

REPUBLIC OF SOUTH AFRICA



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

Case no: 8546/13

In the matter between:

PEDAL POWER ASSOCIATION

Applicant

and

CYCLING SOUTH AFRICA

First Respondent

SOUTH AFRICAN SPORTS CONFEDERATION

AND OLYMPIC COMMITTEE

Second Respondent

Heard: 5 December 2013

JUDGMENT

DELIVERED: 14 FEBRUARY 2014

SAVAGE AJ:

Introduction

[1] The applicant, Pedal Power South Africa ('PPA'), a voluntary association, seeks an order declaring that it does not require the prior sanction or approval of the first respondent, Cycling South Africa ('CSA'), or members of the first respondent, in respect of cycling events organised by the applicant, including fun rides or league rides. In addition, PPA seeks an order interdicting and preventing CSA, its officials or members, from representing to any person or body, including commercial sponsors, local authorities, national, provincial or local traffic and policing authorities, or cyclists, that PPA requires such prior sanction, or that such sanction is a pre-requisite for any other necessary permission or approval granted by national, provincial or local authorities.

[2] PPA has been in existence for 35 years and has more than 18 000 members, with its main purpose and object, apparent from clause 3 of its constitution, being to promote cycling and the interests of cyclists. Its activities are centred in the Western Cape where it is involved in five major annual events, including the organisation of the Argus Pick 'n Pay Cycle Tour and the Coronation Double Century cycle event in conjunction with the Cape Town Cycle Tour Trust.

[3] CSA is a national federation, defined in s 1 of the National Sports and Recreation Act 110 of 1998 ('NSRA'), 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’.

[4] By agreement between the parties the South African Sports Confederation and Olympic Committee (‘SASCOC’) was joined as second respondent in the matter. SASCOC is the national co-ordinating macro body for the promotion and development of high performance sport in the Republic. High performance sport is defined in s 1 of the NSRA as –

‘the high level of participation in major international sporting events including but not limited to world championships and other international multi-sport events such as the Olympic Games, Commonwealth Games, Paralympic Games and All Africa Games’.

[5] There is no dispute that the recreational and competitive cycling events organised by PPA do not fall within the ambit of high performance sport contemplated in the NSRA.

Background

[6] In 2004 PPA became an affiliate of CSA, following an agreement between the two organisations. Under the CSA’s 2004 constitution PPA was permitted to function autonomously in relation to the administration of recreational and competitive cycling, while required to conduct its affairs even-handedly and without unfair discrimination against competitive cycling in favour of recreational cycling. The 2004 constitution also recognised PPA’s jurisdiction in respect of the geographical areas in which it operated before that constitution

came into effect in the '*setting and operating of all their domestic fun ride calendars and all recreational tours; fun rides and league races*'. In terms of article 13.1 of the 2004 constitution, the amendment of PPA's autonomy rights and the manner in which they were to be exercised required a special resolution passed by 75% of all CSA affiliates and the consent of PPA.

[7] Relations between PPA and CSA became strained over time with PPA dissatisfied that it had paid amounts in excess of R1.2 million to CSA since 2004, with what it perceived to be little benefit to PPA in return and while it held less than a quarter of the votes in governing CSA.

[8] On 18 February 2012 CSA and its members adopted a new constitution at a meeting from which PPA was intentionally absent. The 2012 constitution, to which PPA was not party, omitted PPA's autonomy rights and PPA's membership of CSA terminated with the adoption of this constitution. PPA accepts the termination of its affiliation to CSA, of which it is no longer a member.

[9] In the minutes of the meeting of the CSA Special Constitutional Congress held on 18 February 2012, Mr Raymond Hack, legal representative for SASCOG was recorded as having stated that '*it was a pity that Pedal Power Association was not attending the Congress as effectively this means that the Cape Argus Cycle Tour will not take place without the approval and sanctioning of Western Cape and CyclingSA*'. The minutes further reflect his view that PPA was obliged to register as a club, failing which none of its events '*will be able to take place as they will not have Provincial or National approval*'.

[10] On 8 March 2012, Mr Tubby Reddy, the Chief Executive Officer of SASCOC wrote to CSA informing it that arising out of a meeting with SASCOC's Transformation, Ethics and Dispute Resolution Commission -

'...it was decided that CSA were required to amend their Constitution to bring same in line with the directives of SASCOC in regard to the development of Sport in all 9 geopolitical regions of the country, and in all disciplines, as well as to ensure transformation.

As a result thereof, a new Constitution was duly prepared between our representatives and those of your Federation and thereafter a duly constituted Special General Meeting was convened to adopt the Constitution to enable you to comply with the provisions of same...'

[11] This letter sought that CSA inform PPA that SASCOC has jurisdiction over its members, being national sports federations, as well as its officials and athletes, all being subordinate to SASCOC in terms of SASCOC's Memorandum and Articles of Association; that constitutions must not conflict with that of SASCOC, with reference made to the entrenched provisions in favour of PPA contained in CSA's 2004 constitution; and that SASCOC may regulate member's constitutions.

[12] Various unsuccessful attempts were made to resolve the differences between PPA and CSA thereafter. An interim arrangement was agreed between the parties in September 2013, pending the outcome of the current application.

Current application

[13] PPA claims in the current application that CSA is not empowered, by statute or otherwise, to oblige PPA to obtain the prior sanction of CSA to organise cycling events; and that any requirement that prior sanction be obtained from CSA would encroach upon PPA's right to organise cycling events as a voluntary association.

[14] CSA opposes the application on the basis that it is recognised as the national federation for cycling by the international controlling body, '*as the only authority for the administration and control of the relative code of sport or recreational activity in the Republic*'; that it cannot perform its task as national federation if it cannot administer and control the code of cycling and if it does not sanction events; that it is required by s 2(5) of the NSRA to '*develop its sports or recreational activity at club level...*'; that the purpose of the NSRA as expressed in its preamble is to provide for the promotion and development of sport and recreation and the coordination of the relationships among the national Department of Sport and Recreation, SASCOC, national federations and other agencies; and that PPA is not entitled to operate autonomously but must do so within the statutory framework. Furthermore, in terms of s 6 (1) of the NSRA as a national federation CSA contends that it cannot '*assume full responsibility for the safety issues*' or risk incurring liability, a provision echoed by s 16 of the Safety at Sports and Recreation Events Act 2 of 2010, if it may exercise no power over the event itself.

[15] SASCOC opposes PPA's application on the basis that the international cycling federation, UCI, will not sanction cycling events if CSA as the national federation has not sanctioned such events; and that CSA holds the power to control the sport of cycling nationally as the national federation which has nine affiliates in terms of an instruction of the Ministry of Sport and Recreation, with all members subordinate to SASCOC's constitution. SASCOC contends that this control is not limited to high performance sport only, although it is conceded that such power may not be expressly granted by statute; and that the provisions of the SASCOC constitution obliged CSA to adopt its 2012 constitution in order to give effect to the provincial and national structure of the sporting code which did not allow for autonomous operation by organisations such as PPA.

[16] There is no dispute between the parties that PPA's activities do not fall within the ambit of high performance sport contemplated in the NSRA.

Evaluation

[17] CSA is a national federation as defined in s 1 of the NSRA. This is so by virtue of its recognition '*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*'. It is recognition by the international controlling body that defines CSA as a national federation and neither the NSRA, nor any other statute, determines CSA to be the national federation for the sport of cycling.

[18] CSA's recognition by the international controlling body '*as the only authority for the administration and control*' of cycling does not confer upon CSA the power to administer and control cycling. Any such power of administration and control would arise consequent either to it being conferred by statute, or by way of a contractual relationship in existence between the parties.

[19] There exists no binding contractual relationship between CSA and PPA, with PPA neither a member of CSA, nor subject to the terms of CSA's constitution. Furthermore, the structure of governance for sport contemplated in SASCOC's constitution, does not bind voluntary associations such as PPA who elect not to seek or retain membership of or affiliation to the applicable national sporting federation. Accordingly, neither SASCOC nor the CSA holds any contractual entitlement to administer or control PPA, or to sanction its events.

No power conferred by law

[20] Fundamental to our constitutional order is the principle of legality: that the exercise of public power is legitimate only where it is lawful and that no public power or function may be exercised beyond that conferred by law. *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at paras 56 and 58.

[21] Public power is inevitably associated with a duty to act in the public interest rather than for private purposes. When deciding whether it is a public power that is exercised, the source of the power and the extent of state control over the function are relevant, although not decisive considerations. Hoexter, 2007 at 3-4. Parliament is not prevented from delegating subordinate regulatory

authority to other bodies, however the exercise of a public power or the performance of a public function must be in terms of an empowering provision.

Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995(4) SA 877 (C).

[22] In *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 47 O'Regan J stated that –

'It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials and the DG by sections 26(3) and (6) is constrained by the provisions of the Bill of Rights, and in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit. If rights are to be infringed without redress, the very purposes of the Constitution are defeated.' (footnotes omitted)

[23] The NSRA confers specific powers and functions upon a national federation. In terms of s 2(5) a national federation -

‘...must develop its sport and recreational activity at club level in accordance with –

- (a) the service level agreement referred to in section 3A;*
- (b) the development programmes referred to in section 10(3); and*
- (c) the guidelines issued by the Minister in terms of section 13A*

and submit the progress on such development to Sport and Recreation South Africa and parliament on an annual basis’.

[24] Section 3A requires a national federation to enter into a service level agreement, in the prescribed manner, with Sport and Recreation South Africa in respect of any function assigned to it by the NSRA; and in terms of s 6(1) a national federation ‘*must assume full responsibility for the safety issues*’ within its sport or recreational discipline. S6(2) and (3) concern the participation and support of national federations in high performance sport programmes and services and in the recruitment of foreign sportspersons. A national federation must in terms of s 10(2)(b) annually indicate in writing to Sport and Recreation South Africa ‘*the names of the specific clubs under its respective control*’, as well as the proportion of funding such clubs have received annually for development purposes from the national federation.

[25] Save for these specified powers and functions, the NSRA is silent on any further administration and control power to be exercised by a national federation. Consequently, the provisions of the NSRA neither directly, nor by regulation, confer any power on CSA to administer or control cycling as a code of sport or recreational activity, beyond those powers expressly provided in the statute.

Power cannot be implied

[26] There exists a presumption in favour of construing legislation in such a manner as that rights are not interfered with (*Pretorius v Transnet Bpk* 1995 (2) SA 309 (A) at 318C). Furthermore, courts are cautious of unduly extending provisions so as to alter existing law, or to impose burdens that previously did not exist or to allow statutes to be interpreted in a manner that permits surmise or conjecture. Where an extensive interpretation to a statute is given this must occur within the context of the scheme of the statute and where there are compelling reasons for it. LAWSA 360.

[27] Corbett JA in *Rennie NO v Gordon and another NNO* 1988 (1) SA 1 (A) at 22E-G stated that –

‘Over the years our Courts have consistently adopted the view that words cannot be read into statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands (footnotes omitted).’

[28] In addition, there exists a presumption that the legislature has dealt exhaustively with the subject matter of an enactment. It is therefore not for courts to supply omissions in the provisions of a statute. In *Stafford v Special Investigating Unit* [1998] 4 All SA 543 (E) at 553b–c Leach J made it clear that -

‘A court cannot act upon mere conjecture and speculate as to whether or not the legislature might have overlooked something, it cannot supplement a statute by providing what it surmises the legislature omitted. The court therefore

must give effect to what the act says and not what it thinks it ought to have said
 ...'

[29] Effect is capable of being given to the NSRA without an implication that by virtue of its recognition by the international controlling body, its role in developing sport at club level in accordance with specific agreements, programmes or guidelines, or its obligations with regards to safety, it is necessary that a power to administer and control cycling be read into the statute in favour of national federations. There is nothing in the statute to suggest that the legislature intended to grant such power to national federations. A different conclusion would be one of conjecture and speculation as to what was intended by the legislature.

[30] From the preamble of the NSRA it is apparent that the statute's purpose is to promote, develop and co-ordinate relationships between sporting bodies, including national federations such as CSA and other agencies, which would include PPA. The language and construction of the statute is not one that seeks to enforce administration and control. It follows that to read such a power into the statute would strain at its construction and undermine the principle of legality.

Safety obligations may be performed

[31] CSA relies on its obligation to '*assume full responsibility for the safety issues*' within its sport or recreational discipline, to support its claim that the power to administer and control has been conferred on it. The responsibility for safety issues is expressly conferred on a national federation in terms of s 6(1).

This provision is echoed in s 16 of the Safety and Sports and Recreational Events Act 2010, which requires the involvement of the national federation in the provision of safety and security at a sporting event.

[32] CSA's duty to assume responsibility for safety issues does not warrant as a necessary implication the conclusion that national federations are as a consequence of their safety obligations conferred unfettered powers of administration and control over their sport, recreational activity or even particular sporting events. This is given that a national federation such as CSA may assume responsibility for safety issues, and effect may be given to the applicable statutes in this regard, even in the absence of a general administration and control power, or indeed the national federation's consent having been granted for an event.

Relief

[33] This Court has jurisdiction in terms of s 21(1)(c) of the Superior Courts Act 10 of 2013 –

'in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[34] Although neither an existing dispute, nor the fact that a person may claim any consequential relief, are prerequisites for the grant of a declaration, the Court must be satisfied that the case is a proper one for the exercise of the

discretion conferred on it and that there are interested parties upon whom the order would be binding. LAWSA at 561; *Durban City Council v Association of Building Societies* 1942 AD 27 at 32.

[35] A declaration of rights will not ordinarily be granted where the question raised is academic, abstract or hypothetical. By its nature declaratory relief is essentially remedial and corrective and is most appropriate where '*it would serve a useful purpose in clarifying and settling the legal relations in issue*'. *JT Publishing (Pty) Ltd v Minister of Safety & Security* supra; *North Central Local Council & South Central Local Council v Roundabout Outdoor (Pty) Ltd* 2002 (2) SA 625 (D).

[36] In the current matter, PPA constitutes an interested person as contemplated in s 21(1)(c) of the Superior Courts Act. A dispute exists between the parties, upon whom an order of this Court would be binding, and useful purpose will be served in clarifying and settling the legal relations regarding the issue by a judicial determination of the matter. It follows that declaratory relief is competent and useful purpose will be served by granting such relief.

[37] PPA, in addition to declaratory relief, seeks an order interdicting and preventing CSA from representing to any person or body, including commercial sponsors, local authorities, national, provincial or local traffic and policing authorities, or cyclists, that PPA requires the prior sanction of CSA to organise or convene a cycling event, or that such sanction is a pre-requisite for any other necessary permission or approval granted by national, provincial or local authorities.

[38] For the reasons stated above, I am satisfied that PPA holds a clear right to the interdictory relief sought, that CSA through its conduct has made representations which do not reflect the true legal position and there exists to PPA the absence of an alternative remedy available. *Setlogolo v Setlogolo (1914) AD 221 at 227*. It follows that such interdictory relief stands to be granted.

[39] This being the case, there is no reason as to why costs should not follow the result, including the costs of two counsel.

Order

[40] In the result, the following order is made:

1. It is declared that the applicant, the Pedal Power Association, does not require the prior sanction or approval of the first respondent, Cycling South Africa, or members of the first respondent, in respect of cycling events organised by the applicant, including fun rides or league rides.
2. The first respondent, its officials or members, are interdicted and prevented from representing to any person or body, including commercial sponsors, local authorities, national, provincial or local traffic and policing authorities, or cyclists, that PPA requires such prior sanction, or that such sanction is a pre-requisite for any other necessary permission or approval granted by national, provincial or local authorities.

3. The respondents are to pay the applicant's costs, including the costs of two counsel.

KM SAVAGE
ACTING JUDGE OF THE HIGH
COURT

Appearances:

Applicant: L Rose-Innes and D Borgström instructed by Fairbridges

First respondent: P Myburgh instructed by Tinkler Inc

Second respondent: M Feinstein instructed by Rapeport Inc