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In the matter between:

APPLICANT

and

OLYMPIC COMMITTEE

1ST RESPONDENT

PRESIDENT OF THE SOUTH AFRICAN SPORTS

CONFEDERATION AND OLYMPIC COMMITTEE

2ND RESPONDENT

SOUTH AFRICAN GYMNASTICS FEDERATION

3RD RESPONDENT

JUDGMENT

KUBUSHI J

[1] It is public knowledge that the Commonwealth Games are scheduled to take place in Australia beginning from 4 April 2018. The applicant, Ms Shannon Gardiner ("Ms Gardiner"), a fourth year senior Olympic rhythmic gymnast with Protea colours, is desirous to be one of the athletes to compete at the Commonwealth Games. Due to various reasons which shall become apparent later in this judgment she has not been selected to be part of Team South Africa. She has, as such, approached the court to have the decision not to select her reviewed and set aside.

[2] In preparation for the Commonwealth Games, the Commonwealth Games Federation ("CGF") developed the Athlete Allocation System to enable clear communication of deadlines, processes and CGF Quota Allocation requirements. The CGF prescribes in the Athlete Allocation System the number of athletes from each Commonwealth Games Affiliate ("CGA") which will participate in each sporting code. The CGF also allocates the number of athletes for participation in each different sporting event *per* CGA. In rhythmic gymnastics the CGF allotted a maximum of three athletes in Team All-Around Finals and a maximum of two athletes in individual All-Around and Apparatus events *per* CGA. All in all Team South Africa was allocated 101 slots which were not enough to cover all the athletes in all sporting events. Rhythmic gymnasts, as is said, can compete either in the individual or team competition – a team is comprised of three gymnasts. Due to the limited number of the slots allocated to Team South Africa, SASCOC decided to allow only two slots for rhythmic gymnastics. This meant that only athletes participating in individual All-Around and Apparatus event were to be selected. The Team All-Around Finals event was excluded. The remaining slots of the 101 slots allocated to Team South Africa were allocated to deserving athletes in other sporting events.

[3] The first respondent, the South African Sports Confederation and Olympic Committee ("SASCOC") is an association representative of sports and recreation bodies in South Africa. In terms of the National Sports and Recreation Act 110 of 1998, SASCOC is responsible for the preparation and delivery of Team South Africa at all multi-sport international games including the Commonwealth Games. SASCOC's Constitution

empowers it to select, on recommendation from National Sports Federations (if any), athletes to represent South Africa at all multi-sport international games including the Commonwealth Games. SASCOC mandates one of its structures, the High Performance Commission ("the HPC") to deal with the process of selection of athletes to the various games.

[4] The third respondent, the South African Gymnastic Federation ("SAGF"), is the governing body for gymnastics in South Africa. SAGF recommended the name of Ms Gardiner together with two other gymnasts for selection on the team to represent South Africa at the Commonwealth Games for rhythmic gymnastics. The recommendation was that the three be selected as a team on the basis that a team has a chance of earning a team medal for South Africa. The two other athletes were, however, selected for individual entry. The applicant did not make the cut and was not selected.

[5] The application is opposed by SASCOC and the 2nd respondent. I shall, in this judgment, refer to the two collectively as the respondents. The parties appeared before me in the urgent court and when the matter was first argued on 15 March 2018 points *in limine* were raised by SASCOC and the 2nd respondent. I made a ruling that the points *in limine* be heard and determined prior to the merits. Having heard argument on the points *in limine* I found such points not valid and dismissed them. The matter was then argued on merits. This judgment is, thus, on the merits of the application.

[6] The high watermark of Ms Gardiner's case is set out in her founding papers as follows:

"I approach this court for urgent relief to review and set aside SASCOC's decision, alternatively to declare it [SASCOC's decision] unconstitutional and invalid in terms of this court's power in section 172 of the Constitution. I also seek an order directing SASCOC to include me in the team. In seeking this relief, I stress that I do not intend to replace either of the two women's rhythmic gymnasts

selected by SASCOC, but rather to be added as an additional member of the team. I tender all the costs associated with my travel, accommodation and participation in the Commonwealth Games so that SASCOC is not required to bear any of the costs associated with this court's order."

[7] The relief sought in the application is to enable what is referred to in the founding papers as the top Commonwealth ranked rhythmic gymnast in South Africa to join Team South Africa to compete at the Commonwealth Games. The contention is that SASCOC has unlawfully and unfairly refused to include the applicant in the team that will represent the country at the Commonwealth Games. That decision is said to be irrational, procedurally unfair and unconstitutional. I am as such expected to determine whether SASCOC's decision not to select Ms Gardiner to compete at the Commonwealth Games was irrational, procedurally unfair or unconstitutional.

[8] I intend to deal with this application in two phases. I shall, first, determine issues pertaining to prayer 2 read with prayer 3 of the notice of motion. If I find in favour of Ms Gardiner in that respect, I will proceed to deal with prayer 4 read with prayer 5. Should I, however, find for the respondents when I deal with prayer 2 read with prayer 3 of the notice of motion, it will not be necessary to consider the remaining prayers.

[9] As already stated, SASCOC is conferred the power and is, thus, responsible for the selection of athletes to represent South Africa at the Commonwealth Games. In doing so, SASCOC is required to consider the recommendations from the relevant National Sports Federations ("NFs") and in the normal course, enter into a number of Memoranda of Understanding ("MOUs") with the different Sporting Federations.

[10] In March 2017, SASCOC entered into an MOU with participating NFs. The MOU sets out the general protocols governing the relationship between the NFs and SASCOC in preparation for their participation in the Commonwealth Games. In signing the MOU the

NFs indicate their acceptance of the terms and conditions applicable to their participation in the Commonwealth Games. Clause 4 of the MOU is relevant for purposes of this judgment and reads as follows:

- "4. **Eligibility and Selection:** Athletes, who aspire for selection as members of Team South Africa, must in the first place qualify according to the Eligibility Rules pertaining to participation in the Commonwealth Games. Final Selection of athletes and officials will be done according to the official Selection Policy and prescribed time-lines as agreed to between SASCOC and the NF. Although it is the responsibility of NFs to propose athletes and team officials for selection, the final selection authority rests with SASCOC. SASCOC will do the announcement of Team selection according to the Project's media schedule." (my emphasis)

SAGF, as one of the participating NFs, signed this MOU on 10 March 2017 accepting the terms and conditions set out therein and consequently accepting that the final selection authority of athletes for participation in the Commonwealth Games rests with SASCOC.

[11] Each NF also enters into a further MOU with SASCOC wherein the terms and conditions of the eligibility of athletes and the sport-specific selection criteria for the selection of athletes for participation at the Commonwealth Games, are agreed between the specific NF and SASCOC. The general eligibility criteria are common to all the NFs, but each NF sets its own sport-specific selection criteria.

[12] The selection of gymnasts for participation at the Commonwealth Games is governed primarily by the selection policy agreed between SASCOC and the SAGF ("the Selection Policy"). Like other NFs, SAGF's selection policy provides the general eligibility criteria for selection to the Commonwealth Games as well as the sport-specific selection criteria. The selection policy is then agreed between SASCOC and SAGF by signing an MOU. The sport-specific selection criteria for gymnastics, was determined by SAGF and sent to SASCOC. The criteria determined are that the athlete for selection must be ranked in the top ten of the Commonwealth and must meet the eligibility and qualification criteria before 15

December 2017. Pursuant to such determination an MOU between SAGF and SASCOC was entered into on 25 May 2017. It is quite clear from this MOU that the only selection criteria that a gymnast had to comply with in order to qualify for selection is that she or he be ranked in the top 10 of the Commonwealth before 15 December 2017. This is the selection criteria which SASCOC had to consider when exercising its discretion in the selection of athletes/gymnasts. Rhythmic gymnastics is covered by this MOU.

[13] It is common cause that none of the athletes in gymnastics (including rhythmic gymnastics) were ranked in the Commonwealth in 2017. This is so because there are no official events where all Commonwealth countries participate other than the Commonwealth Games. For this reason, SAGF developed a methodology for calculating the gymnasts' ranking in the top ten of the Commonwealth. The method was that gymnasts would be selected to compete at the Commonwealth Games based on their results at the World Championships. The method was communicated by the Chief Executive Officer of SAGF, Mr Tseko Mogotsi ("Mr Mogotsi"), to Ms Ninette Duvenhage ("Ms Duvenhage"), the head of Programme Development for the Rhythmic Gymnastics Technical Committee of the SAGF.

[14] When it became apparent that only two athletes in rhythmic gymnastics competed at the World Championships in 2017, the methodology was, on enquiry by Ms Duvenhage extended as follows in an email by Mr Mogotsi:

"We need the World Championships results in order to determine the Commonwealth gymnasts top 10 ranking.

What we need to do is attend any FIG sanctioned event and use the scores that we achieve to map against those achieved by the Top 10 Commonwealth gymnasts at World Championships. We use this to determine where we rank on the Commonwealth list.

We do not need more than 1 competition to compare. But it is up to the gymnast/club to determine if they want to attend more than 1 FIG- sanctioned competition."

[15] The methodology was disseminated by Ms Duvenhage to a number of other coaches who had potentially eligible gymnasts, as follows:

"We have received the following information from SAGF regarding CWG [Commonwealth Games] 2018.

Gymnasts need to be ranked in the top 10 of the Commonwealth countries to be eligible to participate. They will use the results from the Commonwealth countries at World Champs to compare our scores. All gymnasts wanting to qualify for CWG will then need to participate in any FIG sanctioned event, they only need one, and then their scores will be mapped against those achieved by the Commonwealth countries at World Champs. These competitions need to be completed before 15 December 2017."

[16] As a result of the selection criteria and the methodology disseminated to the coaches, Ms Gardiner together with other athletes, desirous to qualify for selection to the Commonwealth Games, competed in various FIG-accredited international competitions before mid-December 2017. Ms Gardiner is said to have competed in three FIG-sanctioned international events between May and December 2017. She competed in the International Gracia Fair Cup in Budapest, Hungary, the AEON Cup in Tokyo, Japan and the North Rainbow Rhythmic International Tournament in Israel.

[17] On 4 January 2018 SAGF provided SASCOC with a motivation for selection of athletes in gymnastics. The document contained a list of recommended names of gymnasts and a motivation why such athletes should be selected to be included in Team SA. The general motivation for all the athletes in gymnastics read as follows:

"Performance by the above gymnasts was recorded from various FIG-sanctioned events around the world. Their scores were compared against scores achieved by Commonwealth gymnasts at the 2017 World Championships in order to determine a Commonwealth ranking. We see this as the best way of determining a Commonwealth ranking as there are no official events where all Commonwealth

countries participate other than the Commonwealth Games or the World Championships where the majority are expected to participate.”

[18] In the rhythm gymnastics, three athletes were recommended for selection. The first, Ms Grace Legote (“Ms Legote”), was ranked the most experienced gymnast achieving the Top ten Commonwealth criteria, having achieved her selection scores and rankings at the 2017 World Championships. The other two gymnasts, Ms Gardiner (the applicant) and Ms Chris-Marie van Wyk (“Ms van Wyk”), made their criteria at a FIG- sanctioned event held in Israel. SAGF motivated for all three athletes on the basis that a team of three have a chance of earning a team medal for South Africa. SAGF ranked the gymnasts on their medal potential as follows: first Ms Legote – potential medallist in ribbon and ball; second, Ms Gardiner – potential medallist in hoop and clubs; and third, Ms van Wyk – potential medallist in clubs.

[19] Upon further clarity requested by SASCOC from SAGF, it became evident that: none of the three recommended gymnasts had a world ranking; the fact that Ms van Wyk competed in the 2017 World Championships in Italy was not recorded; although SAGF motivated for all three athletes to compete as a team, they had not competed or qualified as a team during 2017.

[20] A meeting of the HPC was held on 10 January 2018 to discuss and debate the selection process in all sports. SAGF’s submissions were also considered. It was decided in that meeting that only world ranking be considered and adjusted to determine Commonwealth ranking of athletes (that is, by removing athletes from other countries from the list of World Championships).

[21] SAGF was requested to resubmit its submissions showing the world rankings of the gymnasts and clarifying the benchmarking. In its response SAGF chose not to include Ms van Wyk's World Championship results as, according to SAGF, the results were not good. The scores used for her were in respect of the Israel tournament. It further became apparent that only the results of world events (World Championships and World Cups) were comparable as the events are organised and monitored by the FIG Technical Committees. In those events they use the highest qualified judges and the events are of a higher standard.

[22] A further communiqué was on 12 January 2018 sent by SAGF to SASCOC providing the following clarification:

"FIG EVENTS: world events such as World Championships and World Cups are organised or monitored directly by the FIG Technical Committees. We believe their results are comparable. They use the highest qualified FIG judges and are generally higher standard events;

FIG-SANCTIONED EVENTS: are invitational competitions organised by countries. They are required to follow FIG guidelines and only use FIG qualified judges. They are however not directly monitored or organised by FIG and are therefore not of the same standard as FIG events.

[23] After receiving this information, the HPC met again on 17 January 2018. On the basis of the advice furnished by SAGF that the judging of various events was different from judging the World Championships and the World Cups and the desktop research done by SASCOC on the all-round ranking, it was resolved that:

In the absence of accurate world rankings, selection would be based on the results from World Championships which meant that all athletes needed to have participated in the World Cup or World Championship to qualify for selection.

Ms Legote and Ms van Wyk were recommended for selection because they had participated at the World Championships. Ms Legote came 54th in the tournament and was ranked 5th in the all-round Commonwealth ranking whereas Ms van Wyk came 88th in the world and was ranked 10th in the

Commonwealth. Ms Gardiner, on the other hand, was not recommended for selection as her scores were only from FIG-sanctioned events and she did not attend the World Championships.

[24] On 29 January 2018, SASCOC informed SAGF of its decision, that is, the selection of Ms Legote and Ms van Wyk and the non-selection of Ms Gardiner, for participation at the Commonwealth Games. At SAGF's request, the decision as to the selected gymnasts was not made public with the other selections. SAGF advised SASCOC of its intention to appeal the decision not to select Ms Gardiner and Ms Caitlin Rooskrantz ("Ms Rooskrantz"). The gravamen of the appeal being the reconsideration of the selection in respect of Ms Gardiner based on the fact that SAGF *'expected that there would be some turmoil with her non-selection and the fact that she was the junior gymnast that represented South Africa at the previous Youth Olympic Games and has extensive international experience'*.

[25] On further enquiries by SASCOC as to the reason why Ms Gardiner did not attend the World Championships and to provide results from any other sanctioned international competitions at which she competed, SASCOC was informed that Ms Gardiner missed one of the two trials that were held for the World Championships and her scores for the second trial was not high enough to be number 2. Further information was requested about any other FIG-sanctioned events Ms Gardiner attended during 2017 besides the Gracia Fair Cup in Budapest, Hungary and the North Rainbow Invitation in Israel. It appears no response was provided to this enquiry. Having reconsidered the additional information at its disposal, and based on its previous selection criteria (being that Ms Gardiner did not have a Commonwealth ranking for 2017 by virtue of not having competed on the same level as Ms Legote and Ms van Wyk at the World Championships) the HPC confirmed its decision to select Ms Legote and Ms van Wyk to represent South Africa at the Commonwealth Games. The decision was communicated to SAGF.

[26] It is not in dispute that SASCOC is required to exercise its powers to select athletes in a manner consistent with its mandate to promote and develop sport, to advance the Olympic movement, and to improve South Africa's position on the medals table at the Commonwealth Games.

[27] It was argued on behalf of Ms Gardiner that in exercising its discretion not to select Ms Gardiner, SASCOC acted irrationally, procedurally unfair and unconstitutional.

[28] It is trite that in exercising its discretion to select athletes, SASCOC is constrained by the constitutional principle of legality that requires that a decision-maker exercises the powers conferred on her or him lawfully, rationally and in good faith.¹ There must be a rational relationship between the decision it makes and the purpose for which the power was given.²

[29] The gravamen of Ms Gardiner's complaint is that SASCOC changed the selection criteria. In argument before me, Ms Gardiner's counsel conflated the selection criteria and the methodology used to determine ranking in the top ten Commonwealth, insinuating that SASCOC changed the selection criteria. But, I do not agree.

[30] It is evident from the papers before me that the selection criteria and the methodology used to determine the Commonwealth ranking are two separate factors. The selection criteria for rhythmic gymnasts were, at all times and as determined by SAGF, the ranking of the gymnasts in the top ten Commonwealth. Due to the fact that none of the gymnasts had a Commonwealth ranking a methodology was determined of how the ranking was to be calculated. The methodology was determined by SAGF and forwarded to SASCOC.

¹ See *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) paras 48 – 49.

² See *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 85.

The methodology was to select gymnasts based on their results at the World Championships. In her own version Ms Gardiner states in her founding papers that Ms Duvanhage was informed that gymnasts were to be selected to compete at the Commonwealth Games based on the results at the World Championships. This is the same methodology used by SASCOC in the selection of the two gymnasts selected to participate in the rhythmic gymnastics event at the Commonwealth Games. They were selected on the basis of their having participated at the World Championships by mid-December 2017. I have already alluded in paragraph [23] of this judgment to the resolution taken by the HPC on 17 January 2018.

[31] Ms Gardiner submits further that it was unlawful of SASCOC not to select the gymnasts on the basis of the recommendation of SAGF and thus changing the selection criteria without informing her. I have already ruled that SASCOC did not change the selection criteria. The intention was always to select gymnasts who ranked in the top ten of the Commonwealth. The method used by SAGF to calculate the required ranking was also not changed. The aim, as already stated, was at all times to calculate the ranking on the basis of the gymnasts' respective results in World Championships. This is the criteria and method used by SASCOC. The methodology was extended to include FIG-sanctioned results when it became it appeared to SAGF that some athletes will be excluded for having not participated in the World Championships.

[32] In calculating the ranking of athletes in the top ten of the Commonwealth, SAGF used two sets of results. It used the results of the World Championship for Ms Legote and used the results of FIG-sanctioned events for Ms Gardiner and Ms van Wyk. The results of the FIG-sanctioned events were mapped against the results of the World Championships. This method, I might say, was adopted to assist gymnasts like Ms Gardiner who did not compete in the World Championships in 2017. This, as argued by SASCOC, was wrong, and I agree.

[33] The events used for comparison by SAGF are not on the same level and are incompatible. As counsel for SASCOC submitted, SAGF did not compare apples with apples. The uncontroverted evidence before me is that international competitions are placed in different categories (groupings). In terms of the FIG General Judges' Rules Cycle 2017 – 2020 there are four groupings: Group 1 consisting of Olympic Games, World Championships and World Cup competitions qualifying for the Olympic Games; Group 2 consists of Continental senior and junior Championships, World Challenge Cup Competitions, World Cup Competitions, the World Games and Youth Olympic Games; Group 3 consist of Commonwealth Games, Continental Games, Mediterranean Games, Universiade and World and Continental Age Group Competitions; Group 4 consists of Regional Championships, Tests Events for the World Games, Tests Events for the Olympics Games, All other Multisport Games and All other FIG-approved international tournaments and competitions.

[34] Just from the aforesaid it is quite clear that the World Championships fall in group 1 whilst the FIG-sanctioned international tournaments fall within the fourth group. There is also evidence on record, undisputed, which confirms that the two groups are vastly different and incompatible. This evidence is in the form of information provided to SASCOC by Mr Mogotsi before the selection of the athletes was done. The information is contained in two letters, dated 11 January 2018 and 12 January 2018 respectively, written by Mr Mogotsi to SASCOC. In the said letters Mr Mogotsi informs SASCOC that only the results of world events like World Championships and World Cups are comparable because the events are organised and monitored by the FIG Technical Committee, the highest qualified judges are used and the events are of a higher standard. I might as well add that the events are comparable because they fall within the same grouping. This, in comparison with FIG-sanctioned events in group 4, which are invitational competitions organised by countries. FIG-sanctioned events are required to follow FIG guidelines and use FIG qualified judges but, they are not directly monitored or organised by FIG and therefore not of the same standard as FIG events. It is incorrect for SAGF to have compared results of events which are of a higher standard, that is FIG events, and results of events of a lower standard, meaning FIG-

sanctioned events. The results could never have been balanced, correct and could never have produced the correct ranking of athletes. That the outcome of the method as applied by SAGF could never have produced the desired outcomes is evident from the various inconsistent calculations it produced. On 4 January 2018 SAGF under the heading "RG Motivation" Ms Legote is listed as the most experienced gymnast; in the document under the heading "COMMONWEALTH GAMES QUALIFICATION RANKING" Ms Gardiner is ranked 2nd, and Ms Legote is ranked 3rd; in a further motivation on 9 January 2018 Ms Gardiner is ranked 2nd, Ms van Wyk 3rd and Ms Legote 6th; and in the Sunday Times of 11 March 2018, Mr Mogotsi states that Ms Gardiner is ranked 2nd in SAGF's rankings.

[35] As it is, having used what I would say was the incorrect method of mapping, SAGF produced a list of recommended names wherein Ms Gardiner is said to be more qualified than Ms Legote and Ms van Wyk whilst in fact she did not compete in a World Championship during the qualifying period. This cannot be correct. The starting point for me is the results of the athletes who competed in the World Championships. This is so because the methodology as determined by SAGF was to select on the basis of the results obtained at the World Championships. In this instance, both Ms Legote and Ms van Wyk had competed at the said championships and were from the word go eligible for selection. Ms Legote is said to have come 54th in the tournament and Ms van Wyk came 88th. When only the gymnasts from the Commonwealth countries were considered Ms Legote was ranked 5th in the all-round Commonwealth ranking and Ms van Wyk was ranked 10th. It is common cause that Ms Gardiner did not compete in any World Championship in the 2017 cycle. She is said to have competed in three FIG-sanctioned international events. Mapping her results from such international events against the results obtained at the World Championship events could never have produced the desired outcome. It was also unfair of SAGF to have excluded the World Championship results of Ms van Wyk and only considered her results from a FIG-sanctioned event only to be able to compare her results with those of Ms Gardiner. I hold, therefore, that the calculation, upon which Ms Gardiner claims that she is the top ranked South African rhythmic gymnast in the Commonwealth, is deeply flawed.

[36] In selecting the gymnasts SASCOC sought to rank them within the top ten in the Commonwealth. From the reading of the minutes of the HPC it is apparent that SASCOC was aware that there were no world rankings for the athletes in rhythmic gymnastics. It consequently, adopted and used the methodology determined by SAGF in calculating their ranking in the Commonwealth. That method was to select gymnasts on the basis of their results in the World Championships. SASCOC looked for results of South African gymnasts in rhythmic gymnastics within the World Championships and found the results of two athletes, namely, Ms Legote and Ms van Wyk. It used such results to determine their ranking in the Commonwealth by removing the names of athletes from countries that were not part of the Commonwealth from the World Championships. Having done so, Ms Legote was ranked 5th and Ms van Wyk was ranked 10th. Once the results of the two athletes were found, SASCOC had no reason to look elsewhere because there were only two slots allotted for rhythmic gymnastics in Team SA, besides, there were only two athletes who competed in the World Championship in 2017.

[37] Ms Gardiner's submission that SASCOC did not consider the fact that she could not compete in the World Championships because of the injury she sustained during trials for qualification to the tournament, has no merit. Whether SASCOC was aware of the injuries or not makes no difference as far as I am concerned. Fact is Ms Gardiner had not competed in a World Championship by December 2017. What were required were her results, if any, in a World Championship and she had none to show. Since she could not produce same, there was no way in which SASCOC could have considered her. The results she had for the FIG-sanctioned international events, as I have already said, could not be compared with those obtained at World Championships. The fact that she was injured during the trials is not unique in the circumstances of this matter. From time to time, athletes do sustain injuries that make them ineligible to participate in tournaments. That an athlete gets injured is not unique as I have said, but comes with the exigencies of the territory. The criterion used to disqualify her was also not specific to her only. For instance, one of the gymnasts recommended for selection by SAGF, Ms Rooskrantz, was also not selected for

participation in the Commonwealth Games due to her lack of World Championship results. Just like Ms Gardiner she could not compete in the World Championships because of an injury sustained during the trials leading to such tournament. For that reason, Ms Rooskrantz, was not selected for participation in the Commonwealth Games.

[38] That SASCOC did not have all the information before it relating to Ms Gardiner before it took the decision not to select her, does not assist Ms Gardiner's case. The information that it is contended was not before SASCOC is the results of the AEON international event that took place in Tokyo and the injuries sustained by Ms Gardiner during the trials held in the build-up to the World Championships. But, AEON is a FIG-sanctioned international event that SASCOC could not have looked at, anyway. I have already addressed the issue of the injuries sustained by Ms Gardiner. The calculations made by SAGF which placed Ms Gardiner on a higher ranking than Ms van Wyk stood to be rejected by SASCOC on the grounds I have already explained in paragraphs [34] and [35] of this judgment. In essence, SASCOC considered all the information that was placed before it by SAGF. Where issues were not clear it sought clarification from SAGF. In fact, except the results of Ms van Wyk which she obtained from the World Championships, all the information, at the disposal of SASCOC before it took the decision not to select Ms Gardiner, was provided to it by SAGF. SASCOC did its own desktop research, as well. From that research, it discovered that Ms van Wyk had competed at a World Championship in Italy during 2017 and that her results of that tournament were not taken into account by SAGF when calculating her ranking. SASCOC in its desktop research also discovered that Ms Gardiner, who was touted as the best gymnast in rhythmic gymnastics in South Africa, did not meet the criteria for selection as she had not competed in a World Championship in 2017. If the desktop research was not done, SASCOC could have rubber stamped SAGF's recommendations and the athlete who did not qualify would have gone to the Commonwealth Games.

[39] The reasons given for the non-selection of Ms Gardiner are apparent from the minutes of the HPC held on 7 January 2018. The reasons are the following:

In the absence of accurate world rankings, selection would be based on the results from World Championships which meant that all athletes needed to have participated in the World Cup or World Championship to qualify for selection.

Ms Legote and Ms van Wyk were recommended for selection because they had participated at the World Championships. Ms Legote came 54th in the tournament and was ranked 5th in the all-round Commonwealth ranking whereas Ms van Wyk came 88th in the world and was ranked 10th in the Commonwealth. Ms Gardiner, on the other hand, was not recommended for selection as her scores were only from FIG-sanctioned events and she did not attend the World Championships.

[40] There is no evidence on record showing that Ms Gardiner requested reasons from SASCOC for its decision not to select her. Ms Gardiner relied on a letter written by the Chief Executive Officer of SASCOC to SAGF informing SAGF of the decision of SASCOC not to select Ms Gardiner. Ms Gardiner ought to have requested reasons directly from SASCOC, this she did not do. I am as such constrained to can accept the reasons stated in the CEO's letter as those of SASCOC.

[41] I have to conclude therefore that SASCOC exercised its discretion rationally. The decision was rationally connected to the purpose for which it was taken, the power for which it was conferred on SASCOC, the information before it or the reason given for it by SASCOC. Similarly I hold that the procedure followed by SASCOC was procedurally fair.

[42] On the issue of costs, Ms Gardiner's counsel implored me to follow the *Biowatch*-judgment³ in the event I find in favour of the respondents. In accordance with that judgment it has become settled law that unsuccessful litigants who approach the court, in good faith, to assert constitutional rights, should not be discouraged to do so for fear of having costs awarded against them.⁴ It is also trite that a conclusion by the court that the

³ *Biowatch Trust v Registrar, Genetic Resources & Others* 2009 (6) SA 232 (CC).

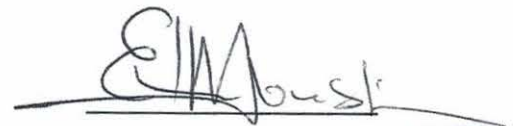
⁴ See *Biowatch* para 21.

institution of proceedings was frivolous or vexatious or manifestly inappropriate, justifies a departure from *Biowatch*.⁵

[43] The respondents' counsel has not made out a case that the proceedings are frivolous or vexatious but contends for an order for costs on an attorney and client scale including costs of two counsel on the basis that Ms Gardiner chose to approach court without first requesting SASCOC to provide her with the reasons for its decision not to select her. Counsel further argued that Ms Gardiner chose to run to the urgent court and also escalate the urgency of the matter without any valid reasons.

[44] As is trite the award of costs is in the discretion of the court. Much as I have to find that the institution of these proceedings was not frivolous or vexatious, I am of the view that it was inappropriate of Ms Gardiner to approach court on a heightened urgency when in fact it was not necessary to do so. By simply having requested reasons for SASCOC's decision and properly read the documents at her disposal, she could have approached the court appropriately. She should as a result be mulcted with costs. I, however, do not think that the circumstances calls for a cost order on a punitive scale. An order of costs on a party and party scale inclusive of costs of two counsel will, in my view, suffice.

[45] In the premises, the application is dismissed with costs including costs of two counsel.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

⁵ See *Mandela v The Executors, Estate Late Nelson Rolihlahla Mandela & others* (131/17) [2017] ZASCA02 (19 January 2018).

APPEARANCES

HEARD ON THE	: 16 MARCH 2018
DATE OF JUDGMENT	: 26 MARCH 2018
APPLICANT'S COUNSEL	: ADV. K HOFFMEYER
	: ADV. F HOBDEN
APPLICANT'S ATTORNEY	: KEITH SUTCLIFFE&ASSOCIATES INC.
RESPONDENT'S COUNSEL	: ADV. M. FEINSTEIN
	: ADV. I DE VOS
RESPONDENT'S ATTORNEY	: TWB ATTORNEYS