REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2024-060318

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

………………………………… ...07/06/2024......
SIGNATURE **DATE**

In the matter between:

UPINGTON CITY FOOTBALL CLUB	**Applicant**
and	
MILFORD FC	**FIRST RESPONDENT**
NATIONAL SOCCER LEAGUE	**SECOND RESPONDENT**
ARBITRATOR ADVOCATE NYMAN	**THIRD RESPONDENT**
BAROKA FC	**FOURTH RESPONDENT**
SOUTH AFRICAN FOOTBALL ASSOCIATION	**FIFTH RESPONDENT**
RICHARDS BAY FC	**SIXTH RESPONDENT**
UNIVERSITY OF PRETORIA FC	**SEVENTH RESPONDENT**

REASONS

MANOIM J:

Introduction

[1] This is an urgent application in which the applicant Upington City Football Club ("Upington") seeks an interim interdict to prevent the second respondent, the National Soccer League ("NSL") from holding promotion and relegation playoffs pending the outcome of a review application. This is set out as Part A of the relief. In terms of Part B, Upington seeks to have its dispute with another club Milford FC, ("Milford") the first respondent, referred to an arbitration panel of the NSL. Only Part A was urgent and was the one I was required to decide.

[2] I heard the matter on Saturday 1 June 2024, a day before the first of the matches which Upington sought to interdict, was to be played. Given the urgency of the situation and that the fate of four teams as well as the NSL and many other parties depended on the outcome, I gave my order on the 1 June 2024 and indicated that my reasons would follow. I dismissed the application with costs. In these reasons I explain why.

[3] As will be noted amongst the seven respondents in this matter are three other soccer teams. All have an interest in the outcome of the application. Upington and two of the other teams all compete in what is known as the Motsepe Foundation League. In the football hierarchy this league is the second division. At the end of the season two of these teams which have finished second and third respectively in the Motsepe Foundation League qualify for the playoffs to be promoted to the first division, the Dstv Premiership League. The third team in the playoffs is Richards Bay. It finished in the second last place in the Dstv Premiership and hence still qualifies to contest the playoffs against the second and third finishers from the lower Motsepe Foundation League. The three teams

play each other twice and the successful team qualifies to go, or remain as the case may be, to the Dstv Premier League. At stake for those seeking promotion is not only prestige but also a more lucrative future for the successful team.

[4] Upington is not in the playoff. Instead Baroka FC ("Baroka"), the fourth respondent, and Richards Bay the sixth respondent, and University of Pretoria the seventh respondent, are. There is no dispute over the eligibility of the latter two teams. The case would merely serve to identify their third opponent. However, the implications for Baroka are different. If Upington succeeds it will displace Baroka as the third side in the qualifying rounds.

Background

[5] The reason for this goes back to a match that Upington played against Milford FC on 6 April 2024. The outcome of that match was that Milford won 3-0. But Upington contends that Milford had for some period of the game played without having two under 23 players on the pitch. If Upington was correct this meant that the NSL had to sanction Milford by deducting its three points and three goals for winning the match and awarding the three points and the three goals to Upington. If this happened then according to the arithmetic of the league table, Upington would rank high enough in the league table to displace Baroka and become instead the third team in the qualifying round. Although Milford is cited as a respondent it is not otherwise effected by whether it must forfeit the points as it has not qualified for the playoffs even if it can retain the three points. This may explain why it is Baroka, not Milford, which along with the NSL has opposed the application.

[6] Of course, there is no guarantee for Upington that if it wins in the court room and subsequent arbitration that promotion would follow. They would have to succeed in the playoffs. This case then might seem about the right of Upington to participate in the playoffs. But as I go on to explain in terms of the relief sought in Part B it is not even that. It amounts to a right to have a new arbitration which might consider new evidence and only then which might be sufficient to lead to Upington being awarded the points and the goals.

[7] On 6 April 2024 Upington played a league game against Milford. In terms of Rule 35.2 of the NSL handbook, each team must at all times field a minimum of two players who are under 23. A failure to do so can result in a sanction against the defaulting team. This in terms of Rule 51.2 which states:

> *"…ineligibility if a player takes part in a match (he is on the team sheet, the field of play or on the substitute bench at any time) despite being ineligible the member club which fielded will be sanctioned with a forfeit of the match and minimum fine of R100,000,00. The player may also sanctioned."*

[8] On the day in question in the 65th minute of the game, Milford decided to substitute three, or possibly four of its players. According to the report of the match Commissioner, two under 23 players were substituted leaving only one under 23 player remaining on the field. The match Commissioner stated that the match continued for about 4 minutes whilst Upington protested. According to him there was an engagement with the fourth official and only four minutes later, in the 69th minute, did Milford then introduce another substitute whose presence then brought Milford into compliance once again.

[9] The match Commissioner indicated that one of those under 23 players who was substituted in the 65th minute, was a player called Olwethu Cele wearing jersey number 22. Milford went on to win the match 3-0.

The protest

[10] Upington lodged a protest with the NSL, and it was referred to the NSL's Disciplinary Committee ("the DC"). Milford denied it had been in contravention of the rule. Upington relied on the report of the match Commissioner and another official. However, during the hearing, the DC found these officials reports unreliable. One's recollection was found to be faulty while another official sought to rely on notes that had got wet in the rain. At issue for the DC was whether Cele was substituted, or as Milford contended, had remained playing after the 65th minute.

[11] The DC wisely, instead of relying on recollections of officials, decided to call for the video of the match. Matches at this level of the game are broadcast on Dstv. The video showed that at the end of the game Cele was still on the field as a player. He was distinctive not only by his jersey number but also because he was bald and wore an armband. Upington sought to first challenge the authenticity of the video. This challenge failed. Then it sought to argue that the video only showed Cele congratulating the other players after a goal had been scored when he was seen in the company of the reserve goalkeeper. This was to suggest he had only run on the field to celebrate with his teammates and not as proof that he was still playing. This interpretation of the video was also rejected by the panel.

[12] Cele did not testify. It was suggested in argument by Mr Thobejane that his failure to testify should have resulted in an adverse inference. But Mr Majavu who appeared for the NSL pointed out that Cele had attended the hearing and there was no need to have called him as the DC was satisfied from the video that he had been playing until the end of the game. In short, the conclusion was that Milford was not in breach of rule 35.2. This meant the result stood.

[13] Unhappy with the outcome Upington sought to appeal. In the normal course the hierarchy of appeals in the NSL system is that the appeal against the DC's decision first goes to an appeal panel. Then there is a further appeal to an arbitrator who can hear additional evidence. On this occasion the CEO decided in terms of the rules to refer the matter straight to an arbitrator a power the CEO has in terms of the Rules. The parties agreed to have the matter heard by Advocate Nyman who is the third respondent.

[14] There is a dispute of fact as to whether Upington agreed to this expedited procedure. The NSL maintains it did while Upington contends otherwise. In any event the NSL argues that the rules permitted the CEO to do so even absent an agreement.

[15] When the matter came before the arbitrator the first issue, she had to decide was whether the matter should be approached as an appeal or start de novo as requested by Upington. She decided that she would only hear the matter as an appeal and that therefore she was confined the record that had served before the disciplinary committee.

[16] The powers of the arbitrator are determined by article 81 of the SAFA disciplinary code which states:

> *"Notwithstanding anything contained in these Rules, the powers of the arbitrator shall be wide and shall be determined by the arbitrator at his sole discretion."*

[17] Having made that determination despite the objections of Upington the next issue was to decide whether Baroka should be allowed to be a party to the appeal. The arbitrator allowed it to be a party. Baroka addressed legal argument but led no new evidence since like the other parties it was confined to the record of the DC.

[18] The arbitrator conducted the hearing and gave her award which was to uphold the decision of the DC. It is this decision that Upington seeks to review on Part B of its relief. Upington seeks to ground its review on the provisions of PAJA although in its founding affidavit it does not indicate which provisions of PAJA it seeks to rely on.

[19] In broad terms this is a review based on audi alterem partem. Upington contends that the arbitrator erred by not allowing it to lead new evidence that had not been presented to the DC. This new evidence it argued would establish its central premise that Milford had for four minutes played with only one under 23 on the field. However, the case now was not premised on Cele but on an entry on Milford's Facebook page, through which Upington seeks to establish that despite the presence of Cele, there was only one under 23 on the field for four minutes. This was not the argument made to the disciplinary committee which was premised on Cele. I quote from the disciplinary committee's record.

> *"The protest related to the contravention /violation of the provisions of Rule 35.2 of the NSL handbook by Milford FC in that it substituted two under 23 players (Cele Olwethu jersey 22 card number 6651 and Nzama Siyabonga jersey 25 card 7341) ......in the 65th minute with two over aged players(Somabhele Unathi jersey 7 card 7336 and Siyaya Skhumbuzo jersey 20 card 7337),.......,thereby remaining with only one under 23 player (Zikakayo Mvelo jersey 40 card 7551) in the field of play."*

[20] The arbitrator distilled the issue down to whether Cele was substituted or not. The arbitrator on this point upheld the decision of the DC finding no merit in the appeal. The arbitrator in her award also refers to the fact that Mr Thobejane had changed his position on appeal. She noted:

> *"In light of these written submissions, it was with surprise that in his Heads of Argument and during his oral submissions, Mr Thobajane no longer placed reliance on the aforementioned grounds of appeal. Instead, he introduced an entirely new ground of appeal. In a nutshell, Mr Thobajane conceded that Mr Cele remained on the field for the duration of the match but he raised a new submission from the bar, unsupported by the evidence. He also failed to share the new submissions with the legal representative of the First to Third Respondents, even though he was requested to do so.*
> *In consequence, the new submissions are not considered herein and stand to be rejected."*

[21] Although before me Mr Thobejane argues that this decision consists of multiple review grounds it amounts to two grounds of review. That the arbitrator should have considered the case *de novo* and that if she had she would have had to consider the evidence of the new submissions he sought to put forward.

Analysis

[22] I now with this background turn to whether Upington has made out a case for an interim interdict that:

> *"The 2nd respondent, the National Soccer League, is interdicted from proceeding with the promotion/relegation playoffs fixtured to commence on the 02nd June 2024, pending the outcome of the review application brought by the applicant in Part B of the notice of motion."*

[23] There is no dispute that the decision of the arbitrator is subject to the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") because it meets the definition of administrative action in terms of section 1(b) of PAJA, namely the exercise

by a juristic person, other than an organ of state, of a public power or the discharge of a public function.

[24] Indeed, as Unterhalter J observed in *Ndoro v SAFA* [1] there are circumstances where private entities (i.e. the NSL) may discharge public functions even if they do not emanate from a statutory source. In that case he found that "

> *"…. while there are broad criteria for making an evaluation as to whether a competence enjoyed by a private entity is a public power or public function, there is no warrant to conclude that, simply because a private entity is powerful and may do things that are of great interest to the public, it discharges a public power or function. Rather, 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."*[2]

[25] A decision by the NSL or one of its entities to determine whether a team qualifies for promotion playoffs or not falls into the latter category identified by Unterhalter J, and thus involves the exercise of a public power or public function hence constitutes administrative action and thus is reviewable under PAJA.

[26] That being said I now consider if a case has been made out for an interim interdict. It is trite law that for an interim interdict the applicant needs to establish:

a. *A prima facie right to the relief sought.*
b. *A well-grounded apprehension of irreparable harm if the*

[1] 2018 (5) SA 630 (GJ)
[2] Ibid, paragraph 23.

interim relief is not granted.

c. *The balance of convenience favours the granting of interim relief.*

d. *The applicant has no alternative remedy.*

[27] Both the NSL and Baroka challenge the application on grounds of urgency. They also argue that even if it is urgent Upington has not made out a prima facie case nor that the balance of convenience favours granting the relief.

[28] I consider that the case is urgent, and the urgency is not self-created as the decision of the arbitrator was only handed down on 31 May and the application was launched on the same day. Given that the match was to take place on 2 June there is not much else Upington could have done to act more expeditiously other than not to bring the case at all

[29] I now turn to whether it has made out a prima facie case. The right as I mentioned earlier is the right to interdict the match pending a new arbitration that is to be established in terms of Part B. It is thus a *prima facie* right to have an arbitration not a right to contest the playoffs. The latter is a possible but by no means probable outcome of the arbitration if its case, premised on the new evidence, prevails.

[30] But to prevail Upington would have to persuade the arbitrator that its new evidence, based it seems on what Milford has stated on its Facebook page about who it substituted at what time, is conclusive evidence that it had played for four minutes without two players under 23. It is by no means clear that this is the correct inference to be drawn from the Facebook entries.

[31] In any event it seems from the DC record that there was considerable confusion about the substitutions timing as the fourth official only had place on his board to signal three substitutions. But from the record Milford contends that it had wanted to at that same time substitute four players and hence be compliant with the two players under 23 age rule requirement. Before this additional substitution could be made it seems that an Upington player had of his own accord resumed the match and hence the fourth substitution which may have been the under 23 player had only been possible four minutes later.

[32] If this is correct and I am in no position to comment on this, it may well mean that this explanation will not invite any points loss sanction against Milford. Nor it is clear to me that a point loss sanction is mandatory in terms of the rules. The correct decision maker on this should have been the DC. Upington even with the benefit of the video did not raise this point at the DC hearing, as it was fixated on the presence or absence of Cele. It would have been manifestly unfair to have regard to this in later proceedings when it was not raised when it should have been. Unfairness here would not only be to Milford but also to Baroka whose presence in the playoffs would be at stake. This again weakens the claim of the prima facie right.

[33] Nor have I been convinced that the arbitrator exercised her discretion in any manner that is reviewable. She considered the arguments and made a rational and with respect fair decision. Upington had based its case on incorrect facts concerning Cele and coming to the end of the road on that before the DC, in the proceedings before the arbitrator had tried to put up an entirely new case. The arbitrator in my view correctly rejected this. Nor can the arbitrator be

criticized for allowing Baroka to present its arguments. Baroka was a party with a legal interest in the outcome of those proceedings because it potentially faced exclusion from the playoffs if Upington had prevailed. If this was an issue of joinder it was a party entitled to be joined. [3]

[34] Thus, the prima facie right contended for is not only of a tenuous nature - the right to have a new arbitration – but also based on slender facts. It is then a prima facie case which is open to much doubt, not merely some doubt.

[35] I turn then to the balance of convenience. The NSL makes a powerful argument about the inconvenience of cancelling the first playoff game which is to feature Baroka on the afternoon before the game. Since I find these arguments convincing, I quote them in full:

> "*While the Upington deal in a cursory fashion with the balance of convenience, focussing only on consequences to Upington, it is in truth impossible to now call off the Play-Off matches and in particular the first two matches…...*
>
> *In respect of these matches all manner of arrangements have already been made and in compliance with various internal and statutory prescripts, and most importantly, at tremendous cost. These include: -*
>
> *29.1 Risk categorization and safety arrangements under the Safety: and Recreational Events Act, 2010;*

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[3] "See *Timasani (Pty) Ltd & another v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SC A) paragraph 15, where the court held: "*The test is whether a party has a direct and substantial interest in the subject matter of the proceedings, i.e. a legal interest in the subject matter of the litigation which may be prejudicially affected by the judgment of the court.*

29.2.1 Match official arrangements;

29.2.2 Broadcast arrangements and in line contractual obligations the League owes to its broadcast sponsors with huge penalty provisions for non- compliance;

29.4 Ticketing arrangements — for supporters who will attend the match tomorrow;

29.5 Stadium and safety and security staff have been arranged to deal with matters as they arise;

29.6 The teams (University of Pretoria FC and Baroka FC) have been notified, made their arrangements and will attend the match and play).”

[36] The only balance of convenience argument advanced by Upington is that if the games are delayed there is no prejudice to the other teams as the playoffs can resume once the arbitration is concluded. This means that three other teams who have had nothing to do with the Milford game must wait for some indefinite date to find out when they may play and whom they may play against. Note that the three teams all play each other twice on a home and away basis.

[37] In interim interdicts our courts adopt a sliding scale when looking at the strength or weakness of an applicant’s case in establishing the requisites. As Erasmus puts it so succinctly “*….: the stronger the prospects of success (i.e. the strength of the applicant’s case), the less need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him*.”[4]

[38] Upington has brought a case based on a weak prima facie right. It has not been

[4] Erasmus, *Superior Court Practice* Volume 2, 2023, D 6-16D. Relying on *Olympic Passenger Service v Ramlagan* 1957 (2) SA 382(D) and *Eriksen Motors (Welkom) Ltd v Protea Motors (Warrenton)* 1973 (3) SA 685 (A).

able to put up a strong case on the balance of convenience. On the contrary the respondents have shown why the balance of convenience strongly favours them. For this reason, I found the application was unsuccessful and I dismissed it on 1 June.

[39] I attach below the order I gave on 1 June.

<u>ORDER:-</u>

[40] **IT IS ORDERED THAT:**

1. The application is dismissed;
2. Costs are awarded to the second respondent including the costs of two legal representatives;
3. Costs are awarded to the fourth respondent including costs of one legal representative.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHNANNESBURG

Date of hearing: 01 June 2024

Date of Reasons: 07 June 2024

Appearances:

Counsel for the Applicant:	L E Thobejane
Instructed by.	Botha Massyn & Thobejane Associated Attorneys
Counsel for the Second Respondent:	K Hopkins SC
	Z Majavu
Instructed by:	Majavu Incorporated
Representative for the Fourth Respondent:	L Mpahlele
Instructed by:	Fairbridges Wertheim Becker