REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 8363/2005

In the matter between

TIRFU RAIDERS RUGBY CLUB
Applicant

And

SOUTH AFRICAN RUGBY UNION First Respondent
GOLDEN LIONS RUGBY UNION Second Respondent
ELDORONIANS RUGBY CLUB Third Respondent
EERSTERUST RUGBY CLUB Fourth Respondent

Coram: YEKISO J

Delivered: 20 December 2005

Summary: Administrative Action – Natural and juristic persons – what constitutes – President's Council of the First Respondent resolving to change rules of fixtures of club championship games - participating clubs not consulted – conduct held to constitute administrative action within the meaning of the term in the Promotion of Administrative Justice Act, No 3 of 2000.
Administrative Action – Natural and juristic persons – what constitutes – factors to be taken into account.

JUDGMENT – DELIVERED 20 DECEMBER 2005

YEKISO, J

[1] The crux issue I had to consider in these proceedings in granting the order I did on 7 September 2005, was whether the conduct of the Management Committee of the First Respondent, in determining clubs to participate in play-off games, and later to proceed to the Supersport Club Championships, constituted exercise of public power or performed a public function contemplated in the definition of the term "administrative action" as defined in section 1 of the Promotion of Administrative Justice Act, No 3 of 2000. An answer to this question will, in turn, determine whether the provisions of the Promotion of Administrative Justice Act do apply to the conduct of the First Respondent complained of.

[2] These proceedings, which came before me on Wednesday, 7 September 2005, are a sequel to an application launched by the Applicant out of this Court, on Notice of Motion, for the relief in the following terms:

[2.1] that the Rules relating to forms and service, as required in terms of Rule 6 be dispensed with; that the time periods laid down in Rule 6 and Rule 53 be condoned and that this matter be heard as one of urgency in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court;

[2.2] an Order reviewing and setting aside the decision of the First Respondent, as contained in its circular dated 2 August 2005 bearing ref no CC/76.05, in accordance with the provisions of the Promotion of Administrative Justice Act;

[2.3] an Order directing the First Respondent to determine the Top

Black Club at the end of the 2005 rugby season which would have ended on 3 September 2005;

[2.4] an Order for costs against the First Respondent including costs consequent upon employment of two counsel. No cost order was sought against Second, Third and Fourth Respondent in the event they did not oppose the relief sought

[3] The application was issued on 26 August 2005 and enrolled for hearing on Thursday, 1 September 2005. For reasons which I do not consider pertinent for purposes of the Order I gave on 7 September 2005, the application was not heard on 1 September 2005. In the event the matter came before me on Wednesday, 7 September 2005. At the commencement of the hearing on 7 September 2005 *Mr Hodes* (with him *A D Brown*) for the Applicant, applied for an amendment of the Notice of Motion by the addition of the following paragraph as an alternative to the relief sought in terms of paragraph 2 of the Notice of Motion, namely:

> "alternatively in terms of the provisions of section 33 of the Constitution of the Republic of South Africa, 1996, in the further alternative in terms of the common law."

[4] *Mr Heunis,* for the First Respondent, opposed the application for the amendment sought. After hearing argument as regards the proposed amendment, I granted the application and ordered that the Notice of Motion be amended accordingly. After hearing argument on the merits I made the following Order:

> "1. The decision of the First Respondent, taken on the 15th July 2005 and contained in a circular dated the 2nd August 2005 and bearing reference no CC76/05 is hereby set aside;
>
> 2. It is hereby directed that the Applicant is entitled to participate in the

Supersport Club Championship scheduled to take place from 9-17 September 2005 in Cape Town as the Top Black Club for the North;

3. The First Respondent is ordered to pay Applicant's costs which shall include costs consequent upon employment of two counsel as also wasted costs of the 1st September 2005 and the 5th September 2005."

I did not give reasons for the Order I gave because of the urgency of the matter but I did indicate that these would be furnished on request. The First Respondent subsequently filed a request for such reasons with the Registrar. The reasons for the order I gave are set out in the paragraphs which follow.

THE PARTIES

[5] Before dealing with the merits of the matter, I deem it necessary to identify the parties cited in the proceedings as constant reference will be made to each one of the parties in the course of this judgment.

[5.1] The Applicant is Tirfu Raiders Rugby Club[1], a voluntary association which, in terms of its constitution, has the power to sue and being sued in its own name and having its principal place of business at Bill Jardine Rugby Stadium, cnr Springbok and Commando Roads, Industria, Johannesburg.

[5.2] The First Respondent is the South African Rugby Union, a juristic person capable of suing and being sued and/or capable of acting and being acted against in its own name, having its headquarters at First & Fifth Floors, SA Sports Science Institute Building, Boundary Road, Newlands[2].

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[1] Tirfu, is an acronym for Transvaal Independent Rugby Football Union and was established in 1898.

[2] Clause 9 of the Constitution of the First Respondent provides that the Union shall have its headquarters at Newlands, Cape Town, or such other place as the General Council of the Union may decide from time to time, and its area of jurisdiction shall be South Africa.

[5.3] The Second Respondent is the Golden Lions Rugby Union[3], a voluntary association having the power to sue and being sued in its own name and having its principal place of business at Ellis Park Rugby Stadium, Doornfontein, Johannesburg.

[5.4] The Third Respondent is Eldoronians Rugby Club[4] , similarly a voluntary association having the power to sue and being sued in its own name. It has its principal place of business at Eldorado Park Stadium, Cuming Road, Eldorado Park, Johannesburg.

[5.5] The Fourth Respondent is Eersterust Rugby Club[5], also a voluntary association having power to sue and being sued in its own name. It has its principal place of business at No 6 Unity Crescent, Eersterust, Pretoria.
Only the First Respondent is opposing these proceedings, the rest of the other parties ostensibly having elected to abide the decision of the Court.

POWERS OF THE FIRST RESPONDENT

[6] The main objects and powers of the First Respondent are set out in Clause 4 of its Constitution. Clauses 4.1.9 and 4.1.10, which in my view are pertinent in these proceedings, provide as follows:

> "4.1.9 To make by-laws, rules and regulations in relation to the Union and the Game and the Conditions under which such Game is played, to annul or vary any by-laws, rules and regulations so made and for the time being in force.
>
> 4.1.10 to determine and arrange all competitions and matches.

Clause 14.2 of the Constitution of the First Respondent establishes a number of sub-committees of which the Management Committee is one.

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[3] In terms of Clause 7 of the Constitution of the First Respondent, the Second Respondent is the member of the First Respondent. The Second Respondent is furthermore the rugby controlling body within the Province of Gauteng.
[4] The Third Respondent is a member of and an affiliate of the Second Respondent.
[5] The Fourth Respondent, in its capacity as a rugby club within Pretoria, is a member of and an affiliate of the Blue Bulls Rugby Union. The Blue Bulls is a member of the First Respondent pursuant to clause 7 of the Constitution of the First Respondent.

These sub-committees perform delegated functions and duties and derive their powers and functions from the Constitution of the First Respondent.

THE MERITS

[7] Apart from raising issues, on which I will elaborate later in this judgment, on basis of which the First Respondent contends the Applicant is not entitled to the relief sought, the factual allegations contained in the Applicant's founding affidavit are not seriously disputed. The following facts appear to be common cause or, it appears on basis of the papers, the First Respondent does not take issue with such factual averments:

[7.1] the [6]Format and General Rules for SA Rugby's Competitions for the year 2005 indicate that competitions at all levels of the game are based on a log system in terms of which the competitions and championships for the year are based on a log that is established during the course of the entire rugby season. The Format and the General Rules provide rules for such competitions as the Absa Currie Cup Competition; Vodacom Cup Competition; Absa Under 21 Cup Competition; Under 19 Cup Competition and several other competitions.

[7.2] the Supersport Cub Championship, in which all provincial club champions aspire to participate at the end of the rugby season, is not specifically mentioned in the Format and the General Rules, but this competition too, has over the years, customarily been based on the same log system approach, the top club to participate in this championship being chosen on the basis of the position on the log as at the end of the rugby season;

[7.3] 1992 saw the unification of the various sporting bodies within South Africa and since then black clubs became eligible to participate in the club championships under the auspices of the First Respondent on merit. During 2000, the First Respondent introduced a policy that the "top black clubs", these being the highest ranking black clubs in their

[6] The Format and General Rules: SA Rugby's Competition, 2005 are at p115 of the Record.

respective logs at the end of the rugby season, would also participate in the club championship. This policy was introduced to give effect to the empowerment and representative policies of the First Respondent.

[7.4] Before the introduction of the empowerment and representative policy referred to in the preceding paragraph, only the "traditionally white rugby clubs" took part in the Supersport Club Championships. Rugby clubs from traditionally disadvantaged communities were excluded from the Supersport Club Championship. It was during the year 2000 that the highest ranking black clubs on their respective logs at the end of the rugby season became eligible to participate in the Supersport Club Championship. The approach adopted to determine the best "white" clubs to participate in the Supersport Club Championships is based on the same log system, the top club being chosen on the basis of the log position at the end of the rugby season. It has similarly been an accepted practice of the First Respondent that the top black club within the Second Respondent is determined by having regard to the log as at the end of the rugby season for within the Second Respondent. The Applicant is the affiliate of the Second Respondent so that its record of performance in the black competition league is kept by the Second Respondent.

[8] Top rugby clubs from each of the fourteen Provincial Unions, which invariably and because of a number of reasons turn out to be "white teams", qualify to participate in the Supersport Club Championship. In the past 6 black teams, being top teams in their respective log positions, were eligible to participate in the Supersport Club Championship. However, at a meeting of the Management Committee held on 15 July 2005 it was decided that the top black team from the North and the top black team from the South would make up the compliment of sixteen teams to participate in the Supersport Club Championships. The fourteen (white) teams to participate in the Championship would be winners of the competition league in their respective Unions, determined on basis of the log position at the end of the rugby season. In terms of this decision, two top black teams, one from the North and one from the South would be added to the fourteen white teams from each of the fourteen Unions to make up a compliment of sixteen teams. Once the Management Committee had taken this decision, it was recorded in its decisions register and was later approved by the President's Council. There is a dispute as regards whether the Management Committee does have competence to make the decision it made. However, this dispute is not material for purposes of the Order I

made and for purposes of this judgment.

[9] The decision referred to in the preceding paragraph is recorded as follows in the decisions register of the meeting of 15 July 2005:

> "It was agreed that the Supersport Club Championship be moved to Kimberley as a result of the situation in EP. The competition will comprise of the 14 Provincial Club Champions, plus 2 best black clubs (one South and one North) determined by SA Rugby. (AM, JS and CB to finalize the necessary arrangements)"

The decision was subsequently approved by the President's Council at a meeting held in Pretoria on 29 July 2005. I should point out at this stage of this judgment that the decision taken by the Management Committee on 15 July 2005 does not authorise the determination of black teams eligible for the play-off games on basis of log positions as at 1 August 2005.

[10] The decision taken by the Management Committee on 15 July 2005 and subsequently approved by the President's Council on 29 July 2005 is not inconsistent with past practice and the rule that the top black club be determined according to the log at the end of the rugby season. However, the decision does not state that the top black club be determined on the basis of the log as at 1 August 2005 contrary to past practice. The submission made on behalf of the Applicant is that the determination of a top black club according to the log position as at 1 August 2005 does not accord with the decision of the Management Committee taken on 15 July 2005 and subsequently approved by the President's Council on 29 July 2005. A further submission made on behalf of the Applicant is that the establishment of a date for the determination of the top club to further proceed towards the Supersport Club Championship is not a matter which falls within the power of the Chief Operations Officer of the Management Committee in the person of

Mr Cliffie Booysen or the Management Committee for that matter.

[11] It is further submitted on behalf of the Applicant that in terms of the [7]Constitution of the First Respondent the power of the Management Committee is limited to "… oversee the day to day operations, manage the business and affairs of the Union and implement the strategies and policies of the Union …". The submission goes further to suggest that such powers and functions do not encompass the establishment of a date to determine the log positions of clubs for purposes of participation in the play-off games, and later to proceed to the Supersport Club Championship on a date other than at the end of the rugby season nor does it encompass authority to nominate a club to participate in the play-off games or the Supersport Club Championship on a date other than at the end of the rugby season. In short, the submission made on behalf of the Applicant is that the Management Committee or its employee, in the person of its Chief Operations Officer, acted beyond their respective powers in determining the log positions of clubs for purposes of participating in the play-off games and later to proceed to the Supersport Club Championships on a date other than the end of the rugby season.

[12] Having regard to what has been stated as regards the merits of this matter, it is thus submitted on behalf of the Applicant that the decision of the First Respondent taken through its Management Committee falls to be reviewed and set aside on a number of grounds, these being that the decision so taken is (i) *ultra vires* the powers of the Management Committee; (ii) that it is procedurally unfair; (iii) that it is irrational; (iv) that it is based on irrelevant consideration; and (v) that it is so unreasonable that no reasonable person could have taken such a decision. In making such submission the Applicant relies on the provisions of section 6(2)(a); 6(2)(c); 6(2)(f)(ii)(aa), (cc) and (dd); 6(2)(e)(iii) and (vi) of the Promotion of Administrative Justice Act. The submissions goes further to suggest that in the event that the decision of the Management Committee not being set aside, the Applicant will suffer extreme prejudice in the form of lack of exposure through print and electronic media when the Supersport Club Championship games are played; that the members of the Applicant club will not receive the benefit of exposure to talent scouts who attend such championship games solely for purposes of identifying talent and players with a potential; that such games are televised throughout the country, which

[7] The powers and functions of the Management Committee are set out in clause 14.2.1 under heading *Management Committee.*

process itself gives exposure to the participating clubs, its players and as well as existing sponsors and that lack of such exposure will impact negatively on future sponsorship as without sponsorship, rugby clubs can these days not survive.

[13] The First Respondent opposes the relief sought on the basis that the application brought on behalf of the Applicant is inappropriate in that the Applicant's reliance on the provisions of the Promotion of Administrative Justice Act is misplaced; that the Applicant was made an open offer by the Management Committee; that the offer made was fair and equitable under the circumstances and that the refusal of such an offer by the Applicant justifies an inference that the Applicant is not *bona fide* in the amicable resolution of the dispute. I now turn to consider each one of the grounds advanced by the First Respondent as the basis to oppose the relief sought.

THE INAPPROPRIATENESS OF THE APPLICATION

[14] In its prayer in terms of the Notice of Motion the Applicant seeks to have reviewed and set aside the decision of the First Respondent as contained in a circular dated 2 August 2005 bearing reference number CC/76.05. The circular referred to is cited fully in paragraph [21] of this judgment. What is contained and being conveyed to the various stakeholders in that circular, as regards the black clubs from the North, is that the Eldoronians from the Golden Lions Rugby Union, will play against the Eersterust Rugby Club from the Blue Bulls Rugby Union in a play-off game so that the winner of this encounter would proceed to the Supersport Club Championship as the top black club from the North. The circular gives the same directive as regards the black clubs from the South, the directive being that Tygerberg Rugby Club from the Western

Province Rugby Union being pitted against Delicious Rugby Club from the Boland Rugby Union. These clubs were determined on basis of their respective log positions as at 1 August 2005. This approach deviates from past practice when the log positions of clubs eligible to participate in play-off games, was determined at the end of the rugby season.

[15] It is abundantly clear, in my view, that the decision to adopt this approach, which deviates fundamentally from past practice, was made on 1 August 2005 and conveyed to the various stakeholders by way of a circular of the Management Committee dated 2 August 2005. The evidence shows that on Monday, 1 August 2005, the latter being the first working day after approval of the decision of the Management Committee by the President's Council on 29 July 2005, the Chief Operations Officer of the Management Committee, telephoned various Provincial Unions, including the Second Respondent, to ascertain the log positions of rugby clubs for purposes of determining the clubs eligible to participate in the play-off games. Thus, the decision to depart from past practice was taken on 1 August 2005. The circular of the Management Committee of the First Respondent dated 2 August 2005 merely conveys the decision taken on 1 August 2005.

[16] The Applicants contend in their papers that they were not afforded an opportunity to make representations before the decision complained of was made. The Applicants further contend in their papers that had they been afforded an opportunity to make representations they would have objected to the proposal on the grounds set out in paragraph [12] of this judgment. The Applicants thus contend that the Management Committee, in making the decision it made, apart from exceeding its powers, acted procedurally unfair and thus violated the *audi alteram partem* rule.

[17] It is correct, as suggested by *Mr Heunis* in his submission, that the Management Committee did not decide on specific teams to participate in play-off games, nor did the President's Council approve a decision in which the Management Committee specified teams to participate in

play-off games. That decision was taken by the Management Committee on 1 August 2005. The latter is the decision which is the subject of an attack in these review proceedings. The Applicant does not seek to attack the decision made on 2 August 2005 as *Mr Heunis* seeks to suggest in his submission. The suggestion by *Mr Heunis* that an impression is created that the Applicant seeks to attack the decision made on 2 August 2005 is clearly incorrect. In view of the observations I make in this paragraph, there is thus no merit, in my view, in the suggestion that the Applicant's application is either misdirected or not appropriate.

DOES THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT APPLY ?

[18] The First Respondent's further basis of opposing the Applicant's claim is premised on the contention that the provisions of the Promotion of Administrative Justice Act do not apply in the circumstances of this matter. This ground of opposition is based on the contention that the decision complained of neither constitutes exercise of public power nor performance of a public function contemplated in the definition "administrative action" as defined in section 1 of the Promotion of Administrative Justice Act.

[19] De Ville[8], comments that since the advent of the democratic order the courts have thus far not indicated when it would be appropriate to say that a public power has been exercised or, for that matter, a public function has been performed. But at p44 of the same work, the learned author comments that the phrase "exercising public power" or "performing a public function" primarily serves the function of distinguishing the *private* actions of organs of state and of natural and juristic persons from the *public* actions of these persons or bodies[9]. The author goes on to refer to *Van Zyl v New National Party* 2003(10) BCLR 1167 (C) p1187 at paragraph [75] where Van Reenen J held that the phrase "exercising a public power" was held to convey the ability to act in a manner that affects or concerns the public and that a decision by a political party to recall a delegate to the National Council of Provinces constitutes exercise of public power.

[20] Section 1 of the Promotion of Administrative Act, in so far as it is relevant for purposes of these proceedings, defines the term "administrative action" as follows:

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[8] JR de Ville: Judicial Review of Administrative Action in South Africa: 2003 Butterworths at p48.
[9] JR de Ville *ibid* at p44.

"'**administrative action'** means any decision taken, or any failure to take a decision by –

(a) ……..

(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 …"

[21] In the instance of this matter, it is common cause that the First Respondent, in terms of clause 2 of its Constitution, is a juristic person capable of suing and being sued in its own name. The conduct of the First Respondent sought to be reviewed is that which is reflected in the circular of the Management Committee, being Circular CC/76.05 (02/08/05) which, for sake of completeness, I propose to cite in full and reads as follows:

"**SUPERSPORT CLUB CHAMPIONSHIP – 2005**

NB: PLEASE IGNORE CIRUCLAR CC/75/05 (01/08/05)

Please be informed that the Supersport Club Championship will ***now*** take place from ***09 – 17 September 2005*** *in* ***Cape Town.***

Sixteen (16) teams, consisting of the 14 Provincial club champions, and the two (2) top black clubs (one from the North and one from the South) will participate in this tournament to be held from 09 – 17 September 2005 in Cape Town.

The SA Rugby Management Committee decided as follows in determining the two (2) black clubs to participate in the Club Championship.

North

Eldoronians from Golden Lions (home) will play against ***Eersterust*** from Blue Bulls to determine who will be the representative from the North.

South

Tygerberg from Western Province (home) will play against **Delicious** from Boland Rugby Union to determine who will represent the South.

[Log positions as determined on Monday, 01 August 2003]

The Provinces involved in the above play-offs are kindly requested to liaise with this office to make arrangements for these matches to be played before 19 August 2005 in order to determine the two (2) clubs to make up the total of sixteen (16) for the Supersport Club Championships.

Please feel free to liaise with me should you require any further information.

Yours sincerely

CLIFFIE BOOYSEN
COO: RUGBY OPERATIONS
CCAB/vg"

[22] What is clearly evident in terms of this circular, in the first instance, is that contrary to the decision of 15 July 2005 in terms of which the Supersport Club Championship would be held in Kimberley, this being the decision which was approved by the President's Council on 29 July 2005 the Supersport Club Championship games would now be held in Cape Town. The President's Council did not approve a decision that the Supersport Club Championship be held in Cape Town. In the second instance, it is abundantly clear that the log positions of clubs, which is the Applicant's main gripe, were determined on 1 August 2005, as against the end of the rugby season consistent with past practice.

[23] It will be noted that the circular informs the stakeholders that the Management Committee had determined that the Eldoronians from the Golden Lions Rugby Union would play Eersterust from the Blue Bulls Rugby Union to determine the top black club from the North, whilst Tygerberg from the Western Province Rugby Union would play Delicious from the Boland Rugby Union to determine the top black club from the South. Neither the Management Committee at its meeting of 15 July 2005 decided which teams from the North and which teams from the South would participate in these play-off games nor did the President's Council at its meeting of 29 July 2005 approve specific teams to participate in play-off games. All that the Management Committee decided at its meeting of 15 July 2005 was that the top black team from the North and the top black team from the South would make up the compliment of 16 teams to participate in the Supersport Club Championship to be held in Kimberley from 09 – 17 September 2005. The teams mentioned in the circular were determined, ostensibly by the Chief Operations Officer, on Monday, 1 August 2005. This he determined on basis of the log positions of the clubs mentioned as at 1 August 2005. The Chief Operations Officer was neither authorised by the Management Committee nor the President's Council to do so. The Chief Operations Officer, in acting in the manner it did, clearly exceeded and acted beyond its powers. This is much evident in the letter by the Chief Operations Officer addressed to the Acting Chairperson of the Applicant dated 17 August 2005. The submission thus made on behalf of the Applicant is that the Chief Operations Officer acted *ultra vires* the powers of the Management Committee.

[24] In regard to the issue of the applicability or otherwise of the provisions of the Promotion of Administrative Justice Act, what I am required to determine, in the first instance, is whether the First Respondent, in determining the log positions of the teams to participate in the play-off games, and later to proceed to the Supersport Club Championships 2005, exercised a public power or performed a public function contemplated in the definition of the term "administrative action". The question of whether or not the First Respondent, through its Management Committee, exercised a public power or performed a public function in determining teams to participate in the play-off games, and later to proceed to the Supersport Club Championship games, is an answer to the applicability or otherwise of the provisions of the Promotion of Administrative Justice Act in the instance of these proceedings.

[25] As is correctly submitted by *Mr Hodes*, for the Applicant, the exercise of public power is to be distinguished, as for an example, from the conduct which is merely confined to internal affairs of the entity. Examples of internal affairs of the entity which come to mind would, in general, involve the hiring of staff; the determination of disciplinary codes; purchase of equipment; decisions such as when annual leave would be due and of course, the list is not exhaustive, and would include all such conduct which is not sufficiently public in nature as to warrant the exercise of the Court's supervisory jurisdiction[10]. In *Van Zyl v New National Party & Others,* supra at p1187 paragraph 75, Van Reenen J observed:

> "No statutory definition of the concepts 'exercising a public power' and 'performing a public function' has been provided for in AJA. Accordingly, recourse has to be had to the dictionary meaning thereof. The *Shorter Oxford English Dictionary's* definition of 'public', in the context, means belonging to, affecting or concerning the community or the nation and 'power' means the ability to act in a particular way. On the basis of the dictionary meanings of the constituent components of the concept 'exercising a public power' it conveys the ability to act in a manner that affects or concern the public."

[26] The powers of the First Respondent, apart from those set out in paragraph [6] of this judgment, involve the following in terms of its Constitution, namely:

Clause 4.1.10 To determine and arrange all competitions and matches.

Clause 5.1.1 To govern the laws regulating and controlling the Game, and to originate and promote improvements in the Laws of the Game and the competitions and/or matches played under its auspices.

Clause 6.1.2.7 The Management of tours, tournaments and competitions.

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[10] JR de Ville *ibid* at p48, particularly at footnote 129.

What also has to be noted is that the First Respondent exercises these powers throughout South Africa, being its area of jurisdiction, in terms of Clause 9 of its Constitution.

[27] The First Respondent exercises these powers on its members, being the Provincial Unions and other associate members. The Provincial Unions, which are members and affiliates in terms of clause 7 of its Constitution, are themselves autonomous voluntary associations and in positions of authority to the clubs affiliated to them. The position of authority is clearly hierarchical, with the First Respondent occupying a position of authority and the Provincial Unions and their affiliate clubs being in a subordinate position. The relationship of authority and subordination is clearly evident.

[28] The Provincial Unions and the clubs affiliated to these Unions, in turn, have stakeholders who have a substantial interest in their very existence. These stakeholders would be the sponsors, who would have an interest through their sponsorship programmes, members of the clubs affiliated to these Unions and the rugby loving public. The public interest in these organisations cannot be over emphasized. There is, in my view, a significant public interest element involved in these organisations to constitute a need to act in a manner that affects or concern the public as observed by Van Reenen J in *Van Zyl v New National Party and Other,* supra. I am making these observations mindful of what this Court said in *Marais v Democratic Alliance* 2002(2) BCLR 171(C) at paragraph 51 in which Van Zyl J made a point that mere public interest in a decision does not make it an exercise of public power or performance of a public function.

[29] The Management Committee, in determining the log positions of clubs on 1 August 2005, purported to manage the affairs of the First Respondent. In doing so, it was exercising power and was performing a function as an organ of the First Respondent. The exercise of such power and the performance of such function did not relate to the internal affairs of the First Respondent but was directed to the external, independent and autonomous bodies such as the Second, Third and Fourth Respondents. In my view the conduct of the First Respondent complained of is sufficiently public in nature to warrant the application of the provisions of the Promotion of Administrative Justice Act. The conduct of the First Respondent complained of, in order to constitute “administrative action” should be derived from an empowering provision.

[30] The phrase "empowering provision" is defined in section 1 of the Promotion of Administrative Justice Act to mean "a law, a rule of common law, customary law, or an agreement, instrument, or other document in terms of which an administrative act was purportedly taken". When the Management Committee determined specific clubs to participate in the play-off games, it purported to exercise a power or purported to perform a function in terms of the Constitution of the First Respondent. That the Management Committee exceeded its powers does not negate the fact that, in its ordinary day to day business, it derives power and authority from the Constitution of the First Respondent. It therefore follows, in my view, that the Constitution of the First Respondent very well constitutes the required empowering provision.

[31] It is contended on behalf of the Applicant, and this appears to be accepted by the First Respondent, that past practice, at least since the year 2000, has been that the top black club to participate in the Supersport Club Championship has always been determined by having regard to the log as at the end of the rugby season of the Union to which such a club is an affiliate. Based on this practice the Applicant was adjudged the top black club within the Second Respondent for the rugby seasons ending 2000, 2001, 2002 and 2003. It is further contended on behalf of the Applicant that in the year 2004, and despite the Applicant once again being the top black club within the Second Respondent as at the end of the rugby season in that year, another club, the Soweto Rugby Club, was invited to the Supersport Club Championships. Apart from this latter event, the top black club was consistently determined at the end of the rugby season of the year in question.

[32] Consistent with the aforementioned practice, the Applicant had every expectation in the world, as has always been the case in previous years, that the top black club would be determined on the basis of the log positions as at the end of the 2005 rugby season. The Applicant, so it is further contended on its behalf, had expected that it would once again be adjudged a top black club at the end of the 2005 rugby season. As a matter of fact, as at the end of the 2005 rugby season the Applicant once again attained a top log position in the league within the Second Respondent, having accumulated 50 points on the log as against 43 points accumulated by the Third Respondent. But for the decision of the Management Committee of the First Respondent taken on 1 August 2005, the Applicant would have qualified for the play-off games and, in all probability, would have later proceeded to the Supersport Club Championship scheduled to have taken place in Cape Town on 9-17

September 2005.

[33] Because of the decision the First Respondent took through its organs, the Applicant contends that its right, in the form of a legitimate expectation, was adversely affected. That the doctrine of legitimate expectation has become part of our common law was confirmed by Dukada AJ as far back as 1996 in *Jenkins v Government of the Republic of South Africa* 1996(8) BCLR 1059(Tk). Even though no reference is made to the doctrine of legitimate expectation in section 33 of the Constitution of the Republic of South Africa, 1996, that the doctrine has since become part of our law is entrenched by the provisions of section 3(1) of the Promotion of Administrative Justice Act.

[34] The requirements to found a legitimate expectation have recently been articulated by Cameron JA in *South African Veterinary Council & Another v Szymansky* 2003(4) SA 42(SCA) at p49 para 19 as being:

32.1 the representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification;

32.2 the expectation must be reasonable;

32.3 the expectation must have been induced by the decision-maker;

32.4 the representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.

[35] Having regard to the observations I made in paragraphs [24] and [25] of this judgment, it cannot be said that the Applicant's claim that its rights, in the form of legitimate expectation, were adversely affected is devoid of substance. Based on the evidence before me, there is merit in the submission on behalf of the Applicant that the decision to use a date, other than a date after the end of the rugby season, to determine the top black club within the jurisdiction of the Second Respondent, constituted a fundamental change in approach from the previous years and, as such, runs contrary to the Applicant's expectation, which is legitimate, that the approach to determine the top black club would be

the same in respect of the 2005 rugby season as in previous years.

[36] In my view the Applicant has succeeded to make out a case that its rights, in the form of legitimate expectation, were adversely affected by the decision of the Management Committee of the First Respondent taken on 1 August 2005. In concluding this issue, I thus determine that the Management Committee of the First Respondent, in taking the decision it did on 1 August 2005, exercised a public power and performed a public function as contemplated in the definition of "administrative action" as defined in section 1 of the Promotion of Administrative Justice Act. I accordingly determine that the provisions of the Promotion of Administrative Justice Act are applicable in the instance of this matter.

[37] In the light of the observations I have made in the preceding paragraph, I further determine that the Management Committee, to the extent that the decision it took had a potential to affect the Applicant's existing rights or a legitimate expectation, failed to afford the Applicant an opportunity to make representations and, through this omission, the First Respondent violated the provisions of section 3(1) of the Promotion of Administrative Justice Act.

[38] Furthermore, the decision of the Management Committee to determine the log position of clubs on 1 August 2005, as against at the end of the rugby season as has happened in previous years, was not rationally connected to the purpose sought to be achieved, being, the identification of the top black rugby club to participate in the Supersport Club Championship. In so doing, the first Respondent violated the provisions of section 6(2)(ii)(aa) of the Promotion of Administrative Justice Act.

[39] And furthermore, the approach adopted by the Management Committee of the First Respondent, by virtue of its decision of 1 August 2005 in regard to the determination of the top black club for the rugby season ending on 3 September 2005, constitutes a discriminatory and inappropriate approach, and is thus unconstitutional or unlawful as contemplated in section 6(2)(i) of the Promotion of Administrative Justice Act.

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[40] The further ground advanced by the First Respondent in its

opposition to the relief sought, is based on an offer made by the First Respondent to the Applicant which the First Respondent contends was fair and equitable and which the Applicant ought and should have accepted. On 31 August 2005, somewhat three days before the end of the black rugby league season within the Second Respondent, the First Respondent made an open offer to the Applicant settle the matter on the basis that the Applicant play the Third Respondent in a play-off game to determine "which black rugby club should represent the North at the forthcoming Supersport Club Championship."

[41] This offer entailed that two teams from within the Second Respondent, play each other in a play-off game despite the fact that the black rugby league season within the Second Respondent had not ended. The practice in the past had been that a top black club from within the Second Respondent (Golden Lions Rugby Union) play a top black club from the Blue Bull Rugby Union, in a play-off game to determine which top black team from the North would proceed to the Supersport Club Championship. Thus, the offer by the First Respondent was still contrary to the established past practice and did not have the potential to determine and identify the top black team from the North. Moreover, the offer did not include or deal with the question of costs.

[42] The Applicant did not accept the offer on the basis that it did not constitute an acceptable solution, and indeed a legally valid solution, to the problem which the First Respondent had created. In my view, the rejection of the offer by the Applicant was not unreasonable in the light of the circumstances prevailing at the time. The relief sought by the Applicant could therefore not be refused on this further ground.

[43] It is for the reasons set out in this judgment that I granted the Order referred to in paragraph [4] of this judgment.

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N J Yekiso, J