



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

CASE NO: 071849/2024

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 08 July 2025

Signature: __

In the matter between:

JOSEPH TAYLOR MHLONGO

Applicant

And

NETBALL SOUTH AFRICA

Respondent

JUDGMENT

NYATHI J

A. Introduction

[1] The applicant is before court seeking a declaratory order against the applicant's Disciplinary Committee ('DC')'s findings and sanction imposed on him.

[2] Applicant seeks more specifically that:

2.1 the findings and sanction be declared a nullity.

2.2 the DC was improperly constituted, thus the respondent acted *ultra vires* the provisions of its Constitution.

2.3 the findings of the DC and the sanction imposed by the respondent against him be set aside. The respondent be directed to forthwith withdraw the findings and sanctions against the applicant and reinstate the applicant's membership without qualification or limitation.

B. Background

[3] The applicant had been a member of the respondent for 15 years, having served in leadership positions in the KwaZulu-Natal and eThekweni Federations, when he was hauled before a Disciplinary Committee of the respondent.

C. Respondent's points *in limine*

[4] The respondent seeks to have the application dismissed on the basis of points *in limine* that it has raised firstly, and also on the merits. The court first heard the parties' submissions on the points *in limine*. In the process the argument

overlapped with the merits as well. Judgment was thereafter reserved. Counsel for the parties have filed thorough heads of argument in respect of both components of the application, for which I am grateful.

[5] Ms. Kriek appearing for the respondent, raised the following points of law:

- 5.1 Lack of jurisdiction – the court lacked jurisdiction to hear the matter due to the existence of an arbitration clause in terms of the Constitution of the NSA. This clause was mandatory, and the applicant has failed to submit the dispute to alternative dispute resolution such as mediation or expedited arbitration as is provided for. The court's jurisdiction is accordingly ousted.
- 5.2 Section 21(1)(b) of the Superior Courts Act 10 of 2013 – in his founding affidavit, the applicant has failed to make out a case triggering the Court's power to grant the declaratory relief sought by virtue of the provisions of section 21(1)(b) of the Superior Courts Act 10 of 2013.
- 5.3 a third point questioning the authority of the deponent to depose to the affidavits was abandoned, therefore nothing more need be said about it.

[6] On the jurisdiction aspect, Schedule Four to the March 2023 Constitution provides that:

“Any disputes arising out of, or in connection with, the enforceability of this constitution, or the application and interpretation of the provisions hereof, or any dispute between any members or the South African Confederation of Sport and Olympic Committee (SASCOC) or between a member and the National Executive Committee or members of NSA shall be referred in terms of the SASCOC Dispute Procedure Resolution to the Disputes Resolution Council for resolution through

mediation or expedited arbitration in terms of the Rules and Procedures for the Resolution of Disputes in Sport, prevailing at the time such dispute is so referred. In the event of arbitration in terms of the above, such resolution shall be final and binding on the parties to the dispute."

[7] Paragraph 31 of the March 2023 Constitution defines disputes as follows:

"For the purpose of this paragraph disputes includes without prejudice to the generality of that term:

31.1 Any action by any member with regards to the interpretation and application of this Constitution.

31.2. Dispute in connection with:

31.2.1 the interest of a member.

31.2.2 the employment of a member.

31.2.3 the powers, duties and office of a member.

31.2.4 the affairs of Netball SA.

31.2.5 the interpretation, application and/or effect of any of the terms, conditions or restriction imposed or any procedure to be followed under this Constitution

...

31.8 Where a dispute arises between members or between a member and NSA, such dispute shall be referred to final and binding arbitration only after the parties have attempted to resolve the dispute by negotiation or mediation. ... "

[8] It was then submitted on behalf of the respondent that Mr. Mhlongo's grievances (and the dispute) being the subject matter of this application, falls squarely within

the provisions of Schedule Four to the March 2023 Constitution as well as paragraph 31 thereof, in that same pertains to Mhlongo's membership with NSA, the interpretation, application and/or effect of the terms, conditions or restriction imposed or any procedure to be followed under the Constitution.

- [9] In terms of the provisions of section four and paragraph 31 quoted above, the referral to mediation and arbitration is mandatory through the meaning of the word “**shall**”. Mhlongo has thus not fulfilled a jurisdictional requirement before initiating the application.
- [10] Ms Kriek then concluded that when a party institutes court proceedings despite the arbitration agreement or clause, the defendant may, *inter alia*, ask for the stay of proceedings, pending final determination of the dispute by the arbitrator.
- [11] Foreseeing resistance from the applicant, which did actually eventuate, the submission was made on behalf of the respondent that the party resisting the stay of court proceedings bears the onus (which is not easily discharged) of convincing the court that, owing to exceptional circumstances, the stay should be refused. In other words, courts will enforce an agreement to arbitrate or an arbitration clause unless there are compelling reasons to order otherwise.¹
- [12] In support of the respondent's contentions, reference was made to the matter of *Timbela Trading CC v Anglo American Platinum Ltd and Another*² where a special plea had been raised by the respondent in an application which was referred to trial that the disputes between the parties were subject to an arbitration agreement. Bester AJ granted an order staying the action pending the

¹ Para 30, respondent's heads of argument.

² Case no (23506/2021) [2024] ZAGPJHC 1896 (9 September 2024) [Unreported].

final determination of the disputes by an arbitrator in terms of the arbitration agreement.

D. Applicant's contentions against the points *in limine*

[13] Ms Stroebel on behalf of the applicant opposes the respondent's submissions as being ill-founded and misplaced. She commenced with a concession that the applicant's case for a declaratory order was erroneously stated as being founded on Section 21(1)(b) of the Superior Courts Act instead of Section 21(1)(c). she applied for an amendment, which was granted.

[14] Ms Stroebel then dealt with the jurisdictional point of law submitting that an arbitration clause does not oust the jurisdiction of this court. She stated that a party seeking a stay of proceedings pending arbitration³ must launch a substantive application.

E. Discussion on the legal provisions

[15] The Constitutional Court in *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd*⁴ confirmed SCA's finding in *PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd*⁵ that "*If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before*

³ In terms of Section 6 of the Arbitration Act 42 of 1965.

⁴ [2021] ZACC 24.

⁵ [2007] SCA 9(RSA).

delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.”⁶ [my emphasis].

[16] Ms Kriek persisted in reply that points of law in motion proceedings are akin to a special plea in action proceedings. There is nothing contentious about that, except that a special plea is raised before the defendant takes any further steps and the pleader then pleads over on the merits. This is because a special plea is a procedural device that allows a party to raise a preliminary issue that, if decided in their favour, could dispose of the entire matter without the need to proceed to a full trial. Essentially, it's a way to address a defence before the court delves into the merits of the case. It makes sense therefore that in motion proceedings these objections should be raised in the respondent's answering affidavit and not for the first time in the heads of argument or from the bar.

[17] In general terms, a point *in limine* should not be raised for the first time in heads of argument in motion proceedings, lest the party so raising it be accused of “trial by ambush”. This is considered unfair and prejudicial to the opposition in that they may not have adequate opportunity to prepare a proper response.

[18] It is trite that in motion proceedings affidavits serve as both pleadings and evidence. A newly raised point in limine might not be supported by the evidence presented in the affidavit. The proper procedure is to raise points in limine in the answering affidavit, or through a formal substantive application thus allowing the other party to respond with their own evidence and legal arguments.

[19] The exceptions to the general rule stated above are:

- a. if the point in limine is a purely legal one based on undisputed facts not requiring new evidence. And

⁶ PCL Consulting footnote 3.

b. if the late raising of the point *in limine* does not prejudice the opposing party.

[20] In the current application, the respondent does raise a point *in limine* pertaining to the court's lack of jurisdiction in its answering affidavit. It however makes no reference to arbitration. The issue of arbitration is more pertinently ventilated in its heads of argument.

[21] From the submissions made before the court, this is no doubt, an instance that is catered for in the exceptions to the general norm, paving the way for the court to consider the point of law raised.

[22] That there is a dispute between the parties is common cause.

[23] A point of law in motion proceedings is akin to a special plea in motion proceedings. The instant point raised has the effect of a dilatory plea. If it is granted, the current proceedings will be paused pending the resolution of the dispute by an arbitrator as provided for in the arbitration agreement.

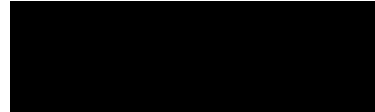
[24] The respondent's counterapplication for a stay of the applicant's application pending the arbitration succeeds.

F. Conclusion

[25] In the result, I order as follows:

- a) The application is stayed pending the final determination of the disputes on the pleadings between the parties by an arbitrator in terms of Paragraph 31 of the March 2023 Constitution, which govern the relationship between the parties.

- b) The applicant shall pay the costs of the points in limine on the party and party scale, including the costs of counsel at scale B.



J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 14/05/2025.
Date of Judgment: 08 July 2025

On behalf of the Applicant: Ms J Stroebel
Applicant's attorneys: Hurter Spies Incorporated

On behalf of the Respondents: Ms R Kriek
Respondent's attorneys: Donaldson Attorneys

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 08 July 2025.