IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 17516/2024

In the matter between:

SHAUN-NICK BESTER	Applicant

and

JAN STERK N.O.	First Respondent
LATI MAHAPA N.O.	Second Respondent
SHANE WAFER N.O.	Third Respondent
CYCLING SOUTH AFRICA	Fourth Respondent

Coram:	Justice Lekhuleni et Justice Nziweni
Heard:	5 August 2025
Delivered electronically:	6 February 2026 (electronically)

Summary – PAJA- Review - A broad, functional test is applied to determine whether an act constitutes the exercise of public power - focusing on the nature of the function rather than the form of the entity - By affiliating with SASCOC to participate in a regulated sport, respondent became integrated into a statutory framework - derived characteristics of a public body and - performs a public functions – Principle of subsidiary - an exercise of public function constitutes administrative action - PAJA is applicable to the merits of the matter and cannot be bypassed.

Section 7(2)(a) of PAJA- competency to adjudicate the substantive merits of the application - exercise of restraint – due to pursuit of alternative relief - to avoid an apprehension of prejudging.

ORDER

The application stands to be dismissed with costs, costs on the scale as between party and party to be taxed on scale C, the costs to include costs of two counsel where so employed.

JUDGMENT

NZIWENI J (LEKHULENI J Concurring):

Introduction and background

[1] This is an application for the review and setting aside the sanction imposed by the first, second and third respondents against the applicant in their capacity as the fourth respondent's appeal tribunal. On 2 June 2024, the appeal tribunal upheld the disciplinary inquiry sanction imposed on the applicant on 30 October 2023 arising from multiple charges of sexual harassment levelled against the applicant.

[2] The disciplinary hearing initiated by Cycling South Africa (the fourth respondent) against the applicant found that a ban of the applicant from taking part in any cycling activity which is organised by the fourth respondent and or the Union Cycliste Internationale ('UCI') or their affiliates was the appropriate sanction in the circumstances.

[3] Pursuant to this decision, the applicant was informed of his appeal rights ('internal appeal') in terms of Clause 7 of the fourth respondent's Safeguarding Policy dated 1 December 2022, which he could exercise in accordance with the applicable procedures within 72 hours from receiving the finding. The applicant availed himself of the remedy provided in terms of the policy and appealed against the decision of the disciplinary hearing.

[4] The internal appeal was chaired by the appeal tribunal which delivered its written finding on 2 June 2024. The appeal tribunal found that the lifelong ban relating to all cycling activities imposed by the disciplinary hearing was inappropriate and amended the sanction to the effect that the applicant may apply for Cycling South Africa (CSA) membership that would entitle him to ordinary (recreational) membership to participate locally in CSA's sanction cycling events after 15 years.

[5] Following the appeal tribunal's ruling, the applicant launched the present application in terms of the provisions of Rule 53 assailing the decision of the appeal tribunal. The applicant asserts that this application is premised upon the provisions of Rule 53 of the Uniform Rules of this Court, read together with the provisions of the Constitution. Therefore, the applicant seeks that the sanction of the appeal tribunal be reviewed and set aside in terms of Rule 53 of the Uniform Rules of this Court.

[6] The applicant further contends that this Court has jurisdiction to hear the matter in terms of section 21 of the Superior Courts Act 10 of 2013.

[7] As previously noted, the appeal tribunal ruling resulted in a 15-year ban on the applicant's participation in both CSA and its international affiliate, UCI.

The parties

[8] The applicant is an adult athlete and coach. The applicant describes himself as an esteemed athlete and cycling coach with suitable international qualifications and expertise. The first to third respondents in this matter are cited in their official capacities of the fourth respondent's appeal tribunal.

[9] The fourth respondent is the National Governing Body of Cycling in South Africa. It is asserted in the founding affidavit that the fourth respondent is a National Federation, duly recognised by SASCOC and affiliated to SASCOC, and therefore, duly authorised to administer the sport of cycling in the Republic of South Africa, subject to - and in terms of a constitution, policies, and regulations.

[10] It is also asserted that the fourth respondent, as a National Federation, is further affiliated with the UCI which is the International Federation tasked with promoting the high-performance sport of cycling internationally in terms of the International Olympic Committee. The UCI promulgated a Code of Conduct, and it makes provision for disciplinary procedures to which all members of the UCI are subject. The fourth respondent as a member of UCI, promoted its own Code of Conduct and disciplinary proceedings which are in line with those of the UCI, and all members of the fourth respondent including the applicant are subject to the Code of Conduct and disciplinary procedures.

Grounds of Review

[11] The applicant is of the view that the decision of the appeal tribunal is susceptible to be reviewed and set aside on the following grounds:

a) it is premised on irrelevant considerations and it is irrational;
b) it is premised on a defective and inappropriate charge sheet;
c) it is based on a procedure that was unfair and ultra vires powers imposed upon the respondents;
d) it is wholly unreasonable, inappropriate and unfair that no reasonable tribunal ought to have adopted under the prevailing circumstances;
e) it is not rationally premised upon the objective evidence or facts which emanate from the record;
f) it is not rationally connected to the reasons provided by the respondents in their ruling;
g) it is irrational in that the respondents provided no basis upon which they imposed a sanction of a 15-year ban;

h) it has caused severe and irreparable harm and damage to the applicant as an individual, including but not limited to emotional and psychological trauma, which have a substantial and severe impact on his constitutional right to choose his trade, occupation or profession freely, as provided for and envisaged in section 21 of the Constitution; and

i) it violates the principles pertaining to legality, fairness, equity and does not survive constitutional muster. And maintains that the achievement of administrative justice is dependant upon administrative action being valid and therefore should be in compliance with the principle of legality and fairness.

Preliminary Points

[12] The fourth respondent raised two preliminary points against the applicant's application. Regarding the first preliminary point, the respondents' asserted that in terms of the fourth respondent's safeguarding policy and specific rules pertaining to disciplinary proceedings, the fourth respondent is empowered to appoint a judicial panel in the event of a person against whom a hearing is held is not satisfied with the finding and intends to challenge such finding on appeal. To this end, the fourth respondent resolved to refer to the applicant's appeal against the findings and sanction of the disciplinary proceedings to the judicial body of SASCOC in terms of the provisions of Chapter 11 of the Constitution of SASCOC. The fourth respondent stated that the judicial body of SASCOC acted in terms of the provisions of clause 50 of the Constitution of SASCOC and appointed the first, second and third respondents to act as a appeal tribunal in terms of clause 50.6 of SASCOC Constitution.

[13] The respondent further contended that since the judicial body of SASCOC heard the appeal and substantially upheld the findings and sanctions imposed by the disciplinary inquiry, and by virtue of the provisions of section 13 of the National Sport and Recreation Amendment Act 18 of 2007 ('NSRA'), it is clear that SASCOC has a direct and substantial interest in these proceedings and should have been joined as a respondent. In the premises, the the fourth respondent raised a point in limine of non-joinder concerning SASCOC and submitted that such non-joinder is material warranting the dismissal of the applicant's application with costs.

[14] In the second preliminary point, the fourth respondent averred that the findings and sanctions imposed by the disciplinary inquiry which were substantially upheld by the judicial body on appeal constitute administrative action as defined in terms of s 1(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA'). In terms of s 7(2)(a) of PAJA, a court is precluded to review administrative action unless any internal remedy provided for in any other law has first been exhausted. The respondent further stated that in terms of paragraph 50.7 of the Constitution of SASCOC any party aggrieved by a decision of the judicial body may refer the matter to the Court of Arbitration for Sports, ('CAS'), the relevant International Federation or an appropriate court having jurisdiction for its final determination within 14 days from the granting of the ruling.

[15] After the judicial body of SASCOC consisting of the first, second, and appeal third respondents (appeal tribunal) delivered their ruling on appeal, the applicant was thus afforded the remedy of referring the matter to the CAS or UCI for its final determination, which the applicant failed to do so. According to the fourth respondent, the applicant failed to explain in the founding affidavit why the applicant has not exercised the available remedies nor has the applicant illustrated any exceptional circumstances as referred to in section 7(2)(c) of PAJA. The respondents implored the court to dismiss the application on this ground.

Principal submissions by the parties

(a) The applicant's submissions

[16] The applicant denies that SASCOC has an interest in the matter. According to the applicant, SASCOC was never part of any of the preceding proceedings.

[17] The applicant further contends that while the appeal ruling's heading refers exclusively to CSA, the ruling clearly states that the first to third respondents acted in terms of the Safeguarding Policy of CSA. Furthermore, the initial notification of enquiry clearly shows that the notice to attend was instituted by CSA, and the disciplinary hearing finding clearly shows the heading as 'the fourth respondent versus him.

[18] According to paragraph 22.2.3 of the applicant's founding affidavit, the sanction imposed by the fourth respondent constitutes administrative action as provided for and envisaged in Rule 53, read together with the provisions of section 33 (1) of the Constitution.

[19] The applicant further asserts the following in paragraph 19.1 of the founding affidavit:

> "The framework against which this application should be adjudicated is that an administrative function, including an administrative decision, should be taken in a manner that is legitimate and procedurally fair."

[20] The applicant further contends that exercise of public power must comply with the Constitution and the doctrine of legality which forms essence of the process implemented by the respondents. It is the applicant's contention that lawfulness is one of the three components of an individual's right to just and fair administrative action.

[21] The applicant also asserts that reasonableness and fairness are in their own right, requirements for the legality of administrative action. It is the applicant's submission that every person has the right to administrative action that is procedurally fair and reasonable. So, the argument goes, it is of paramount importance for **the respondents to impose their administrative powers** reasonably and in a just and fair manner.

[22] According to the applicant, the fact that he is prohibited from participating in any cycling events, sanctioned by the fourth respondent is unfair shocking and unreasonable.

[23] The applicant asserts that in the Constitutional era, legality, inter alia, entails that administrators such as the respondents should act in a fair, reasonable and lawful manner to all.

[24] According to the applicant, this court is called upon to apply its judicial discretion and to make a finding which accords with the principles which underpin fair and reasonable administrative action. The applicant maintains that the principle of legality is

paramount. In his papers, the applicant specifically emphasised that the review application is premised upon the principle of legality, the common law, in accordance with the procedure which is governed by Rule 53 and on section 33 of the Constitution.

(b) The fourth respondent's submissions

[25] On the first preliminary point the fourth respondent submitted that SASCOC should have been joined as a respondent, as it is clear that it has a direct and substantial interest in these proceedings by virtue of Section 13 of the National Sport and Recreation Act (the 'NSRA').

[26] The fourth respondent contends that the non-joinder of SASCOC is material; consequently, the application falls to be dismissed on that basis.

[27] On the second preliminary point the fourth respondent submitted that the applicant failed to exhaust internal remedies as contemplated in PAJA. According to the fourth respondent, in terms of section 7 (2) (a) of PAJA, a court is precluded to review administrative action unless any internal remedy provided for any other law has first been exhausted. It is the fourth respondent' s submission that these proceedings fall under the provisions of PAJA.

[28] It is further asserted on behalf of the fourth respondent that a legality review only finds application when PAJA does not apply. It is argued on behalf of the fourth respondent that, where an action or decision constitutes an administrative action; the principle of subsidiary demands that the action or decision to be dealt with in terms of PAJA. Consequently, where PAJA is applicable, the principle of subsidiarity dictates that a party may not circumvent the Act to rely directly on the Constitution or common law.

[29] The fourth respondent asserts that the grounds relied upon by the applicant in the founding affidavit and the heads of argument constitute an appeal rather than a review and fail to properly identify the applicant's cause of action.

[30] The fourth respondent further contends that it is a National Federation. It argues that their dispute resolution is governed by section 13 of the NSRA, and that section 13(2) of the NSRA creates a statutory obligation to refer unresolved disputes within a sports or recreation body to the Sports Confederation (SASCOC). The fourth respondent is a member of SASCOC. The argument continues that any appeal against a decision of the fourth respondent lies with the judicial body of SASCOC.

[31] The fourth respondent draws this Court to clause 50 of SASCOC's constitution that provides for a dispute resolution mechanism. Paragraph 50.1.1, reads as follows:

> 'Subject to the constitution of the Republic, and save in circumstances where there is a need for urgent relief of a sort which cannot be obtained through the dispute resolution procedure contemplated by this article . . . nobody or individual falling under the jurisdiction of Sport SA shall approach a court of law to decide on a sport related dispute it has with the body or individual affiliated to Sport SA or with Sport SA itself, until such individual or body has first exhausted all available internal remedies , at all appropriate levels which is applicable to such a party, and as may be applicable to such a dispute or complaint'.

[32] The fourth respondent also places reliance upon clause 50.7.1 of the SASCOC constitution that provides for a remedy of <u>an appeal</u> to the Council for Arbitration on sport [CAS], the International Federation ("IF") or an appropriate court having jurisdiction for a final determination if a party feels aggrieved by a decision of the JB. According to the fourth respondent, in terms of clause 50.7.1, an aggrieved party can only refer a decision of the JB to a court for an appeal and not a review. Thus, there is a statutory bar to refer a dispute to a court prior to the exercising the appeal remedy provided in the constitution of SASCOC.

[33] The fourth respondent further submit that in terms of paragraph 50.7 of the Constitution of SASCOC; any party aggrieved by a decision of the judicial boy may refer the matter to the Court of Arbitration for Sport (CAS), the relevant international federation or an appropriate court having jurisdiction for its final determination within 14 days from the granting of the ruling. It is the respondents' assertion that after the judicial body of SASCOC, consisting of the first, second, and third respondents, delivered their ruling on appeal; the applicant was thus afforded the remedy of referring the matter

to the Court for Arbitration for Sport (CAS) or to the UCI for its final determination, which the applicant failed to do.

[34] The fourth respondent further submits that in terms of article 35 of the Code of Conduct of the UCI, any decision of the Ethics Commission may be appealed before the Court of Arbitration for Sport (CAS) by the parties to the proceedings. The extension of the sanction imposed on the applicant to a global application as recorded in annexure "B" is a sanction imposed by the Ethics Commission of UCI and is therefore appealable to CAS.

[35] Lastly, it asserted by the respondents that the applicant failed to explain in the founding affidavit why the applicant has not exercised the available remedies.

The law

[36] At this point I consider it apt to set out the provisions of section 1 of PAJA:

> "administrative action" means 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, but does not include-
>
> (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;
>
> (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;
>
> (cc) the executive powers or functions of a municipal council;
>
> (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
>
> (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and

Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4 (1)"

[37] In *Sokhela & Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & Others* 2010 (5) SA 574 (KZP) paragraphs 60-61 Wallis J stated:

'[60] The lineaments of the enquiry that must now be undertaken are fairly clearly established. The question whether action taken by a public official or authority is administrative is central to the enquiry. The focus of the enquiry is primarily upon the nature of the power being exercised, rather than the identity of the person or body exercising the power. With the enactment of PAJA the grounds of judicial review of administrative action have been codified and the cause of action for judicial review of administrative action now ordinarily arises from PAJA. That requires a consideration of the action in question, against the requirements of the definition of 'administrative action' in PAJA. There are seven requirements, namely that there must be (i) a decision, (ii) by an organ of State, (iii) exercising a public power or performing a public function, (iv) in terms of any legislation, (v) that adversely affects someone's rights, (vi) which has a direct, external, legal effect, and (vii) that does not fall under any of the exclusions listed in s 1 of PAJA. As the judgment in Grey's Marine makes clear it is a requirement flowing from the definition of 'decision' in PAJA that the decision be one of an administrative nature. In deciding whether a decision is one of an administrative nature the appropriate starting point is to determine whether it would constitute administrative action within the meaning of s 33 of the Constitution. The boundaries between administrative action and other forms of conduct by organs of State will often be difficult to draw and this must be done carefully on a case by case basis, having regard to the provisions of the Constitution and the need for an efficient, equitable and ethical public administration.

[61] The requirement that the decision should be of an administrative nature has been described as 'something of a puzzle'. In my view it serves two important purposes. Firstly it focuses attention on the need for the court to determine whether the particular exercise of public power or performance of a public function under consideration is properly to be classified as administrative action. As the Constitutional Court recognised in Fedsure, that task of classification is mandated by the provisions of the Constitution itself. That does not mean that the former classification of administrative powers and functions, that was largely discredited and abandoned in our administrative law even before the advent of the interim Constitution, has now been revived. The

present situation is that the Constitution draws an ostensibly simple distinction between acts that constitute administrative action and acts that do not, and the courts must draw that distinction or essay that process of constitutional classification. The court is required to make a positive decision in each case, whether a particular exercise of public power or performance of a public function is of an administrative character. Thus, the determination of what constitutes administrative action does not occur by default, on the basis that, if it does not fit some other juristic pigeonhole, it is administrative action. There needs to be a positive finding that particular conduct is administrative action, in order for the power of judicial review under PAJA to be engaged. That approach ties in closely with the second purpose, which is to make it clear that the mere fact, that an exercise of public power or the performance of a public function does not fall within one of the exclusions in subparas (aa) - (ii) of the definition of "administrative action", does not necessarily mean that the exercise of public power or performance of a public function in question constitutes administrative action. It precludes the determination of what constitutes administrative action from becoming a mechanical exercise in which the court merely asks itself whether a public power is being exercised or a public function is being performed, and then considers whether it falls within one or other of the exceptions. The inclusion, of the requirement that the decision be of an administrative nature, demands that a detailed analysis be undertaken of the nature of the public power or public function in question, to determine its true character. This serves in turn to demonstrate that the exceptions contained in the definition of administrative action are not a closed list, nor are cases falling outside those exceptions to be looked at on the basis that, if they are not eiusdem generis with the exceptions, they are automatically to be treated as constituting administrative action.

There is accordingly no mechanical process by which to determine whether a particular exercise of public power or performance of a public function will constitute administrative action. That will have to be determined in each instance by a close analysis of the nature of the power or function and its source or purpose.'

[38] *In President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC) paragraph 141, the following was stated:

'[141] In s 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

> [143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.'

Evaluation

The preliminary points

(a) The non-joinder

[39] The general rule is that, if a party has an interest of such a nature that it is likely to be prejudiced by a judgment given in the proceedings, such a party ought to be joined. *Standard Bank of South Africa Ltd v Swartland Municipality and Others* 2010 (5) SA 479 at 482F. The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. *Zingwazi Contractors CC v Eastern Cape Department of Human Settlements* 2021 (6) SA 557 (ECG) para 62. A 'direct and substantial interest' has been held to be an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. *Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk* 1997 (4) SA 635 (O) at 644A-B. It is a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only. A mere financial interest is an indirect interest and may not require joinder of a person having such

interest. *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK* 2002 (3) SA 653 at 663E–H.

[40] In the present matter, it is common cause that the fourth respondent is an association duly established in accordance with the provisions of the NSRA as amended. As discussed above, the fourth respondent is the National Governing Body of Cycling in South Africa and is affiliated to International Cycling Union (UCI). The applicant was a member of the fourth respondent. He is a professional athlete and UCI accredited level 4 coach. The applicant is subject to the rules and Code of Conduct of both the fourth respondent and UCI. In terms of s 13 of NSRA, every sport or recreation body must, in accordance with its internal procedure and remedies provided for in its constitution, resolve any dispute arising amongst its members or within its governing body.

[41] Section 13(2) of NSRA provides that where a dispute cannot be resolved within its own structure by a sports or recreation body, the dispute must be referred to the Sports Confederation. Section 13(2) of NSRA creates a statutory obligation to refer unresolved disputes within a sports or recreation body to the Sports Confederation. The Sports Confederation referred to in section 13(2) is SASCOC. The Constitution of SASCOC provides for the appointment of a judicial body which is empowered to hear and determine appeals by any party against a decision of Sport SA, or a member affiliated to it. The fourth respondent is a member of SASCOC and thus any appeal against a decision of the fourth respondent lies to the judicial body of SASCOC. SASACOC is bestowed the obligations to resolve disputes under section 13 of the NSRA. As discussed above, clause 50 of the Constitution of SASCOC forbids the institution of proceedings in a court of law on a sport related dispute until such individual or body has exhausted all available internal remedies at all appropriate levels applicable to such dispute. Evidently, the provisions of NSRA, the Constitution of SASCOC apply to the applicant. The judicial body of SASCOC heard the appeal of the applicant and substantially upheld the findings and sanction imposed by the disciplinary inquiry. By virtue of the provisions of section 13 of the NSRA it is abundantly clear that SASCOC has a direct and substantial interest in these proceedings and should have been joined as a respondent. To this end, I agree with the fourth respondent's submissions that the non-joinder of SASCOC is material in this matter.

[42] In light of the findings in this judgment, it is clear that SASCOC possesses a direct and substantial interest in the matter and, as such, ought to have been joined as a necessary party.

(b) Does PAJA serve as the exclusive legislative framework for this review, thereby superseding other considerations of fact or common law?

[43] As I have already mentioned, it is the contention of the applicant's counsel that this review is not launched in terms of PAJA, but is premised upon the principle of legality, the common law, and the Constitution. Accordingly, PAJA requirements are not applicable. It thus appears in this matter that the applicant relies on a doctrine of legality, constitution and common law for this review.

[44] Before addressing the second leg of this preliminary point regarding the failure to exhaust internal remedies, I must first resolve a jurisdictional question pertaining to the first part of the objection point. Therefore, the pertinent question, presented on this point in limine, is whether PAJA or the principle of legality governs these review proceedings.

[45] The applicability of PAJA or the jurisdictional gateway [from PAJA] hinges on the threshold inquiry of whether the impugned sanction and the decision satisfy the definition of administrative action.

[46] Indeed, the fourth respondent vehemently asserts that the applicant wrongly bypassed PAJA and in so doing, offended the subsidiary principle. The fourth respondent maintains that when the judicial body of the fourth respondent imposed the sanction upon the applicant, it was preforming a public function. The fourth responded further argues that PAJA is the overriding authority governing the facts of this application.

[47] The pivotal inquiry is whether the imposition of the sanction in question falls within the statutory ambit of administrative action. Put otherwise, whether the provisions of PAJA find application in this instance is contingent upon whether the sanction may be properly characterised as an act of an administrative nature. The contention of the fourth

respondent is that the sanction that is a cause of action, is an administrative action as defined in section 1 of PAJA.

[48] The question that begs is whether the imposition of the sanction by the first to third respondents was done whilst they were exercising a public power or performing a public function.

[49] Notably, while the applicant does not dispute in his papers that the respondents possess administrative powers and that the fourth respondent's sanction constitutes administrative action, he nonetheless relies on the doctrine of legality, the Constitution, and the common law for this review.

[50] Mr Bote SC, counsel on applicant's behalf, contended that it is clear that the fourth respondent is entirely a private voluntary association with no statutory foundation at all or under auspices of governmental control. Mr Botes SC maintains that the fourth respondent derives its authority over cyclists from membership agreements. It is further the contention of Mr Botes that the fourth respondent lacks defining features that places it within the purview of PAJA. Applicant's counsel earnestly argues that the NSRA, does not bestow authority upon the fourth respondent to exercise public power.

[51] The essence of Mr Botes' argument is that if regard is had to the definition of PAJA, PAJA has very distinctive and a very narrow application insofar as reviews are concerned. Mr Botes also advanced the argument that, because the fourth respondent is a voluntary association, it falls outside the scope and ambit of PAJA.

[52] Mr Botes' apparent authority for this proposition is grounded upon an unreported case of *Pretoria Cricket Club v Pretoria Sports Union*, case number 81786/2017, Gauteng Local Division, Pretoria, 16 May 2019. In this case Unterhalter J, as he then was, stated the following:

> 'The applicant submit that the Union does exercise public powers, because the Union's facilities derive from a 99-year lease, concluded with the City of Tshwane, that the lease specified that the land leased from the City to the Union, must be used exclusively to establish sports club. The purpose of the lease is to provide a sport facility. Well, the City clearly specified the use to which

> the land, the leased land can be put and doubtless had in mind how much, how such use would bring about public benefit. That to my mind is insufficient to characterise the Union's competences as public powers. The City has simply been willing to place a public resource "land" under the control of private body who can use the resource to make sporting facilities available. The Union's powers are a matter of private agreement and entail no exclusive coercive regulatory competence. Nor does the City enjoy any control of the exercise of the Union's powers, save under the contractual positions of the lease. The Union is bound by the terms of the 99 year lease but is equally at liberty to enter into other contractual arrangements without public constraint. In the circumstances I cannot find that the decisions of a Union as to affiliation have any connection to the exercise of public power. And hence, neither the principle of legality, nor PAJA can be of application.'

[53] First and foremost, Mr Botes's oral argument is inconsistent with the founding affidavit. Consequently, during his submissions, a question was posed to counsel, and it was pointed out that the applicant's founding affidavit appears to refer to PAJA, administrative action, and the exercise of public power. It was further pointed out during Mr Botes's oral submissions, in relation to the question posed, that nowhere in the founding affidavit is there a mention that the applicant does not rely on PAJA.

[54] There is a clear inconsistency in the applicant's case. Mr Botes's submissions are not plausible or supplementary additions, but rather departures from the pleading. His answers to the questions posed by this Court fail, however, to resolve the discrepancy between his oral argument and the founding affidavit as well as the replying affidavit.

[55] Furthermore, in the instant case, the relationship between the applicant and SASCOC differs substantially from the relationship observed between the Union and the City in the aforementioned case. There is a dramatic difference, because amongst others, the relationship between SASCOC and the applicant is not linked to a lease agreement.

[56] Or, put differently, the argument of Mr Botes overlooks the fact that the present case is not at all fours with the *Union Cricket case, supra*. Accordingly, the *Union Cricket case*, supra, is readily distinguishable from the present case. The applicant's reliance on the *Union* case is misplaced; it does not recognise the proposition that the decision

to affiliate SASCOC [and the fourth respondent] invariably connected the fourth respondent to the exercise of public power.

[57] Therefore, there are several reasons why his [Mr Botes] position is untenable. In the first place, it is entirely clear, in my reading of the cases, that the fourth respondent is a national federation recognised under the National Sport and Recreation Act 110 of 1998. Thus, the fourth respondent is mandated to develop and control cycling in the Republic.

[58] More significantly, it should be noted here that it is not in dispute that the fourth respondent is an official affiliate of SASCOC. Consequently, they [the fourth respondent and SASCOC] operate within a defined statutory framework under the National Sport and Recreation Act, rather than functioning as a strictly private entity. Thus, their [SASCOC and the fourth respondent] conduct is inextricably intertwined.

[59] It is also relevant to note that since the fourth respondent's affiliation with SACOC, the fourth respondent's powers are not only based on a private agreement. Instead, they entail exclusive coercive regulatory competence. It is also important to emphasise that the fourth respondent is part of a statutory regulatory scheme.

[60] This part of the evidence and the 'concessions' made in the founding affidavit cannot be brushed aside. As correctly pointed out by the fourth respondent, both entities, because of their relationship, are bound by national sports legislation.

[61] In addition, this conclusion is further reinforced by the fact that it is not in dispute that under section 1 of the National Sports and Recreation Act 110 of 1998 ('NSRA'), a national federation is defined as –

> 'a national governing body of a code of sport or recreational activity in the Republic recognised by the relevant international controlling body as the only authority for the administration and control of the relative code of sport or recreational activity in the Republic'.

[62] Admittedly, because the Minister of Sport, Arts and Culture delegates oversight of high-performance sport to SASCOC, [SASCOC] affiliated entities such as CSA [the

fourth respondent] are regarded as part of a broader statutory framework rather than exclusively private associations or clubs. Consequently, administrative functions can be performed within a private-law context.

[63] This conclusion is further reinforced by the fact that 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;.....'

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.'

[64] In contrast to the *Union* matter which involved private agreements, this case concerns mandatory regulatory powers. In the *Union* matter, the City held no authority over the Union beyond the specific terms defined in their contractual lease. In the present case, as noted above, the fourth respondent also operates under a public mandate that cannot be treated as a typical private commercial relationship. Thus, the applicant's reliance on the Union case is not well-grounded.

[65] In my view, a case that skates close to the core of our case, is the case of *Chess South Africa v South African Sports Confederation and Olympic Committee and Another* (62189/2023) [2024] ZAGPPHC 601 (25 June 2024). This I say because, the *Chess* case also touched on the nature of public power. It also established that because there is no path to international participation or national colours except through SASCOC, the organisation fulfils a governmental function. This directly supports the view that affiliated

bodies (like CSA or Chess SA) are not "purely private clubs" but entities performing public functions within a "privatised setting"; This is so because they perform administrative functions within the SASCOC system.

[66] Ultimately, the core of the issue lies in the fact that by affiliating with SASCOC to participate in a regulated sport, the fourth respondent became integrated into a statutory framework [National Sport and Recreation Act as the "empowering provision"]. In doing so, it derived characteristics of a public body and as such, performs a public function. Consequently, the imposition of a sanction constitutes what is regarded essentially as an exercise of a public function and, as such, qualifies as administrative action as contemplated in PAJA.

[67] It is also important to record that in the case of *Ndoro and Another v South African Football Association and Others* (16/16836) [2018] ZAGPJHC 74; [2018] 3 All SA 277 (GJ); 2018 (5) SA 630 (GJ) (24 April 2018), the court determined that the SAFA Arbitration Tribunal is not a form of private arbitration but a regulatory dispute resolution body. The court found that these tribunals lack party autonomy inherent in private arbitration because participation is compelled by regulatory bodies like FIFA, SAFA, and the NSL, and their decisions constitute administrative actions reviewable under PAJA. I consider it prudent to cite the following excerpt from the *Ndoro* case, supra, the following is stated at paragraph 27-36:

> 'The question is whether, in substance, the appeal to the Arbitration Tribunal is a private arbitration. I do not consider that it is. First, private arbitration is a voluntary agreement between parties to refer a dispute to arbitration. In so doing, the parties frame the dispute to be referred, the powers to be conferred on the arbitrator, and choose the arbitrator or the mechanism of appointment.
>
> These essential attributes of party autonomy, choice and agreement are altogether lacking in respect of the Arbitration Tribunal. First, Mr Ndoro and Ajax referred their dispute to the DRC not because they and the NSL chose to do so (indeed they entirely disagree on this matter) but because Mr Ndoro and Ajax considered that they were required to do so. And whichever dispute resolution body should ultimately be determined to have jurisdiction over the dispute, that is a function of compulsory rule making by FIFA, SAFA and the NSL. Second, the DRC is an institution created under the Handbook that the NSL, Member Clubs and players must use. How the DRC is constituted and its powers is not chosen by the parties who submit their disputes to it. The DRC

is not a species of private arbitration but is a dispute resolution body constituted by the regulatory scheme to enforce the rules created by that scheme.

A similar finding is warranted in respect of the Arbitration Tribunal. Whether parties may appeal a DRC decision, to which body, and enjoying what powers is not left up to the parties to the dispute to determine. The rules do so. SAFA appoints the arbitrator from its panel. The Arbitration Tribunal is an appellate dispute settlement body forming part of the regulatory scheme to enforce the rules of that scheme. The fundamental features of private arbitration are lacking.

It may be contended that although the institutions of dispute settlement are created and compelled by the regulatory scheme, they are nevertheless a form of private arbitration because the parties agree to participate in these associations, and the rules, including dispute settlement, flow from agreement.

That contention cannot be accepted because, as I have explained, membership of the associations that make up the institutional framework of professional football are not in any real sense elective. FIFA, SAFA and the NSL have assumed exclusive competence to regulate professional football in South Africa. Players and clubs must join to participate, and on terms they are not free to determine on a consensual basis. The dispute settlement bodies are an integral part of this regulatory scheme. How they are constituted, what disputes they determine, and with what rights of appeal flow not at all from voluntary adoption but coerced regulatory fiat. That is the very opposite of private arbitration.

There is a final submission made by Mr Redman SC, who appeared with Mr Tshikila, for the NSL that I must consider. They submitted that section 40 of the Arbitration Act is of application, and thus, even if the regulatory scheme is one constituting public powers, it may still reference an arbitration that is made subject to the Arbitration Act and its limited review jurisdiction under section 33.

Section 40 provides that the Arbitration Act applies to every arbitration under any law passed before or after the commencement of the Arbitration Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement.
The question is whether the referral to the Arbitration Tribunal in the Handbook and SAFA Statutes is an arbitration under any law? In my view it is not and for two principal reasons. First, for the reasons given, compulsory appellate dispute settlement under the Handbook and SAFA Statutes lacks the defining characteristic of an arbitration. For the purposes of section 40, there must be an arbitration provided for under the law. The Arbitration Tribunal is not a species of arbitration.

Second, the Handbook and the SAFA Statutes are not law. The Interpretation Act 33 of 1957 defines a law to mean any law, proclamation, ordinance Act of Parliament or other enactment having the force of law. I do not consider the Handbook and SAFA Statutes to be enactments having the force of law. PAJA in defining administrative action distinguishes an organ of state exercising a public power in terms of legislation and a juristic person exercising a public power in terms of an empowering provision. For reasons already given, a private entity may enjoy powers under its domestic statutes that amount to administrative action. Such private statutes are empowering provisions. But they do not constitute an enactment. An enactment is an act of law making by an organ of state. Hence the law referred to in Section 40 does not include the internal rules under which a private entity defines its competences.

I am of the view that the decision of Mr Cassim is administrative action, and unlike the position in Sidumo, I can see no reason why the regulatory powers of FIFA, SAFA and the NSL, which includes their dispute settlement provisions (as I have found) should not permit of the application of the public law disciplines of PAJA.'

[68] It is evident from the foregoing that this Court has ample latitude to determine whether an exercise of power is public or if the performance is private in nature. As a result, in determining the reach of administrative law, the Court is not bound by rigid categories but possesses the scope to evaluate the specific context in which the power was exercised. Consequently, little wonder the applicant's founding affidavit inadvertently reveals that the respondents' actions constitute administrative action and that the fourth respondent is an administrative body. Furthermore, it is also not surprising that the founding affidavit fails to state pertinently that PAJA is inapplicable to the merits of this case.

[69] From the foregoing it is clear as day light that the sanction that was imposed by the fourth respondent is indeed an administrative action as contemplated in section 1 of the Act exercised by an administrative body. Therefore, if an exercise of function constitutes administrative action, PAJA is applicable to the merits of this matter and cannot be bypassed. Thus, the applicant cannot bypass PAJA to rely directly on the Constitution or the common law. Indeed, a legality review is a safety net to act as a measure of last resort where the law allows for no other measure to challenge to the exercise of power.

Alternative relief

[70] It is well-established that section 7(2)(a) of PAJA precludes a court from reviewing an administrative action unless any internal remedy provided for in any other law has first been exhausted. In light of the foregoing, it is evident that the applicant failed to exhaust the internal remedies available to him prior to instituting these proceedings, as he believed that his application falls within the ambit of legality review. Paragraph 50.7 of the Constitution of SASCOC and Article 35 of the Code of Ethics of the UCI set out the internal remedies available to the applicant.

[71] Consequently, the inquiry shifts to whether this Court, despite the aforementioned findings, remains competent to adjudicate the substantive merits of the application. I am of the view that it will not be appropriate at this stage to engage the merits of the application. The rationale for this restraint is that, should the applicant subsequently elect to pursue an alternative remedy, a prior determination on the merits by this Court would inevitably give rise to an apprehension that the dispute has been prejudged.

[72] Consequently, it is untenable under these circumstances to engage with the merits of the application. Furthermore, the applicant has failed to establish any exceptional circumstances that would justify this Court departing from the general rule to adjudicate upon the substantive issues.

Conclusion

[73] The fourth respondent submits that the applicant's case was fundamentally without merit. Consequently, there is sufficient justification to mulct the applicant in punitive costs and to order that his legal representatives be held liable for such costs, *de bonis propriis*, jointly and severally with the applicant.

[74] Regarding the fourth respondent's submission that a punitive cost order is warranted, it is well-established that the Court must have regard to the conduct and reasonableness of the litigation. While the application may not be characterised as strictly frivolous or vexatious, it was nonetheless pursued in the face of settled adverse precedent, without any persuasive argument for a departure therefrom. Such

persistence, despite clear authority to the contrary, constitutes a material factor in determining the appropriate scale of costs. It is as well to remind oneself at this stage that a court is a forum where a party that feels aggrieved should feel free to seek redress, provided there is a live issue to be determined.

[75] While the fourth respondent's prayer for costs is compelling—especially in light of the discrepancies in the applicant's case and the settled nature of the law—the Court must acknowledge that the issues raised were, at the very least, arguable. Absent a finding of mala fides or gross misconduct on the part of the legal representatives, a departure from the ordinary scale of costs is not justified.

[76] In the results, I make the following order:

Order

[77] The application stands to be dismissed with costs, costs on the scale as between party and party to be taxed on scale C, the costs to include costs of two counsel where so employed.

[redacted]

CN. Nziweni
Judge of the High Court

I agree and it is so ordered.

[redacted]

JD. Lekhuleni
Judge of the High Court

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