

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case number: 1159/2016

Date heard: 18/8/16

Date delivered: 20/9/16

Not reportable

In the matter between:

DESPATCH RUGBY CLUB

Applicant

and

EASTERN PROVINCE RUGBY UNION

First Respondent

SOUTH AFRICAN POLICE SERVICE (PE) RUGBY CLUB

Second Respondent

JUDGMENT

PLASKET, J

[1] Rugby, a game that the late president Nelson Mandela described as both a sporting code of national importance and a national asset,¹ occupies a special place in the hearts of many South Africans, not least in the Eastern Cape. This matter concerns the question of whether the first respondent, the Eastern Province Rugby Union (EPRU), acted contrary to its own rules when it either decided or announced that the second respondent, the South African Police Service (PE) Rugby Club (Police), rather than the applicant, the Despatch Rugby Club (Despatch) would represent Eastern Province in a national club competition, the Gold Cup, in

¹ *President of the Republic of South Africa & others v South African Rugby Union & others* 2000 (1) SA 1 (CC), para 15.

September and October 2016. Owing to the urgency of the matter I made an order, dated 9 September 2016, dismissing the application with costs. These are my reasons for so doing.

[2] Both Despatch and Police are clubs that are affiliated to the EPRU. They played in the EPRU's 2015 inter-club competition, the Grand Challenge Cup. Both claimed to have finished the competition at the top of the log and, on this basis, to have qualified to play in the Gold Cup.

[3] As a result of this dispute and the EPRU's decision or announcement that Police won the Grand Challenge Cup and would represent Eastern Province in the Gold Cup, Despatch launched this application in which it sought orders:

- '1. That the decision of the First Respondent's Management Committee and the Club Affairs Committee allowing the Second Respondent to play in the Gold Cup as the First Respondent's representative be and is hereby reviewed, and thereafter declared to be ultra vires the Rules and Regulations guiding the Grand Cup Challenge (sic), and set aside.
- 2. That it is declared that the Applicant, as log leader of the Grand Cup Challenge (sic) is the First Respondent's representative in the Gold Cup; **Alternatively**, that the First Respondent is ordered and directed to hold a semi-final playoff between the Applicant and the Second Respondent and that the winner of that match be the First Respondent's representative in the God Cup.
- 3. Costs of the Application.'

The facts

[4] The point of contention in this matter concerns the cancellation by the EPRU of fixtures that were to be played on 6 June 2015 as a result of grounds being waterlogged. There is a hearsay allegation made in the founding affidavit that the Despatch ground was not waterlogged. This does not appear to be relevant: because the other grounds were not fit for play – and the municipality, that controlled their use, forbade play on them – all of the fixtures were cancelled.

[5] Mr RW van Wyk, Despatch's secretary and the deponent to the founding affidavit stated that Despatch later played the cancelled game and, it would appear,

won it with a bonus point. That is how it is alleged that Despatch ended the season at the top of the log.

[6] The EPRU's Competition Rules and Regulations for the 2015 season deal with cancelled fixtures and re-plays. Rule 8 is the applicable rule. Rule 8.1 deals with the abandonment of matches due to 'an act of God'. It is not disputed that the fixtures of 6 June 2015 were cancelled due to rain – an act of God for purposes of rule 8.1. Rule 8.1.1 states that when a match is cancelled due to an act of God, 'the points for these matches will be shared by the Clubs (2 points each with no bonus point) i.e. regarded as a draw 14 all'.

[7] Rule 8.3 allows for the replaying of a match earlier abandoned due to an act of God. It provides:

'Should circumstances, due to an act of God, warrant a possible rescheduling of a match, within 7 (seven) days of a scheduled match (excluding match day), the CEO of EPRU after consulting with some relevant stakeholders, will determine whether circumstances warrant the match to be rescheduled.'

[8] The founding papers are cryptic as to how the replay occurred, not even stating who Despatch's opposition was and what the score was. All that is said is that the applicant 'was advised to replay the rained out match by the first respondent which it did...'. In answer to this, Mr. Phillip Joseph, the Deputy President of the EPRU said:

'I cannot find any record wherein the First Respondent lawfully and in terms of its constitution or any duly authorised employee instructed the Applicant to replay the rained out match in terms of the competition rules and regulations applicable to the 2015 season.'

[9] Having made the point that the match could only have been replayed in terms of rule 8.3, Jackson stated that none of the requirements of the rule were met and that, as a consequence, 'there can and could not have been any replay of the rained out match as alleged by the applicant'.

[10] Despatch claimed, and were awarded, the points but, at a later stage, this was reversed. How this happened – and whether it occurred in a procedurally fair manner – is at the heart of Despatch’s case on the merits. It is the regularity of that decision that it challenged on review. Three points in limine were, however, taken by Police. It is to them that I now turn.

The points in limine

[11] The points in limine were that Despatch had no standing as it had no capacity in terms of its constitution to sue and be sued; that it had failed to join the clubs that finished third and fourth on the log in circumstances in which it should have done so; and that it had failed to exhaust an internal remedy available to it and was, on this basis, non-suited.

[12] Before dealing with these issues, it is necessary to say something about the basis upon which this review application is to be decided. On the one hand, the relationship between the EPRU and Despatch is governed by the former’s constitution. In other words, a contractual nexus exists between them in which the terms are contained in the constitution. On the basis of a long line of authority – often referred to as the Jockey Club cases by way of shorthand – it is accepted that a private law relationship exists between the parties; that the governing body – the EPRU – exercises private and not public power in relation to its governance of its sport; that despite this, it is bound by its constitution and is required to comply with its terms in respect of those falling under its power – such as Despatch; and that even when the constitution is silent, tacit terms may be imported into it that require it to act in accordance with the ‘fundamental principles of justice’ in relation to those over whom it exercises power.²

[13] This orthodoxy has begun to be questioned recently. In *Tirfu Raiders Rugby Club v SA Rugby Union & others*,³ on facts that were fairly similar to those in this case, Yekiso J found that the South African Rugby Union, in the administration of rugby, had exercised public power and that its exercises of power were subject to

² *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645H-646B.

³ *Tirfu Raiders Rugby Club v SA Rugby Union & others* [2006] 2 All SA 549 (C), paras 25-28.

review in terms of administrative law, in particular, in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA).

[14] I have not had the benefit of full argument on this issue in the context of the relationship between the EPRU and Despatch. I accordingly opt to leave open the question of whether the common law – in the form of so-called private administrative law⁴ – or the PAJA applies. I do so because the result will be the same in either instance. Irrespective of whether the EPRU has exercised private, contractual powers or public, administrative powers, it has to act lawfully – in accordance with its constitution – rationally, and in a procedurally fair manner.⁵

Standing

[15] The constitution of Despatch does not grant it an express power to sue or be sued in its own name. In *Morrison v Standard Building Society*⁶ Wessels JA, in what is still regarded as the leading authority on the issue, stated:

‘In order to determine whether an association of individuals is a corporate body which can sue in its own name, the Court has to consider the nature and objects of the association as well as its constitution, and if these show that it possesses the characteristics of a corporation or *universitas* then it can sue in its own name.’

[16] Despatch’s constitution is not a great example of the legal drafter’s art but it appears to me that it contemplates a distinction between the club and its members; that the scheme for its governance contemplates perpetual succession; that it, as opposed to its members, has the power to own property and to enter into contracts; and that its primary purpose, being the playing and promotion of the game of rugby, is a lawful purpose. That being so, it qualifies as a corporation and may, on the authority of *Morrison*, sue in its own name. To approach the same issue from a slightly different perspective, given the characteristics I have outlined, the power to sue is essential to its functioning and is a tacit term of its constitution.⁷

⁴ This term is used in *Klein v Dainfern College & another* 2006 (3) SA 73 (T), para 24.

⁵ *National Horseracing Authority of Southern Africa v Naidoo & another* 2010 (3) SA 182 (N).

⁶ *Morrison v Standard Building Society* 1932 AD 229 at 238.

⁷ *Bantu Callies Football Club (also known as Pretoria Callies Football Club) v Motlhamme & others* 1978 (4) SA 486 (T) at 490A-B.

[17] My conclusion, accordingly, is that Despatch has the necessary standing to have instituted these proceedings.

Non-joinder

[18] In terms of the EPRU's rules of the competition, the top four teams on the log at the end of the season are required to play semi-finals and a final, with the winner of the final representing Eastern Province in the Gold Cup. This did not happen this season because, it would appear, the clubs agreed to the log winner playing in the Gold Cup.

[19] That explains the primary relief sought by Despatch in paragraph 2 of the notice of motion, namely that it be declared the log leader and, as such, the representative of Eastern Province in the Gold Cup. In the alternative, however, it sought an order directing the EPRU to 'hold a semi-final play-off between Despatch and Police, with the winner representing Eastern Province in the Gold Cup.

[20] No mention is made of the two other teams that would have to compete in the semi-finals and then, of course, a final would also have to be played. The point taken was that those clubs ought to have been joined as they have an interest in the matter. The non-joinder point disappeared, however, with the abandonment of the alternative relief envisaged in paragraph 2 of the notice of motion.

Exhaustion of internal remedies

[21] If the PAJA applies in this matter, the question arises as to whether s 7(2) places an obligation on Despatch to exhaust any internal remedy before it may approach a court by way of review. Section 7(2) provides:

'(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned

must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

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

[22] As will be seen, the EPRU constitution contains internal remedies but, not being 'any other law' as contemplated by s 7(2), any obligation that there may be to exhaust those remedies cannot arise by virtue of the PAJA, even if it otherwise applies.⁸

[23] That is not, however, the end of the enquiry. At common law, the mere existence of an internal remedy is not decisive: judicial review will only be deferred on account of a failure to exhaust internal remedies 'if such intention is clearly evident from the governing legislation or, in the case of a private organisation, from the terms of agreement between the complainant and the association concerned'.⁹

[24] Clause 10.10 of the EPRU constitution is concerned with the appointment of an enquiries committee and an appeals committee, as well as their composition. Clause 10.10.2 provides that the appeals committee comprises of three members and it has the 'sole duty to hear and determine and adjudicate upon appeals brought before it by any Player, Club or Official of the Union against any decision of the Union'.

[25] Clause 10.10.7 proclaims the decisions of the appeals committee to be 'final and binding'. Clause 10.10.8 then provides:

'No affiliate or person(s) belonging to a club shall institute legal proceedings against the Union in a Court of Law, unless ALL the normal rugby channels/procedures (structures) have been exhausted or consulted or a ruling confirmed. **(If no appeal is held within 21 days as per clause 10.10.6 then the party could refer the matter to any Court of law for an appropriate order.)**

⁸ *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C), para 47; *Van Zyl v New National Party & others* 2003 (10) BCLR 1167 (C), paras 58-59.

⁹ *Baxter Administrative Law* at 720; *Hoexter Administrative Law in South Africa* (2 ed) at 539.

[26] Clause 20 deals with the leagues that are administered by the EPRU. Clause 20.3.5 provides that appeals 'in connection with a decision to reverse a result shall be dealt with i.t.o. the provisions of Clause 20.9'. That clause, in turn, is in the following terms:

'20.9.1 The UNION COMMITTEE shall have the sole and exclusive right to decide disputes arising from matches played under the control of the UNION.

20.9.2 Any appeal regarding a match shall be lodged in writing with the UNION within ten (10) days, calculated from the day and time after the date and time on which the particular match was completed.

20.9.3 Clause 20.9.1, 20.9.2 and 20.9.3 above are subject to the provisions of Clause 10.4.5 above. The UNION COMMITTEE and/or the EXECUTIVE COMMITTEE are empowered to refer disputes to the APPEALS COMMITTEE for final adjudication.'

[27] It is clear from both clauses 10.10 and 20.9 that when a dispute arises, the EPRU constitution requires it to be dealt with internally before an aggrieved party may approach a court. In other words, clause 10.10.8, read in its broader context, places an obligation on an aggrieved player, club or official to exhaust their internal remedies before seeking the review of a decision. To this extent, the right to approach a court is deferred.

[28] It is common cause that Despatch did not appeal internally against the decision about which it complains. That being the case, its application is premature and cannot succeed.

Conclusion

[29] Given the above conclusion, it is unnecessary to consider the merits of the matter. In summary, I have found that there was no merit in the non-joinder point once the alternative relief was not being pursued, that Despatch had standing but that it had not exhausted its internal remedy of appealing against the disputed decision and was precluded from approaching a court, in terms of clause 10.10.8 of the EPRU constitution, until it had done so. As a result, I dismissed the application with costs.

C Plasket

Judge of the High Court

APPEARANCES

For the applicant: B Dyke instructed by Vlok Attorneys

For the second respondent: K Williams instructed by D Gouws Inc