daar 21 dae voor die datum van die

jaarvergadering skriftelik van die nuwe nominasies deur 'n geaffilieerde klub kennis gegee word, word die vorige president en die vise-presidente outomaties herkies.

7.2.4 Die president, of in sy afwesigheid die senior of die junior vise-president, in hierdie orde, tree as voorsitter op by alle vergaderings, behalwe vergaderings van die keurkomitees, skeidsregters en skole-komitees. In die afwesigheid van beide die president en die twee vise-presidente, kies die vergadering 'n voorsitter uit lede wat teenwoordig is."

Clause 9.1 of the constitution deals with the annual general meetings and Clause 9.3 with the holding of a special annual general meeting. The constitution is, however, silent regarding members' entitlement to remove the executive committee or any member thereof, prior to the expiry of its term of office. The gravamen of Cronje is that SWD's constitution does not expressly provide for the removal of the executive committee or presidency, before the expiry of their term of office and that the elections held, to achieve this purpose, were invalid.

Counsel for Cronje, Mr A C Oosthuizen SC, assisted by Mr D L

Van der Merwe, main contentions are firstly the Baartman and Stemmet group (Baartman and Stemmet) in the first three applications failed to make out a case for the inclusion of a tacit term in the constitution that entitles the members to vote out the executive committee before the expiry of its term of office. Moreover, the reliance by Baartman and Stemmet on an implied term to sanction their conduct in outvoting the executive committee and Cronje as president, is misplaced. Mr Oosthuizen also argued that the dictum of Herbstein, J in Cape Indian Congress v Transvaal Indian Congress, as reported in Cape Indian Congress & Others v Transvaal Indian Congress 1948(2) SA 595 AD, should not be followed as the facts *in casu* are clearly distinguishable and the law of agency as applied, questionable.

Counsel for Baartman and Stemmet, Mr A La Grange SC, assisted by Mr G Elliott, argued that a committee of a voluntary association does not have an indefeasible right of continuity of office for the period for which it had been elected. Mr La Grange relied on the dictum of Cape Indian Congress case and Jonker v Ackerman & Andere 1979(3) SA 575 (O), as legal bases for his proposition. He also contended that it is untenable, in the absence of an express term, where the majority members of a voluntary association have lost confidence in the executive committee in the period for which

they have been elected, to have no option but to wait for the term of the office to expire before voting them out. According to him, it is an implied term that in such circumstances, the committee of a voluntary association does not have an indefeasible right of continuity of office for the period for which it has been elected.

It is well accepted in our law that the constitution of an association with all its rules and regulations, constitute the agreement which is entered into by its members. This agreement is relevant and a crucial factor in the existence of an association as it regulates the rights of members and provides for certain procedural aspects. In this regard see Turner v Jockey Club of South Africa 1974(3) SA 633A at 654. Also Lawsa, Volume 1, at paragraph 620. The constitution of SWD entrusts the management of the club to an executive committee.

The election of persons to serve on the management committee takes place in accordance with its constitutional provisions. In order to ascertain what each member's rights are, it is therefore necessary to interpret the relevant provisions of the constitution. The method of construction to be adopted was set out in Fisher v South African Bookmakers Association 1940 WLD at 92 where Malan, J held as follows:

"I am of the opinion that in construing the constitution and the bylaws of an association, the same principle should be applied as in the construction of any other written instrument, in terms of which parties have contracted. The constitution and bylaws embody the terms and conditions upon which the members have agreed to become bound and to remain associated."

In the absence of an express provision in SWD's constitution for the removal of the executive committee or any individual member thereof before the expiry of their term of office, the central question that falls to be decided is whether the members, by so electing a committee, have relinquished all the rights to remove the whole committee, or individual members thereof, even if good cause exist to do so, or can it be implied tacitly, or by law, that the executive committee or any individual member thereof does not have an indefeasible right of continuity of office for the period for which it has been elected.

A tacit term is an unexpressed provision of a contract which derives from the common intention of the parties as inferred from the express terms of the contract and from the surrounding circumstances, whilst an implied term usually

arises by law. Moreover, with a tacit term, a Court must be satisfied, upon a consideration of all the surrounding circumstances, that the parties intended to contract on the basis of the suggested term before it can be applied. A Court does not readily import a tacit term, it cannot make contracts for people, nor can it supplement the agreement of the parties merely because it might be reasonable to do so.

An implied term on the other hand simply represents a legal duty imposed by law, unless excluded by the parties in cases of certain class of a contract. In this regard see Alfred McAlpine & Son (Pty) Limited v Transvaal Provincial Administration 1974(3) SA 506 (A) at 530E and 533H. Braaff and Stemmet do not rely on a tacit term, but on an implied term that the executive committee of SWD or any individual member thereof, does not have an indefeasible right of continuity of office for the period for which it had been elected.

The right of members of a voluntary association to remove the management committee or any member thereof before their term of office has expired, has been the subject of a number of decided cases in our law. In the matter of Cape Indian Congress v Transvaal Indian Congress supra at 598 Herbstein, J in the court *a quo* held the following:

"I can see no distinction between the committee elected by a voluntary association, which is not a universitas and one elected by a universitas. And, in my opinion, the committee vis-à-vis the general body of the body, is in a position of a special agent with the authority conferred by the rules.... The fixing of a period for which a committee is to serve, does not, in my view, constitute a contract by the principal with the agent that he will not, during that period, provoke the authority. Nor, in my opinion, can such a contract be implied here. There must be special circumstances before such inference can be drawn."

In Cape United Sick Fund Society & Others v Forest & Others 1956(4) SA 519 (A), the Court held that where the constitution of a voluntary association makes specific provision that rules can be amended at an annual general meeting, there is no room for an implied term that a resolution to amend rules can also be considered at a special general meeting. In Govender v Textile Workers Industrial Union 1961(3) SA at page 94F-G, the Court held the following:

"While it is in no doubt true that the executive committee may, in a certain sense, be regarded as the agent of the branch, the constitution must nevertheless be looked to in order to determine its authority and the

circumstances in which its rights and duty to act come to an act."

In Jonker v Ackerman & Andere 1979(3) 575, at page 598 C-D, the Court held the following:

"Per slot van rekening is die komitee regtens die verteenwoordiger van die lede van die klub en kan hul mandaat, in die afwesigheid van enige bepaling in die konstitusie dat dit nie voor die verstryking van hul ampstermyn mag geskied nie, beëindig word deur die prinsipaal, naamlik die klub se lede."

In Padayichi v Pavadai & Another 1994(1) SA at 662, the constitution of the association expressly provided certain officials "*shall be elected at the biennial general meeting*". The holding of a special general meeting to remove the elected committee was held to be invalid, as it does not confirm with the terms of the constitution.

The golden thread in all the above-mentioned cases, is that elected members of a management committee may be removed from office, but in conformity with the express terms and provisions of the constitution. This, in my view, is the proper approach in deciding the rights of members of a voluntary

association to remove the elected management committee or any member thereof before their term of office expires.

However, in the absence of any express provision in a constitution of a voluntary association, whether a *universitas* or not, it can only be fair, and accordance with law, that the right of members to recall an elected executive committee at a properly constituted special or annual general meeting, must be implied. To view it any differently, would be untenable and can produce absurd results. The dictum of Herbstein, J in the Cape Indian Congress case at 597, is in my view apposite in this instance:

> *"To hold that the members of an elected committee, in which is included the officials, have an indefeasible right of continuity of office for the period for which they have been elected, may lead to absurd results. The treasurer might embezzle the funds of the association, the secretary fail or neglect to carry out his duties, some members may not attend meetings, so that the necessary quorum is never obtainable; the Committee as a whole might conduct a policy, not only in conflict with the wishes of members, but one harmful to the Association and in conflict with its objects. Is there to be no remedy available to the members except resignation by them from the association? In my*

opinion the answer is in the negative and the basis for this answer is to be found in the legal relationship between the members as a whole and the Committee."

In this case, in terms of the provisions of the constitution, the executive committee is elected at the AGM. The president and the two vice-presidents are elected for a time of three years. In terms of Clause 7.3 of the constitution, the affairs of SWD will be managed by the elected executive committee. According to Clause 7.3.2, it's only the president, the two vice-presidents and each of the three members of the premier and president's club, that are elected for a term of three years, whilst the rest of the members are elected for a period of one year only. Clause 8 deals with the powers of the executive committee and in Clause 8.3 the following is stipulated:

"8.3 Beheer oor Fondse. Om, <u>onderworpe aan enige besluit van enige algemene jaarvergadering</u> (my underlining) alleenbeheer oor die fondse van die unie uitoefen en sal gemagtig wees om onroerende eiendom of roerende bates oor te dra en te verkoop of daarmee te handel of andersins van die hand te sit en sal ten volle gemagtig wees om alle of enige doelstellings van die unie uit te voer

en alle sake namens die unie te doen."

On a proper construction of the constitution, it appears that the executive committee derives its powers from the constitution, subject to any decision that members may take at the AGM. The executive committee's purpose and function is to promote the aims and objectives of SWD, subject to any authority that might be given to them at the AGM. The AGM can, therefore, be regarded as the highest decision making body in SWD. If this is so, then in my opinion the executive committee, *vis-à-vis* the general body of members at the AGM, is in a special legal relationship. This relationship, in my view, is analogist to that of a special agent and with the authority conferred upon it by the constitution. In this regard see Cape Indian Congress & Others at page 598.

Clause 9 of the constitution deals with meetings and its procedures. In terms of the provision of Clause 9.1.5, certain items on the agenda of an AGM must be considered and disposed of. The following is stipulated in the clause:

> *"9.1.5 Die agenda wat op die algemene jaarvergadering afgehandel moet word, is as volg:*
>
> *9.1.5.1 Bekragtiging en ondertekening van die notules van enige jaarvergadering.*

9.1.5.2 Oorweging van die president se jaarverslag, tesame met die finansiële state.

9.1.5.3 Verkiesing van die president, die twee vise-presidente en lewenslange ere-presidente.

9.1.5.4 Verkiesing van die afgevaardigdes na die vergaderings van die Suid-Afrikaanse Rugby Unie.

9.1.5.5 Oorweging van mosies en enige ander aangeleentheid waarvan behoorlik kennis gegee is en een kalendermaand voor die algemene jaarvergadering.

9.1.5.6 Affiliasie van die nuwe klubs.

9.1.5.7 Algemeen orde reëlings oor die sluiting van die agende na opening."

Clause 9.1.5.2 stipulates that the election of the president, the two vice-presidents and the honorary life presidents be on the agenda at an AGM and secondly, is it obligatory that this order of the meeting business must be disposed of. I can find nothing to suggest that it is obligatory that the election of the presidency or executive committee must only be triennially. In this regard see the case of Padayichie v Pavadai. Moreover, according to the constitution, it is not obligatory that the presidency must only be elected at an AGM. In this regard see Cape United Sick Fund Society, *supra*.

In the absence of any such express provisions in the constitution of SWD, it can only be fair, and in accordance with the law, that the right of members to recall an elected executive committee or any member thereof at a properly constituted annual general meeting, or special annual general meeting must be implied. The constitution in question does no more than to fix a period for which a committee or office bearers is to serve. The reference to the officers and committee, holding office for the stipulated period in its context, means nothing more than their period of office will automatically come to an end at the expiry of that period, provided it is not terminated earlier at a proper meeting.

The meeting convened on 21 November 2009 was a special annual general meeting. At that meeting the motion of no confidence was passed and the presidency and six members of the executive committee were removed from their positions. Cronje seeks to rely on a remark made in Bredenkamp en 'n Ander v Van der Westhuizen en Andere 1968(4) SA 358, to support the view that a motion of no confidence does not amount to a revocation of a chairman's authority. In the Bredenkamp's case, after a motion of no confidence in the chairman was adopted, he left the chair and the vice-chairman took the chair and called for proposals for a new chair. The vice-chairman was duly elected as chairman. At page 366B,

the Court held the following:

> *"Nou is dit na my mening duidelik dat die tweede applikant nie as gevolg van die sogenaamde mosie van wantroue of aanvaarding van die voorstel dat hy moet bedank, verplig wees om te bedank nie. Hoewel meeste mense onder sulke omstandighede waarskynlik nie baie begerig sal wees om nog voorsitter te bly van 'n vergadering wat geen vertroue in die bekleër van die voorsitterstoel het nie."*

On a proper reading of the Bredenkamp matter, the remarks that the motion of no confidence does not amount to a revocation of a chairman's authority, was made *obiter*. In fact the Court, at page 366A, held that where no provision has been made for situations where the chairmanship becomes vacant, it is implied that in those circumstances the members can elect a new chairman.

Having regard to the evidence in this matter, I am satisfied that the meeting and resolutions adopted at the special annual general meeting, was in accordance with the law and the constitution of SWD. It is so that dissatisfied groups of members might, by repeated requests of this kind, be able to bring about an intolerable state of affairs, but that possibility

does not appear sufficient to justify the inference that the general body of members gave up all its rights to rid itself in whole or in part of a committee to which it had objection. In my view the Braaff election was conducted in a proper manner and it follows that the *rule nisi* in the first application falls to be discharged.

The evidence in this matter further clearly demonstrates that the majority of the members of SWD have lost confidence in Cronje as president and the executive committee he chairs. At the AGM held on 28 November, a motion of no confidence in the presidency of Cronje and the executive committee was again adopted. Cronje then left the meeting. I am satisfied that the members at the AGM were entitled to remove the members of the elected executive committee before its three year term expired. It follows that the *rule nisi* in the second application should be confirmed and the third application should be dismissed.

An argument was advanced by Mr La Grange that SWD was incorrectly joined as a co-applicant in the first and third application and that any cost orders in these matters should be paid by Cronje alone. For this proposition he relied on the dictum in Ntombela & Others v Shibe & Others 1949(3) SA 586N at 587 and Lawsa, Volume 1, 2nd Edition at 630. The

reason for a joinder is usually convenience and because of the substantial interest a party may have in issues to be decided. The issues regarding the construction and interpretation of the constitution of SWD can hardly be regarded as unsubstantial. I am satisfied that the joinder of SWD in these matters were appropriate.

In the result the following order is made:

1. In the first application, Case Number 24939/09, the *rule nisi* is discharged with costs.

2. In the second application, Case Number 25870/09, the *rule nisi* is confirmed with costs.

3. The application in Case Number 25876/09, is dismissed with costs.

4. In Case Number 24939/09(A), it is recorded that the applicant has withdrawn the application and tendered to pay the respondents' costs.

5. In Case Number 1900/10, the *rule nisi* is discharged with no order as to costs.

6. The costs include the costs occasioned by the employment of two counsel.

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