

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



Case number: 62189/2023

Date of hearing: 4 June 2024

Date delivered: 25 June 2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/ NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/ NO	
(3) REVISED	
25/6/24	[REDACTED]
DATE	SIGNATURE

In the matter of:

CHESS SOUTH AFRICA

Applicant

and

**SOUTH AFRICAN SPORTS
CONFEDERATION AND OLYMPIC
COMMITTEE
THE MINISTER OF SPORT, ART
AND CULTURE**

First Respondent

Second Respondent

JUDGMENT

SWANEPOEL J:

BACKGROUND

[1] This is an application brought in two parts. In Part A the applicant ("Chess SA") sought a suspension of a decision of the first respondent's ("Sascoc") Board, taken on 10 March 2023, to provisionally suspend Chess SA. It also sought a suspension of the decision of the general assembly of Sascoc to finally suspend Chess SA on 22 April 2023, and it sought ancillary relief related to the awarding of national colours. Part A of the application was brought on a semi-urgent basis, but was never heard. In Part B of the application the applicant seeks to review and set aside the aforementioned decisions in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). It is Part B that is now before me.

[2] The following is the brief general background to the matter:

[2.1] Sascoc is the national multi-coded controlling body for sport in South Africa, controlling the presentation and performance of multi-coded events such as the Olympic and Paralympic Games, the Commonwealth Games, All Africa Games, and the like. Although there was some controversy relating to Sascoc's constitution, I accept Sascoc's version that it is governed by a constitution that was adopted on 26 November 2022.

[2.2] The National Sport and Recreation Act, 110 of 1998 ("the Sport Act") is aimed at promoting and developing sport and recreation in South Africa, and at coordinating the relationships between the Sport Confederation and the National Department of

Sport and Recreation (“the Department”), and between the Department and national sport federations. It provides for the recognition by the second respondent of a sport confederation that *“will be the national coordinating macro body for the promotion and development of high performance sport in the Republic”*.¹ Chess SA alleges that Sascoc is the sports confederation referred to in section 2 of the Sport Act, and that it has been recognized in writing by the second respondent, as required by the Sport Act. I will deal with this averment hereunder when I consider Sascoc’s status.

[2.3] Chess SA is a national sport federation that controls the sport of chess in South Africa. It is a member of Sascoc, albeit that its membership has been suspended.

[2.4] Chess SA launched this application on 30 June 2023, whereafter it approached the Deputy Judge President seeking a date for the hearing of Part A as a special allocation. The 5th October 2023 was allocated. Shortly before the hearing of the matter, on 29 September 2023, Sascoc delivered the supplementary affidavits of four chess players in which Sascoc sought to show that chess activities in South Africa had not been disrupted by Chess SA’s suspension. It also delivered an ‘explanatory’ affidavit which explained that the transcript of the proceedings of the general meeting previously filed were incomplete, and the complete transcript was attached.

[2.5] Chess SA took the view that the late delivery of these affidavits did not leave it with sufficient time to respond, and it sought a postponement of the matter. On 5 October 2023 Part A of the matter was postponed, certain directives were given as to the delivery of a further affidavit in response to Sascoc’s

¹ Section 2 of the Sport Act

supplementary affidavits, and the costs of Part A were reserved for later determination.

[2.6] A further management meeting was held with the Deputy Judge President, and a provisional date for the hearing of Part A was set for 2 February 2024. On 30 October 2023 Chess SA's attorneys wrote to the Deputy Judge President proposing that, instead of Part A being heard on 2 February 2024, that a date be allocated for the hearing of Part B in March 2024.

[2.7] A further case management meeting followed on 23 January 2024. At that meeting Chess SA proposed that instead of Part A being heard, timelines rather be set for the hearing of Part B. The result was that Part B of the matter was set down for hearing on 3 June 2024, and Part A was never heard.

[3] The above is a brief timeline of the matter. Before I deal with the merits of the matter, it is necessary to consider Sascoc's striking out application. However, in order to do so, the history of the matter is important to show the context within which the averments that are sought to be struck out were made.

[4] Chess SA has been a member of Sascoc for a number of years. As I have said, it is the national controlling body for chess in South Africa. It is governed by a National Council and an executive board ("Exbo"), in accordance with its constitution. Its members are the various provincial chess associations that are in turn governed in accordance with their own constitutions.

[5] Chess SA says that upon the death of its erstwhile president in 2017 a faction of members was born which aimed to 'capture' Chess SA. It says that from approximately 2018 onwards, this faction pushed for the inclusion of unlawfully elected provincial representatives in the voting process, and the suspension of some of the provincial members. That

led, ultimately, to the election on 1 July 2018 of one Mr. Mahomole as president of Chess SA, and the appointment of a new Exbo. As a result, one of the provincial members, Gauteng Chess, brought an application against a number of the provincial chess bodies, against Chess SA and against a number of individuals, including Mr. Mahomole, attacking the suspension of the provincial members, and the consequent election of Mr. Mahomole as president of Chess SA.

[6] On 17 August 2018 the suspension of the provincial members and the resolutions taken at a special general meeting were set aside by Desai J in the Western Cape High Court. It was directed that a further special general meeting should be held on 25 August 2018, and that the persons appointed to the Exbo on 1 July 2018 were not to act as the Exbo pending the further special general meeting.

[7] An interim Exbo was elected on 24 August 2018, and an annual general meeting ("AGM") was arranged for 8 December 2018. In an attempt to oust the competing members, Mr. Mahomole produced a list that reflected all nine provincial members as not being in good standing and therefore not entitled to participate in the AGM. Two urgent applications were then brought by Gauteng Chess and the Players' Commission respectively, seeking declaratory orders that they were in good standing and eligible to vote at the AGM. Both applications were heard together and resulted in an order by Siwendu J to the effect that the applicants in those applications were entitled to vote at the AGM on 8 December 2018.

[8] On 8 December 2018 the deponent to the founding affidavit, Mr. Du Toit, was elected as president of Chess SA, and a new Exbo was elected. Despite the appointment of the new Exbo in accordance of the order of Siwendu J, the Mahomole faction refused to accept the outcome of the meeting, and refused to hand over assets and financial documents to the new Exbo.

[9] As a result, the new Exbo brought an application for a declaratory order to the effect that it was the legitimate board of Chess SA. The Mahomole faction brought a counter-application seeking to rescind the Siwendu J judgment. Yacoob J granted the counter-application and the Mahomole faction effectively continued to govern Chess SA.

[10] Chess SA says that it called upon Sascoc on numerous occasions to arrange a meeting to discuss the impasse between the factions. A meeting was eventually held on 5 June 2019 at which both the Exbo and the Mahomole faction were present. Not much needs to be said about the meeting save that nothing was resolved. On 7 June 2019 Sascoc wrote to Chess SA advising it that until the impasse had been resolved, Chess SA was not welcome to attend Sascoc's general meeting. What the legal basis was for this *de facto* suspension is unclear, but that remained the position until the events that led to this application unfolded.

[11] Sascoc continued to adopt the stance that it could not determine who was Chess SA's legitimate leadership. At a hearing of the Parliamentary Committee on Sport, Arts and Culture on 3 November 2020 Sascoc told the committee that it considered the Mahomole faction to be in control of Chess SA, as it had caused the continental structures to recognize South African chess players, whilst, on the other hand, it realized that Du Toit and his group were regarded by the International Chess Federation ("FIDE") to be the true leadership of Chess SA.

[12] Despite having taken the decision that Chess SA could not participate in Sascoc meetings, the Mahomole faction was invited to Sascoc's general meeting that was held on 4 November 2020.

[13] On 24 January 2022 FIDE appointed a 'reverse delegate' with a mandate to oversee a process of reconciliation between the factions, and the holding of elections. On 16 February 2022 a Full Court upheld the appeal of Chess SA against the order of Yacoob J. The Full Court replaced the Yacoob J order with the following order:

[13.1] That the appeal is upheld;

[13.2] That the counter-application is dismissed with costs;

[13.3] That the executive board was comprised of the persons elected on 8 December 2018;

[13.4] The Mahomole faction was interdicted from acting or purporting to act as representatives of Chess SA or its interim executive board, and from accessing Chess SA's First National Bank and ABSA Bank accounts or from transacting on the accounts. The individuals who formed the 'board' of the Mahomole faction were ordered to pay the costs of the appeal on a punitive scale.

[14] Chess SA says that during the Mahomole regime great harm was done to Chess SA. It alleges that there was a complete failure in corporate governance, no financial statements were prepared, and democratic elections were not held. It also accuses the Mahomole faction of excessive spending and of boycotting chess tournaments. Once the Full Court judgment had been handed down the recognized Exbo tried to take control of the business of Chess SA through the reverse delegate appointed by FIDE. Nevertheless, the Mahomole faction refused to accept the Full Court judgment, and continued to refuse to hand over Chess SA's financial and governance documents to the Exbo.

[15] Chess SA alleges that during this time Sascoc supported the Mahomole faction and that it showed a clear bias against the Exbo. On 10 July 2022 FIDE recognized the Exbo as the legitimate leadership of Chess SA. Sascoc was advised of this decision. On 18 August 2022 Du Toit communicated the FIDE decision to the chess community at large, and set out the intentions of the Exbo going forward. Having ignored a number of requests by the Exbo to meet, Sascoc then agreed to meet on 21 September 2022.

[16] Chess SA says that it conveyed to Sascoc at the meeting of 21 September 2022 that the financial statements for the 2017 to 2022 financial years had yet to be completed, and that it was experiencing difficulties in compiling the statements due to problems with accessing source documents. The minutes of the meeting do not bear out that contention. The following day Sascoc wrote to Chess SA demanding various documents, including minutes of annual general meetings and attendance registers, audited financial statements, annual reports and various documents relating to governance matters.

[17] On 4 October 2022 the Department invited Chess SA to give a presentation at a meeting of the parliamentary portfolio committee which was to be held on 18 October 2022 regarding “the annual report and related matters”. The presentation was to be submitted by Chess SA to the Department by 11 October 2022. Mr. Du Toit was unable to comply with the timelines set. As a result, he sought a postponement of the meeting and for sufficient time to prepare a presentation which request was granted. Sascoc continued to enquire about the documents demanded in its letter of 22 September 2022.

[18] Du Toit replied to Sascoc’s letter of 22 September 2022 by email on 23 January 2023. He placed the following on record:

[18.1] That Chess SA was experiencing a difficult time as ‘certain elements’ were refusing to adhere to the constitution, which caused a drain on its time and resources;

[18.2] That Chess SA had difficulty understanding some of Sascoc’s requirements as it had been previously excluded from Sascoc meetings;

[18.3] That the previous treasurer was refusing to cooperate and to provide source documents to the Board;

[18.4] That legal action would follow if the treasurer did not cooperate;

[18.5] That members who were non-compliant with Chess SA constitutional requirements had been suspended but had been afforded an opportunity to rectify their standing by the end of February 2023

[19] One Andre Lewaks had, in the meantime, written to Sascoc on behalf of the National Council of Chess to alert it to the fact that the affairs of Chess SA were not in order, and he demanded that the Exbo be dissolved. At the AGM held on 10 December 2022 representatives of provincial members attended. They demanded that the Exbo resign and they refused to acknowledge the Du Toit Exbo. They were asked to present their credentials to prove that they represented the provinces, but refused to do so. The provincial members who could not show that they were in good standing were suspended, and afforded an opportunity to fulfil the requirements to become in good standing by the end of February 2023. Chess SA did not deal squarely with the events that occurred at the AGM, and specifically whether a new Exbo was elected.

THE STRIKING -OUT APPLICATION

[20] It is largely the above history that Sascoc seeks to have struck out. It has applied to have the majority of the contents of paragraphs 3, 6, 7 and 8 of the founding affidavit struck out. It alleges that the contents of those paragraphs are scandalous, vexatious or irrelevant to the issues in the matter. It also argues that the averments sought to be struck are disparaging and scandalous as regards the Mahomole faction.

[21] Rule 6 (15) provides that a court may on application order any matter struck from any affidavit, if such matter is scandalous, vexatious or irrelevant, but it may only do so if the court is satisfied that the applicant will be prejudiced if the application is not granted. The question whether

matter should be struck is therefore a dual one, firstly, whether the matter is either scandalous, vexatious or irrelevant, and secondly, whether Sascoc would be prejudiced in its case if the matter were not struck.

[22] Matter is scandalous if it is worded in such a manner as to be abusive or defamatory, whether it is relevant or not.² The word 'abusive' is defined in the Oxford Dictionary as "extremely offensive and insulting" and "involving injustice or illegality". In the Merriam-Webster dictionary it is defined as "harsh or insulting language". It seems that it is the manner in which the words are used, more than simply the content of the words, that cause the words to be 'abusive'.

[23] Allegations are often made in papers that have the result of harming the other party's reputation. The mere fact that an averment is damaging to the offended party's reputation is not sufficient to render an allegation "defamatory". For instance, in a case for the return of property unlawfully removed by a party, it would not be inappropriate to say that the property was stolen. That averment would have the result of harming the offended party's reputation, but would be reasonable in the circumstances. However, to gratuitously add, for instance, that the thief is also a sexual offender would be scandalous and also irrelevant. The test whether allegations are scandalous are fact specific, and must be decided on the circumstances in each case.

[24] The same approach may be taken in considering whether allegations are vexatious, which Erasmus defines as "allegations that may or may not be relevant, but are so worded as to convey an intention to harass or annoy". It is not so much the allegation that is offensive, but the wording thereof and the context within which it is made that is offensive.

² Vaatz v Law Society of Namibia 1991 (3) SA 563 (NM); See also Erasmus, Superior Court Practice, 2nd Ed. D1-91

[25] Irrelevant matter is matter that does not have a bearing on the issues in the matter, or as Erasmus puts it, it is matter that does not contribute to the decision in the case.³

[26] Chess SA seeks to review and set aside the suspension decisions on a number of grounds. One of the grounds is bias. Chess SA alleges that Sascoc was biased, or reasonably suspected of bias, in favour of the Mahomole faction, and that its decisions are reviewable under subsection 6 (2) (a) (iii) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). It also alleges that the decisions were taken for an ulterior motive, and are thus reviewable under subsection 6 (2) (e) (ii) of PAJA, alternatively was taken in bad faith, and are thus struck by subsection 6 (2) (e) (v) of PAJA.

[27] It would be hard to imagine how a party can make a case for bias, ulterior motives or bad faith without making disparaging remarks about the other party's conduct and motives. That is in the nature of the matter. It is also clearly so that Chess SA has made a number of remarks that Sascoc would find offensive, and has vehemently expressed its opinion regarding Sascoc's conduct. However, I do not believe that the disparaging remarks were made simply in order to offend or defame, nor were they so worded. Similarly, the wording is not such that one can find that the words are meant solely to harass or annoy Sascoc. In my view, given the case that Chess SA's seeks to make, the allegations are relevant.

[28] In *Tshabalala-Msimang and Another v Makhanya and Others*⁴ the applicants sought an order securing the medical records of the first applicant, and an interdict restraining their publication. In the answering affidavit a number of allegations were made regarding the first applicant's (a Government Minister) alleged abuse of alcohol and its effects on her

³ See footnote 3 above. See also *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 23

⁴ 2008 (6) SA 102 (W), [2008] 1 ALL SA 509 (W)

state of health. In an application to strike out these averments, the first applicant argued that they were scandalous and vexatious and also irrelevant. The Court held that even though the allegations had the result of damaging the first applicant's reputation, they were necessary for the respondent to be able to set out in detail the facts upon which she wished to make her case. They were also relevant to the case sought to be made. For those reasons the application to strike was dismissed.

[29] In my view the remarks in *Beinash v Wixley*⁵ are apposite to this case:

"I have considerable difficulty in appreciating why the narration of the background which preceded the application to set aside the impugned subpoena should be characterized as irrelevant. On the contrary the substance of this narration appears to be quite relevant and indeed very useful in understanding the reason and need for, and the cogency and legitimacy of, the attack made by Wixley on the impugned subpoena."

[30] The point is that, even if allegations are damaging to a party, and does harm to its case or to its reputation or standing in the community, that in itself does not make such allegations scandalous or vexatious. Only if the allegations are levelled in such a manner as to solely abuse harass annoy or defame the other party can they be characterized as scandalous or vexatious.

[31] Once the applicant for a striking order has failed at the first hurdle, that is the end of the case. However, I also wish to deal with the issue of prejudice. Sascoc's averment that the Mahomole faction has been prejudiced by the allegations in the founding affidavit is of no moment. It is the applicant in the striking application that must be prejudiced. The issue of prejudice is not to be narrowly construed. It is not only in instances, for example, where a party may be forced to answer to lengthy irrelevant averments that it would be prejudiced. It may also be that the

⁵ 1997 (3) SA 721 (SCA) at para 24

allegations impact on the objecting party's broader life, such as in *Weeber v Vermaak and Another*⁶ where irrelevant allegations were struck out that may have impacted a party's chances in an election.

[32] The averments made against Sascoc in these papers may have the effect of harming its reputation. However, they are directly relevant to the case sought to be made by Chess SA, and are not couched in a manner which is abusive or harassing. There is simply no other way to make a case such as Chess SA wishes to make. Sascoc is entitled to dispute the averments, and it has done so at length. I find therefore that Sascoc has not suffered prejudice within the meaning of rule 6 (15). It follows that the striking-out application must fail.

PAJA REVIEW

[33] Chess SA seeks to review Sascoc's decisions to suspend Chess SA in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). The decisions would only be open to review under PAJA if they constitute "administrative action" as defined by PAJA, which is:

"any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect....."

⁶ 1974 (3) SA 207 (O)

[34] An organ of state is defined in section 239 of the Constitution as:

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

(b) Any other functionary or institution-

- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;..... “

[35] The Sport Act provides for the recognition of a sport confederation
Section 2 (1) of the Sport Act reads as follows:

“(1) The Minister must recognize in writing a Sports Confederation which will be the national coordinating macro body for the promotion and development of high performance sport in the Republic.”

[36] The Sport Act defines “sport confederation” as the confederation referred to in section 2 of the Sport Act. Section 2 sets out the duties and powers of the sport confederation referred to in subsection 2 (1). In terms of subsection 2 (2) the sport confederation may, from time to time, develop guidelines for the promotion of high-performance sport. In relation to high performance sport a government ministry, department, province or local authority may consult with the sport confederation.⁷ The sport confederation must co-ordinate all activities relating to high performance sport, including team preparations and must consult with all the relevant sport bodies in that regard.⁸ Section 3 A requires the sport confederation to enter into a service level agreement with the Department. Section 4 provides for consultation between the Minister and the sport confederation insofar as general policy to be pursued high

⁷ Subsection 2 (3) (b)

⁸ Subsection 2 (4)

performance sport is concerned. Subsection 6 (2) requires the national sport federations (such as Chess SA) to actively participate in and support programmes of the Department and the sport confederation. The sport confederation is also tasked with establishing a national colours board that considers all applications for national colours⁹. Section 14 empowers the Minister, after consultation with the sport confederation, to make regulations in relation to high performance sport.

[37] Section 13 provides for dispute resolution between members of sport bodies or between members and their governing bodies. Where disputes cannot be resolved by the particular sport body it may be submitted to the sport confederation for resolution.¹⁰ The sport confederation must then advise the Minister of the dispute.

[38] Once the dispute has been referred to the sport confederation, the provisions of subsections 13 (3) and (4) apply:

"13 Dispute resolution

- (1) ...
- (2)
- (3) The Sport Confederation must, in relation to any dispute referred to in subsection (1) or (2)-
 - (a) notify the relevant parties of the allegations;
 - (b) invite the parties to make representations to it;
 - (c) convene where necessary an inquiry into the dispute;
 - and
 - (d) in accordance with the provisions of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), notify the parties of the decision.
- (4) The Sport Confederation may, at any time, of its own accord, cause an investigation to be undertaken to ascertain the truth within a sport or recreation body, where allegations of-

⁹ Section 11

¹⁰ Subsection 13 (2) (a)

- (a) any malpractice of any kind, including corruption, in the administration;
- (b) any serious or disruptive divisions between factions of the membership of the sport or recreation body; or
- (c) continuation or maintenance of any institutionalized system or practice of discrimination based on gender, race, religion or creed, or violation of the rights and freedoms of individuals or any law,

have been made, and may ask the Minister to approach the President of the Republic to appoint a commission of enquiry referred to in section 84 (2) of the Constitution.”

[39] From the above it is clear that the sport confederation that is contemplated in the Sport Act is an institution exercising a public power or performing a public function as defined in section 239 of the Constitution. The question is whether Sascoc is the sport confederation referred to in section 2 and whether it has been recognized by the Minister in writing.

[40] In the founding affidavit Chess SA alleged that Sascoc is the sport confederation recognized by the Minister in terms of section 2 of the Sport Act, that it derives its powers and functions from the Sport Act, and that it is an organ of state which exercises a public power or performs a public function in terms of the Sport Act. Sascoc did not engage with these allegations in its answering affidavit. In a supplementary affidavit Sascoc denied that it was an organ of state. It said that it is a private entity established in terms of its constitution. It specifically denied that it derived its powers from the Sport Act.

[41] However, Sascoc did not engage with Chess SA's central allegation, that Sascoc has been recognized by the Minister as the sport confederation referred to in section 2. Whilst Sascoc persisted in its supplementary affidavit in denying that it is the sport confederation referred to in the Sport Act, it simultaneously submitted that Chess SA

was permitted to refer the dispute between it and the Mahomole faction to Sascoc for resolution in terms of section 13 of the Sport Act. If that is the case, then Sascoc is the sport confederation referred to in the Sport Act, and it is an institution exercising a public power and performing a public function in terms of legislation. It is thus an organ of state within the meaning of section 239, and subject to review in terms of PAJA.

[42] If I am wrong in this finding, the decision by Sascoc would, in any event, in my view, fall within the definition of administrative action in (b) of PAJA, in that Sascoc is a juristic person exercising a public power or performing a public function in terms of an empowering provision.

[43] Sascoc is a private entity that has been established in terms of its constitution. It says that it is a voluntary association that is governed and regulated in terms of the constitution. Therefore, it argues, it does not exercise public powers or perform public functions when it exercises its powers in terms of its constitution.

[44] Sascoc's membership is comprised of national sport federations, provincial sport confederations, elected ex-officio members such as the International Olympic Committee, the International Paralympics Committee, etc. It also has a number of associated members representing various other sporting bodies. In terms of its membership regulations Sascoc is the pre-eminent organization designated "*to take national responsibility for the development of the particular code of Sport and Recreation in South Africa*". It acts as the controlling body for the preparation and delivery of Team South Africa at the Olympics, Paralympics, Commonwealth Games, World Games and All Africa Games. Its members must obtain consent from Sascoc if they wish to participate in international sporting events, and they must report to Sascoc on developments within the particular sport.

[45] In terms of its constitution Sascoc has the authority to implement the National Sports Colours Regulations, 2001. In terms of clause 4.2 of

its constitution, Sascoc's main business is to promote and develop a strategic framework for High Performance Sport as defined in the Sport Act, and to act as the controlling body for sport in the Republic. One of its ancillary objects is to act as the recognized national sports entity for the Republic. It has the exclusive authority to select a city that may apply to host the Olympic or Commonwealth Games. It also has to ensure close cooperation between government and the private sector.

[46] Does it, however, as a private body, exercise public power or perform a public function? I shall attempt to provide hereunder a summary of the various authorities that deal with this question.

[47] In pre-constitutional times, in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange*¹¹ the Court held that the decisions of the JSE were reviewable on the basis that the JSE had a statutory obligation arising from the legislation in terms of which it had been established¹² to be licensed, and to ensure that its rules safeguarded and furthered the public interest. It found that the functions of the JSE affected the public in general, and that it was not merely a private body exercising private functions.

[48] In *Cronje v United Cricket Board of SA*¹³, (before the advent of PAJA), the question was whether the passing of a resolution by the Cricket Board banning the applicant from all involvement in cricket was reviewable. The Court considered itself bound by *South African Roads Board v Johannesburg City Council*¹⁴ in which it was held that rules of natural justice only come into play when a statute empowers a public official or body to do an act or give a decision prejudicially affecting a person's rights. The Court in *Cronje* held that the Cricket Board was not a public body, but rather a voluntary association unconnected to the State. Its powers derived from contract, it was privately funded and it had

¹¹ 1983 (3) SA 344 (W)

¹² The Stock Exchanges Control Act, 7 of 1947

¹³ 2001 (4) SA 1361 (T)

¹⁴ 1991 (4) SA 1 (AD); [1991] 4 ALL SA 722 (AD)

no statutory recognition nor was it required to act in the public interest. For those reasons its decisions were held not to be reviewable.

[49] In *Coetzee v Comitis*¹⁵ the Court considered a contractual term imposed on a soccer player by the governing body that was akin to a restraint of trade. The judgment was handed down seven days after the commencement of PAJA and was decided on general public policy grounds and on the Constitutional right to freedom of movement and dignity. It is not, in my view, authority in respect of the exercise of public power or public functions by a private entity.

[50] In *TIRFU Raiders Rugby Club v South African Rugby Union and Others*¹⁶ the Court was called upon to determine whether a decision of the South African Rugby Union on which clubs would participate in play-off games constituted the exercise of public power or the performance of a public function for purposes of a PAJA review. The Court considered the provisions of PAJA to be applicable to the case at hand based on “significant public interest” in the affairs of the rugby organisations. It said so after having had regard to the dictum in *Marais v Democratic Alliance*¹⁷ which reiterated that the mere public interest in a decision did not make it an exercise of public power or performance of a public function. The Court (per Yekiso J) said:

“The exercise of such power and the performance of such function [by the management committee of the Rugby Union] did not relate to the internal affairs of the First Respondent but was directed to the external, independent and autonomous bodies such as the Second, Third and Fourth Respondents. In my view the conduct of the First Respondent complained of is sufficiently public in nature to warrant the application of the provisions of the Promotion of Administrative Justice Act.”¹⁸

¹⁵ 2001 (1) SA 1254 (C)

¹⁶ [2006] 2 ALL SA 549 (C)

¹⁷ 2002 (2) BCLR 171 (C)

¹⁸ At para 29 *TIRFU* places much emphasis on the public interest, an approach that was doubted in *Calibre (infra)* at para 36

[51] The approach taken in *TIRFU* was questioned in *Calibre (infra)*.¹⁹ I believe that in *TIRFU* too much emphasis was placed in *TIRFU* on the public interest, and that something more than public interest is required for the conduct to be the exercise of public power or the performance of a public function.

[52] In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*²⁰ the Constitutional Court (per Yacoob J) considered whether the Constitution applied to the rules of the first respondent (“the Micro Finance Council”), a regulator of the micro-lending industry and if so, whether the rules were consistent with the Constitution. The central question was whether the Micro Finance Council exercised public power when it made rules regulating micro-lenders.

[53] Yacoob J examined English, Canadian and United States law on the issue of judicial review. In the *Panel on Takeovers and Mergers* case²¹ in England the Court held that the Panel was subject to judicial review because it performed an important public duty, its decisions affected the general public, it acted judicially in some respects, and its power arose from certain statutory powers exercised by a government department.

[54] In *Anston Cantlow*²² the English approach was described as follows:²³

“What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application....Factors to be taken into account include the extent to which in carrying out the relative function the body is publicly funded, or is

¹⁹ At para 36

²⁰ 2007 (1) SA 343 (CC)

²¹ *R v Panel on Takeovers and Mergers, ex parte Datafin and Another* (Nortoin Opax PLC intervening) [1987] 1 ALL ER 564 (CA)

²² *Anston Cantlow and Wilmcote with Billesley Parochial Church v Wallbank* [2003] UKHL 37; [2004] 1 AC 546

²³ At para 12

exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.”

[55] In the United States it has been held²⁴ that a private corporation was bound by the First Amendment to the Constitution on the basis that it (Amtrak) had been established and organized under federal law for the purpose of pursuing federal government objectives, and it operated under government control.

[56] In Canada conduct has been considered to be subject to judicial review where non-governmental entities engaged in conduct that is ‘governmental’ in nature²⁵, or where there the body in question had been established in terms of a statute, or where there was a degree of government control. In both Canada and the United States, the proximity of the conduct to governmental functioning was the deciding factor in whether the conduct was reviewable.

[57] Yacoob J distinguished the Canadian and United States’ emphasis on whether the conduct was governmental in nature from the South African approach as follows²⁶:

“Our Constitution does not do this, however, by an expanded notion of the concept of government or the executive or by relying on concepts of agency or instrumentality. It does so by a relatively broad definition of an organ of state. This definition renders the legality principle and the Bill of Rights applicable to a wider category of functions than the Charter does in Canada. An organ of state is, amongst other things, an entity that performs a public function in terms of national legislation. If the Council performs its functions in terms of national legislation, and these functions are public in character, it is subject to the legality principle and the private protection. In our constitutional structure, the Council or any

²⁴ *Lebron v National Railroad Passenger Corporation* [1995] USSC 11; 513 US 374 (1995)

²⁵ *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624

²⁶ At para 41

other entity does not have to be part of government or the government itself to be bound by the Constitution as a whole.”

[58] The Court held that the functions of the Micro Finance Council were public in nature for the following reasons: Firstly, the Minister exercised a measure of control over the Council, its composition and tasks, and the criteria for registration of its members, and, secondly the Minister prescribed minimal rules that the Council had to enforce. Thirdly, the Council was obliged to perform its functions in terms of a ministerial Exemption Notice.

[59] In *Mittalsteel South Africa (Ltd) (formerly Iscor Ltd) v Hlatswayo*²⁷ the Court considered the meaning of a ‘public body’ in the Promotion of Access to Information Act, 2 of 2000 (which is similar to the definition of an organ of state in section 239), and reached a conclusion that Mittalsteel (formerly Iscor) was a ‘public body’, based on the extent by which the body was under the control of the state or performed a traditional governmental function.

[60] In *The National Horse Racing Authority of Southern Africa v Naidoo and Another*²⁸ a decision to ‘warn off’ a horse trainer by a Board of Enquiry established by the National Horseracing Authority was under review as administrative action under PAJA. The Court held that the question was whether the sporting body was exercising a public power or performing a public function, and that the answer to the question lay in a consideration of the functions of the body. The government, the Court held, had a substantial interest in the regulation and administration of sport, and in cases where the body exercised a near monopolistic control over the sport on all levels, and where public interest in the sport was massive and the amounts of money generated by the body was substantial, there was no reason to find that PAJA was excluded from application to sporting bodies such as the Horse Racing Authority.

²⁷ 2007 (1) SA 66 (SCA); [2007] 1 ALL SA 1

²⁸ 2010 (3) SA 182 (N)

[61] In *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another*²⁹ the Court considered whether the decision of a Bargaining Council not to appoint the appellant as a service provider was subject to review. The Court made the point that a body cannot be considered to exercise a public power simply because the public had an interest in the manner in which the powers were exercised. Nugent JA emphasized the fact that abroad and in South Africa:

“...courts have consistently looked to the presence or absence of features of the conduct concerned that is governmental in nature. What has been considered to be relevant is the extent to which the functions concerned are ‘woven into a system of governmental control’ or ‘integrated into a system of statutory regulation’, or the government ‘regulates, supervises and inspects the performance of the function’ or it is ‘a task for which the public, in the shape of the state, have assumed responsibility’, or it is ‘linked to the functions and powers of government’ or it constitutes ‘a privatization of the business of government itself’ or it is publicly funded, or there is ‘potentially a government interest in the decision-making power in question’ or the body concerned is ‘taking the place of central government or local authorities’...”³⁰

[62] Nugent JA held that although there is no single test of universal application to determine whether conduct of a private body is judicially reviewable, it is useful to enquire whether the conduct is governmental in nature and whether it entails public accountability because *“it seems to me that accountability to the public is what judicial review has always been about.”*³¹

²⁹ 2010 (5) SA 457 (SCA); [2010] 4 ALL SA 561 (SCA)

³⁰ At para 38

³¹ At para 40

[63] In *Nyoka v Cricket South Africa*³² the president of Cricket South Africa was removed from office, and whereas it was conceded that in terms of the principles of natural justice he had had the right to be heard before his removal was considered, the only question for determination (on the merits) was whether his right to be heard had been violated. I also do not consider this case to be authority regarding the application of PAJA to a private body.

[64] In *Ndoro and Another v South African Football Association and Others*³³ the Court was concerned with the question whether the decision of an arbitrator appointed in terms of the SAFA statutes and the National Soccer League's constitution was reviewable.

[65] Having considered *Cronje*, *Coetzee*, *National Horseracing*, *TIRFU*, *Nyoka* and *Calibre*, the Court (per Unterhalter J, as he then was) parsed the following principles from the cases:

[65.1] Private entities may discharge public functions by recourse to powers that do not have a statutory source. Such powers may constitute public powers.

[65.2] A private entity may exercise public power, but not all of its conduct is necessarily the exercise of public power or the performance of a public function. Whether it is depends on the nature of the power or function.

[65.3] While there are broad criteria for evaluating whether a competence of a private entity is a public power or public function, the simple fact that an entity is powerful and may do things of interest to the public does not result in the conclusion that the entity discharges a public power or public function.

[66] The test, according to *Ndoro*, is the following:

³² [2011] ZAGPHC 32 (15 April 2011)

³³ 2018 (5) SA 630 (GJ); [2018] 3 ALL SA 277 (GJ)

"It is the "assumption of exclusive, compulsory, coercive regulatory competence to secure public goods that reach beyond mere private advancement that attracts the supervisory disciplines of public law."³⁴

[67] I was urged to find that *Ndoro* was incorrectly decided, in that it seems on the face of it to deviate from the principles laid down in *AAA Investments (supra)* and *Calibre (supra)*, which have both "*sought out features that are governmental in kind when interrogating whether conduct is subject to public law review*"³⁵. I do not believe that to be the case. *Ndoro* makes it clear that public power is exercised and public functions performed when a body assumes the competence "to secure public goods that reach beyond mere private advancement." (my emphasis). That is the same as saying, as did Nugent JA in *Calibre*:

"Powers or functions that are 'public' in nature, in the ordinary meaning of the word, contemplates that they pertain 'to the people as a whole' or that they are exercised or performed 'on behalf of the community as a whole'- (or at least to a group or class of the public as a whole-), which is pre-eminently the terrain of government".³⁶

[68] In *Ndoro* the Court took into account that the regulatory scheme of the Football Association was exclusive, comprehensive, compulsory and coercive and that there was no other way to play professional football other than in terms of the SAFA rules. Compliance was not optional and the rules were backed by coercive sanctions. Finally, soccer was of enormous importance to large sections of the public, so that the flourishing of the game was bound up with the well-being of the nation. For these reasons the Court held that SAFA was acting in the public good,

³⁴ At para 23

³⁵ At para 39

³⁶ At para 39

and not merely in furthering private interests, and that the decision of the arbitrator was 'administrative action' as defined in PAJA.

[69] However, whether *Ndoro* did or did not extend the understanding of what constitutes public power, in my view Sascoc is clearly fulfilling a governmental function. It cooperates with the Department in promoting and regulating sport within the republic. There is no path to participation internationally other than through Sascoc, nor is there a path to national colours, save on its recommendation. On Sascoc's own version, when a dispute arose between the two Chess SA factions, Chess SA was entitled to submit the dispute to Sascoc in terms of subsection 13 (2) of the Sport Act, at which point Sascoc was obliged to act in accordance with the provisions of subsection 13 (3). Sascoc promotes sport throughout the country, and it does so in conjunction with, and under the guidance of the Minister and of the Department.

[70] I therefore find that Sascoc is also a juristic person that exercises a public power and performs a public function in terms of an empowering provision (its constitution). Its conduct is subject to review under PAJA.

[71] Should the decisions to suspend Chess SA, initially by the Board pending confirmation of the general meeting, and the subsequent permanent suspension at the general meeting be reviewed and set aside? Sascoc has argued that the decision by the Board has been overtaken by Chess SA's final suspension by the general meeting, and that Chess SA cannot obtain relief in respect thereof. In my view that argument misses the point. It is so that setting aside the Board decision would not have the effect of reinstating Chess SA. As Sascoc says, it is a *fait accompli*. However, the Board's decision may still be declared to have been taken unlawfully, if it is so.

[72] Having held that Sascoc's decisions are reviewable under PAJA, I now turn to consider whether the decisions to suspend Chess SA, provisionally and then finally, should be reviewed and set aside. The

following is a summary of the events leading up to the taking of the decisions:

[72.1] Sascoc's intervention in Chess SA seems to have been commenced in earnest at the meeting held between Sascoc and the Du Toit faction on 21 September 2022. Mr. Du Toit says that at that meeting he advised Sascoc of the enormous difficulties faced by Chess SA to get its house in order. That may or may not be the case, but nonetheless, on 22 September 2022 Sascoc requested a number of good-governance documents from Chess SA.

[72.2] Chess SA only replied to the request on 23 January 2023, essentially saying that it did not understand some of the Sascoc requirements, and that it could not comply with other requests due to non-cooperation by members of the rival faction. Chess SA requested a meeting with Sascoc to discuss how Sascoc could assist it in achieving the necessary good-governance requirements. Sascoc's response was simply to note receipt of the email.

[72.3] On 27 January 2023 Sascoc invited Chess SA to a portfolio committee meeting to be held on 24 March 2023. Chess SA was requested to submit a presentation for the committee's attention. There was then an attempt to reschedule the meeting that, due to scheduling issues, never materialized.

[72.4] On 14 March 2023 Chess SA received a letter from Sascoc informing it that Chess SA had been provisionally suspended as a member of Sascoc by the Sascoc board. Chess SA was advised that the next general meeting would be held on 22 April 2024 where its suspension would be discussed. Two reasons were given for the suspension, firstly, that Chess SA had undertaken to provide the documents required by Sascoc, but had failed to do

so, and, secondly, that there had been a six-year impasse in the factional fighting within Chess SA which had brought Chess SA into disrepute.

[72.5] Mr. Du Toit wrote to Sascoc on 16 March 2023, setting out the history of the case, and demanding certain documents relating to the Board's decision, and also requesting a copy of the Sascoc constitution. No response was received from Sascoc. A further letter by Chess SA's attorneys on 30 March 2023 elicited no response from Sascoc.

[72.6] On 6 April 2023 Sascoc gave notice to its members of the upcoming general meeting to be held on 22 April 2023. Chess SA did not receive the notice, and no mention was made therein of the proposed ratification of the suspension of Chess SA.

[72.7] Only on 17 April 2023 did Sascoc acknowledge receipt of Chess SA's letters. In its reply Sascoc invited Chess SA to attend the general meeting. It was told that Chess SA would be allowed to 'present' to the general meeting. No reasons were given for the proposed ratification of the suspension.

[72.8] On 19 April 2023 Sascoc disseminated a report written by Ms. Patience Shikwambana, the deponent to Sascoc's answer, in which she provided a five-page summary of the state of affairs within Chess SA, and of the events of the previous 6 years. The report had apparently also served as the basis for Chess SA's provisional suspension by the Board. The report did not specify what the specific basis was for Chess SA's suspension, save to state that Sascoc had concerns in relation to the Chess SA elections process "*and possible litigations on verification system on good standing for each member*", whatever that may have meant. The report noted that both Sascoc and the Department were of the view that Chess SA did not "*meet requirements to be*

in good standing with Sascoc based on their presentation and failure to prove that all its affiliates understand the election processes including the verification on good standing process."

There was no attempt made to explain to the reader exactly what 'requirements' were not met. The report did not explain that different courts had in the past held the Mahomole faction's attempts to take over Chess SA to have been unlawful. It also did not explain Chess SA's difficulties in administering the sport in the face of a takeover attempt by the Mahomole faction. Sascoc was quite disparaging of Chess SA's decision to institute legal action against the Mahomole faction.

[72.9] Chess SA was given a hearing at the general meeting held on 22 April 2023. Ms. Shikwambana presented the case for Chess SA's suspension. She provided two reasons for the suspension: Firstly, that Chess SA had not complied with Sascoc's membership requirements, specifically, that it had not submitted its annual documents and that its affiliates were not in good standing. Secondly, that the leadership issue within Chess SA had brought the sport into disrepute, by bringing court cases without exhausting internal processes, and undermining Sascoc interventions.

[72.10] Mr. Du Toit was given an opportunity to respond. However, it is clear that he was placed under a severe time constraints in that he was given only 20 minutes to present his case. Some six pages into the transcription of his presentation he was told that he only had five minutes left to make his case, and ultimately, he was made to stop.³⁷

[72.11] Du Toit's presentation largely amounted to a plea to Sascoc to assist in reviving the organization. His plea fell on deaf

³⁷ Page 013-30 of the record

ears because, after a brief discussion, the general meeting resolved to permanently suspend Chess SA.

[72.12] On 28 March 2023 Sascoc recorded its decision in writing, advising Chess SA formally of its suspension. It provided the following reasons:

[72.12.1] That Chess SA had not complied with Sascoc membership requirements of having no less than five affiliates within 5 provinces;

[72.12.2] That Chess SA had not held free and fair elections since 2018;

[72.12.3] That Chess SA had not submitted governance documents such as a constitution, an agenda and minutes of annual general meetings, and financial reports;

[72.12.4] That Chess SA had not convened annual general meetings;

[72.12.5] Chess SA had failed to submit audited financial statements since 2017, and had not submitted a safeguarding policy;

[72.12.6] Chess SA had failed to act in its own best interests, had since 2019 disregarded and undermined Sascoc and the International Chess Federation, and had failed to resolve a long-standing leadership dispute.

[73] Clause 22 of Sascoc's constitution provides for the suspension of members. It says that the general assembly may suspend a member at a general meeting. In terms of clause 22.2 the Sascoc Board may provisionally suspend a member in two circumstances, firstly, if a member violates its obligations as a member, or secondly, if the member no longer

meets the requirements to be in good standing. The Board must do two things before it suspends a member. Firstly, it must consult the relevant international body, and secondly, the Board must grant the member the opportunity to make representations at a hearing before a suspension is confirmed.

[74] Mr. Seleka SC, acting for Sascoc, argued that the member's opportunity to put its case comes at the general meeting that considers the provisional suspension. That cannot be correct. Clause 22.2 relates to suspension of a member by the Board, not by the general meeting. Secondly, it requires the Board to provide a hearing, which would be superfluous if the member were already suspended.

[75] Section 3 of PAJA requires an administrative action to be taken in a procedurally fair manner³⁸, which includes that a person whose rights are materially and adversely affected by a decision must be given adequate notice of the nature and purpose of the proposed administrative action³⁹, a reasonable opportunity to make representations,⁴⁰ a clear statement of the administrative action,⁴¹ and the person must be given an opportunity to put its case before a decision is taken⁴².

[76] None of these requirements were met by the Board. Its decision to provisionally suspend Chess SA was therefore procedurally unfair.

[77] Notice of the general meeting was given to members of Sascoc on 6 April 2023, short of the thirty days' notice period provided for in the Sascoc constitution. Chess SA received only five days' notice of the meeting. It only received the Shikwambana report three days before the meeting. That was not, in my view, adequate notice for it to prepare its case. Also, the Shikwambana report did not provide a clear statement of

³⁸ Subsection 3 (1)

³⁹ Subsection 3 (2) (b) (i)

⁴⁰ Subsection 3 (2) (b) (ii)

⁴¹ Subsection 3 (2) (b) (iii)

⁴² Subsection 3 (3)

the complaint against Chess SA, and it had to try to distill from the report what case it had to meet. Moreover, in my view Chess SA was not given adequate time to put its case. I find that the proceedings relating to the general meeting were also procedurally unfair.

[78] Chess SA argued that Sascoc was not authorized by its constitution to suspend a member, due to Chess SA's suspicions regarding the validity of the November 2022 constitution⁴³. I have already said that I accept that the latter constitution was properly adopted. It authorizes Sascoc to suspend members in appropriate circumstances, and no more has to be said on this subject.

[79] Chess SA also says that the decision to suspend it was tainted by bias, or that Chess SA held a reasonable belief that Sascoc was biased.⁴⁴ Although I can say that Sascoc's approach to the matter was unfortunate, in that it refused, apparently on legal advice, to become embroiled in the dispute between the Du Toit and Mahomole factions, I cannot say that its decision was the result of bias, or even that Chess SA's belief of bias is reasonable. One could perhaps have hoped that Sascoc would accept the Full Court findings, and have become involved in active dispute resolution, as the Sport Act empowers it to do. The apparent absence of leadership by Sascoc does not, however, translate into a conclusion that it was biased. The same applies to the argument that the decision was taken in bad faith⁴⁵, for an ulterior motive, or that the decision was taken because of the dictates of another person or body⁴⁶.

[80] Chess SA submitted that Sascoc had considered irrelevant facts in coming to the decision, and had not considered relevant aspects. It argued that the results of the litigation should have been considered, as well as the interference in Chess SA affairs by the Mahomole faction. For

⁴³ Subsection 6 (2) (a) (i) of PAJA

⁴⁴ Subsection 6 (2) (a) (iii)

⁴⁵ Subsection 6 (2) (e) (v)

⁴⁶ Subsection 6 (2) (e) (iv)

that reason, it says, the decision by the general meeting should be reviewed under subsection 6 (2) (e) (iii).

[81] There is some substance to this argument. The Shikwambana report, upon which both the Board and the general meeting made its decisions did not, in my view, convey the entire context of the predicament in which Chess SA found itself. The election of Exbo office bearers on 1 July 2018, including the election of Mr. Mahomole, had been set aside, and the Court directed that a Special General Meeting should be held again. The elected Exbo members, evidently from the Mahomole faction, were not thereafter entitled to act as Exbo members.

[82] The Full Court handed down judgment on 16 February 2022 in which it upheld the appeal against the rescission order of Yacoob J. The result of the Full Court upholding the appeal was that the order of Siwendu J revived, with the consequence that an AGM held on 8 December 2018, at which the Du Toit faction prevailed, was held to be valid. That information was never provided to the general meeting, and Sascoc seems to have paid no heed to the findings against the Mahomole faction.

[83] The difficulties that Chess SA faced in obtaining possession of its financial documents and bank documents, that prevented it from preparing annual statements, was also only referred to in passing. It may well be that if that information had been conveyed to the general meeting properly, there may have been a different outcome. However, given my findings below I do not have to come to a conclusion on this issue.

DID THE EXBO OF CHESS SA HAVE AUTHORITY TO LAUNCH THIS APPLICATION?

[84] Although I believed it to be proper to consider all of the above issues, this final topic is, in my view, dispositive of the application.

[85] Chess SA says that on 27 April 2023 the Exbo met and adopted a resolution to institute this application. Its contention was supported by a document titled "*Minutes of the Executive Board of the Voluntary Association Chess SA held on 27 April 2023*" that purported to be a resolution taken by the Exbo. The document recorded that it had been resolved that Chess SA would institute litigation against Sascoc, and that Mr. Du Toit was authorized to do all things necessary to institute the proceedings.

[86] Sascoc asked Chess SA to provide the actual minutes of the meeting. These were never forthcoming. The resolution itself cannot be the minutes of the meeting as Chess SA alleges. Sascoc also denies that a proper executive meeting could have been held, in light of the fact that nine of Chess SA's provincial members had at that time been suspended. It says that the decision to institute the litigation is a nullity.

[87] The Chess SA constitution records that its ordinary members are the various provincial chess associations. It also has a special member known as the Player's Commission that is comprised of individual chess players. Associate members are those chess associations that have applied to be recognized as associate members and have at least 250 individual members of their own.

[88] Chess SA is governed, firstly by a National Council that meets bi-annually. An Ordinary General Meeting must be held every year but not later than July of each year. The Annual General Meeting is to be held not earlier than October. An Annual General Meeting must be held each year. Curiously, the list of business to be transacted at an Annual General Meeting in terms of clause 20.4 of the constitution does not include the election of an Exbo, although it seems unlikely that a new Exbo is not elected each year. Clause 22.5 of the constitution does, however, refer to an "elective A.G.M." where a new Exbo is elected.

[89] The National Council has full power to manage and direct the business affairs of Chess SA, and may exercise all powers possessed by Chess SA, and may *"do all such acts on behalf of Chess SA, as may be exercised and done by Chess SA itself."*

[90] Secondly, Chess SA's day-to day affairs are conducted by the Exbo that consists of the president, two vice-presidents, a treasurer, a general secretary, three provincial representatives, a representative of the Special Member, a person responsible for public relations and marketing, the head of schools chess, and the Head Coach. In terms of clause 24.1 each member of Exbo has one vote, which it must exercise by a show of hands. Decisions are taken by majority vote, and in the case of a tie, the chairperson has a casting vote. A quorum consists of seven members of Exbo, including a minimum of two provincial members being present.

[91] The Exbo functions are:

[91.1] To oversee Chess SA's administrative functions and to deal with any matters referred to it by the National Council.

[91.2] To decide on administrative structures and procedures;

[91.3] To control and oversee the work of the management committee, commissions and technical committees.

[92] On 22 April 2023 Mr. Du Toit told the general meeting that the decision of the Full Court handed him the "keys" to Chess SA, seeming to imply that he was then placed in charge of the organization. Nothing is further from the truth. The only effect of the Full Court order was that the elections of December 2018 were given legitimacy. That does not mean that the Du Toit faction had carte blanche then to continue to rule Chess SA by fiat. Chess SA was still obliged to hold annual general meetings to elect a new Exbo. This it did not do.

[93] It seems clear that no new Exbo was elected at the December 2022 annual general meeting. In my view, the Exbo that had been elected in 2018 had no authority to act on behalf of Chess SA in 2023.

[94] I also have grave doubts, although this issue was not canvassed in argument, whether the Exbo, even if properly elected, would have had the authority in terms of the constitution to launch litigation. That authority seems to me to be vested in the National Council.

[95] However, be that as it may, I also have grave doubts whether the Exbo was properly constituted, and whether a proper vote was taken on 27 April 2023.

[96] Although Chess SA did not put up minutes of the meeting of 27 April 2023, it provided a version of the events leading to the adoption of the alleged resolution. It says that when the resolution was adopted, the Exbo consisted of Mr. Du Toit as president, a vice president, one provincial representative, one Players' Commission representative, the Head of Schools, the Head Coach and a public relations person. These persons had one vote each. In addition, the Exbo consisted of a schools' representative, secretary, two provincial representatives, treasurer and provincial, all of whom had been co-opted onto Exbo, and none of whom had voting powers. From the above it is clear that the Exbo was not properly constituted.

[97] At the meeting on 27 April 2023 the following persons with voting rights were present:

[97.1] Mr. Du Toit (president);

[97.2] Ms. J Steenkamp (vice-president);

[97.3] Mr. M Lekgau (Players' Commission representative);

[97.4] Mr. J Mabusela (Head coach);

[97.5] Ms. J Soojay (Public relations).

[98] In addition to the above voting members, the following non-voting members were present:

[98.1] Mr. T Nene (schools' representative);

[98.2] Ms. P Mahamba (provincial representative);

[98.3] Ms. A Vermaak (treasurer);

[98.4] Mr. J Wilken (provincial representative).

[99] Mr. Du Toit says in his affidavit that it was decided to put the resolution to a vote onto a Whatsapp group. He says one voting member abstained from the vote. That left four votes for members present at the meeting. Three members voted against the resolution. One person, Ms. L Koekemoer, was absent from the meeting and voted in favour of the resolution by Whatsapp. That, Mr. Du Toit says, means that there was a three-votes in favour, three votes opposed tie, which he broke by exercising his casting vote. That cannot be. Leaving aside the question whether it was permissible for Ms. Koekemoer to vote on Whatsapp when she was not present at the meeting, given the constitutional requirement that voting is to be by a show of hands, the mathematics do not add up. If there were six votes available, five at the meeting and one by Mrs. Koekemoer, and one member abstained, there could not have been a tie. The votes must have been three votes opposed to the resolution and two in favour.

[100] In my view Sascoc correctly challenged the authority of Mr. Du Toit to institute these proceedings on behalf of Chess SA. I find, therefore, that these proceedings were not properly authorized.

COSTS

[101] Sascoc seeks costs against Chess SA, and has also argued that costs should be granted against Mr. Du Toit *de bonis propriis*. The issue of costs is one to be considered judicially, and bearing in mind the approach in *Ferreira NO v Levin & Others; Vryenhoek & Others v Powell NO and Others*⁴⁷:

“...without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings.”

[102] In *Biowatch Trust v Registrar Genetic Resources and Others*⁴⁸ the Constitutional Court restated the general rule, that in constitutional litigation an unsuccessful litigant ought not to pay costs.⁴⁹

[103] In my view there were clear Constitutional issues at stake in this case, namely Chess SA's right to fair administrative action by an organ of state. In such circumstances, Chess SA ought not to be made to pay costs.

[104] In any event, Chess SA has shown that Sascoc's decisions were procedurally unfair, firstly in suspending it first provisionally, and later, finally. In this regard Chess SA has achieved a measure of success, albeit that it was unsuccessful due to a technical challenge. It would, in my view, be appropriate to make no order as to costs in respect of the main application. That includes the costs of Part A.

⁴⁷ 1996 (2) SA 621 (CC) at para 3; [1996] ZACC 27

⁴⁸ [2009] ZACC 14; 2009 (6) SA 232 (CC)

⁴⁹ The Constitutional Court restated the rule applied in *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC)

[105] Sascoc brought an unsuccessful substantive application for the striking out of evidence that I intend to dismiss. That application was voluminous and took some time to consider. In respect thereof, Sascoc ought to bear the costs.

[106] Consequently, I make the following order:

[106.1] The application is dismissed.

[106.2] The first respondent's striking-out application is dismissed.

[106.3] The first respondent shall bear the costs of the striking-out application.

[106.4] Save for the costs order in paragraph 106.3 above, there is not order as to costs.


**SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA**

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