

**There is no such rule as  
'Under Administration' in  
South African Football**

**Not  
allowed!**



# The Abuse of Article 2.17.16 and the Removal of Elected Officials

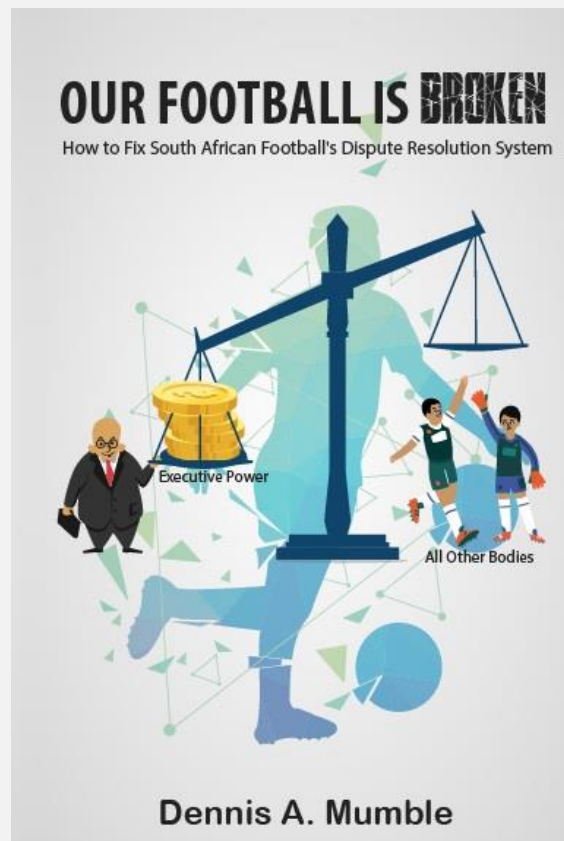
Extracted from *Our Football is Broken: How to Fix South African Football's Dispute Resolution System* (MFH Publishers, 2022)

**NOTE:** On 26 March 2022, the SAFA Congress approved an addition to the powers of the SAFA NEC to inquire into the administrative and/or financial affairs of a Member. This addition is an admission that the NEC never possessed that power before, as it merely duplicates the wording of Article 2.17.16 of the Statutes.

SAFA's recent history is littered with examples of elected officials being removed from office using *ad hoc* committees, in particular. It has become an unsavoury practice where the opponents of the leadership are usually removed using the broad provisions of Article 2, without citing its enabling regulation. Operationalists (those who regard the constitution as a first-instance law, subject to interpretation located within their own biases) have used the vague provisions of this article to pursue their political opponents.

It must be made clear that SAFA already has a regulatory mechanism to remove elected members of its bodies – that is, the Parliamentary Authority as prescribed by Article 3.2 of the *Standing Orders for SAFA Meetings*. However, the National Executive Committees typically arrogated the power to remove elected officials to themselves when it expelled two of its number for calling for the SAFA President to be investigated for corporate governance failures.

For many decades, many of SAFA's meetings had an aura of disorganisation and



was sometimes chaotic when overly vibrant “points of order” were raised for even the most mundane points. The SAFA Presidents struggled to control these meetings. The SAFA Secretariat then proposed the *Standing Orders for SAFA Meetings* which was adopted at the SAFA Congress of 19 July 2013. This regulation created greater certainty on how motions were to be raised by introducing basic parliamentary procedure.

Article 3.2 of the *Standing Orders for SAFA Meetings*, states that “*The Parliamentary Authority of SAFA shall be the Robert's Rules of Order as revised from time to time.*” Sections 62 and 63 of the *Robert's Rules of Order Newly Revised* (RONR)

makes extensive provision for the removal from office of elected officials and incorporates all the provisions of the *Promotion of Administrative Justice Act, 2000*.

However, even if it can be argued that the constitution is silent on the matter of removal from office of elected officials and that the judicial bodies of the Association do not have jurisdiction (which is denied), the Parliamentary Authority of the Association must be invoked for this purpose. Should there be a conflict between the statutes and the RONR, the provisions of the SAFA Statutes shall take precedence over the RONR.

Whether it is the judicial bodies or the Parliamentary Authority that is used for this purpose, it is trite law that the Executive does not have this authority. If it did, the framers of the statutes and FIFA would have included it among the powers conferred on the Executive in Article 34 of the SAFA Statutes. This point is further emphasised in FIFA and CAS jurisprudence. Both these bodies have consistently applied the *ubi lex voluit dixit, ubi noluit tacuit* legal principle – commonly applied in Roman Dutch law – which literally means “if the law means something, it says it”.<sup>1</sup> This principle was acknowledged when the drafters of the 2022 edition of the SAFA Statutes incorporated a specific provision (Article. 32.13) granting the NEC authority to suspend a person for the first time in SAFA’s history.

In a classic case of executive overreach, the SAFA NEC was recently advised by one of its members that it was possible to use the

“*Unforeseen Contingencies and Force Majeure*” clause to abrogate some of the provisions of its Regulations and certain clauses of the SAFA Statutes to discipline a Member. The clause provided that “*The SAFA NEC shall have the final decision on any matters not provided for in the Statutes or in cases of force majeure.*” [my emphasis]

But, as noted above, responsibility for disciplinary matters *is adequately provided for* by the establishment of the judicial bodies in the statutes and the existence of a Parliamentary Authority. The executive cannot serve as an alternate judicial body and utilise opaque provisions such as the “*Unforeseen Contingencies and Force Majeure*” clause. The direct applicability of FIFA and CAF regulations clause must also be considered irregular. The SAFA Statutes are not silent on disciplinary matters.

Football officials often conflate the various sanctions outlined in this section by endowing it with the same meaning. Therefore, euphemistically, suspension is also a ban; dismissal takes on the same meaning as expulsion; expulsion is seen to be the same as dismissal, etc. As demonstrated in the case abstract from the North West Province elsewhere in this book, a disciplinary committee chairperson conflated these terms, using the same language employed by the clueless football officials who initiated the charges against the accused.

### ‘Inquiring into the Affairs’ of Members

The following account is derived from personal experience, both as the Chief Executive Officer of the Association and as a former member of the Football

<sup>1</sup> “This construction of the FIFA Statutes conforms to the interpretive principle *ubi lex voluit dixit, ubi noluit tacuit* (applied on several occasions by CAS panels: see, e.g., CAS 97/176) and is confirmed by FIFA’s practice, as recalled by the Respondent [FIFA] and not refuted by the Appellant [NFF].” – Extracted from CAS 2014/A/3744 & 3766 Nigerian

*Football Federation (NFF) v. FIFA (para. 193) in reference to the interpretation of Art. 17.3 of the FIFA Statutes that does not state that FIFA shall have the power or duty to recognize elections of its member associations.*

Transformation Forum, whose noble objectives were horribly turned on its head by a leader whose conduct has divided South African football more than any other in the history of the organisation. The pages that follow outline this divisive role in more detail and how this behaviour accelerated the irregular use of a favourite clause in the Statutes to intervene in the internal affairs of SAFA Members.

This section seeks to correct the deeply-held misconception of the meaning of Article 2.17.16 of the SAFA Statutes, and its counterparts in the *Standard Statutes*, and will demonstrate how many leaders have not taken the time to acquaint themselves with the intricacies of the legislation they are charged with implementing.

For some time now executive committees have invoked Article 2.17.16 to intervene in matters considered intractable and/or where the matters under the control of the affected Member are not resolved in a manner satisfactory to the mother body. All too frequently, however, this clause has also become a favourite go-to clause to settle political scores. This culture became especially pronounced in the 2 years after the 2013 SAFA national elections when the systematic purging of all of the SAFA President's 2013 political opponents commenced. The Membership Affairs Committee became the *de facto* Disciplinary Committee for perceived Regional misconduct.

In addition to the main challenger being subjected to a contrived takeover of the schools football programme, former members of the SAFA NEC who supported a rival candidate were targeted in various Regions throughout the country.

Whilst there are many other examples of political vendettas against rivals of the SAFA President, this section concerns itself

with the abuse of Article 2.17.16 as a disciplinary tool.

In 2014, the SAFA eThekweni Region, like many other Regions at the time, had not completed the process of aligning its statutes with that of the SAFA Standard Statutes. The Region nevertheless went to elections without ensuring that five of its LFAs conducted their elections before the Regional elective Congress. The intention behind this decision of the SAFA Congress was to ensure that all SAFA structures were representative of the membership at all levels. The decision to intervene in this Region ushered in a long and protracted legal fight that led to the near-fatal split of football structures in one of the country's largest and most successful Regions.

A vocal supporter of the SAFA President was encouraged by him to establish parallel structures throughout the Region with a promise that his structure would be recognised by the Association. The SAFA President also despatched a Task Team to 'regularize' matters in the Region, a commonly used tactic for removing political opponents, in this case the Regional President who was a key supporter of his main rival in 2013.

The key point here is to illustrate how Article 2.17.16 was abused because many other Regions had not aligned their statutes, yet they were not subjected to the same treatment. In this case, the action was in retaliation for supporting another candidate. I was informed on numerous occasions by the SAFA President that we needed to 'deal' with that Regional President, noting that we could not allow him to go to elections without those five LFAs having completed their processes.

A resolution was pushed through the SAFA NEC to invoke Article 2.17.16 to take over the Region and remove the elected Executive Committee, whilst encouraging the rival candidate to set up parallel

structures in the Region. No less than six SAFA NEC and staff members were subsequently deployed to that Region to go and ‘fix’ it.

After seven years of turmoil and multiple court decisions later, the Region was finally placed ‘under administration’ in 2021 after enormous damage was done to football structures and development in the Region. A former President of the Association was deployed to regularize matters in the Region and lead it to its first elections in seven years.

Ironically, the candidate who eventually triumphed in the Region soon realised the duplicity of this conduct and started asking questions about the motive of the SAFA President. It may take generations for this Region to regain its former glory as the preeminent producer of the country’s best football talent.

A similar scenario played itself out in the SAFA Sedibeng Region when in the year following the election, an Administrator was appointed to run the affairs of the Region, ostensibly because of the lack of football competitions. Once again, we saw the targeting of a Regional President who was the campaign manager of the SAFA President’s main rival in 2013. The Administrator appointed in that Region was also a sitting NEC Member and administered the Region for four years until a ‘suitable’ leader could be found. At the time of the takeover, none of the 52 Regions were in full compliance with the 31-point compliance criteria.

The same pattern was repeated after the 2018 election when a Task Team was despatched to the SAFA Capricorn Region to depose the elected leadership of the Region because the then President of the Region was suspected of supporting a rival candidate for the Presidency in 2018. Many other examples abound where the dreaded

“2.17.16” was invoked to deal with political opponents.

Yet, other examples abound where this clause was not invoked against allies of the current President. For instance, over many years there have been complaints about massive financial mismanagement in the SAFA West Coast Region, with reams of evidence produced, but no action taken, even after the matter was reported to the SAFA Ethics Committee and the FIFA Ethics Committee. The FIFA Ethics Committee referred the matter to the SAFA Ethics Committee, who has not taken any action in the four years since this referral was made.

Similarly, football ground to a complete halt in the SAFA Dr Ruth Segomotso Mompati Region in the North West Province for a few years, but no decision was taken to place it ‘under administration’. There are many other examples where Regions simply did not function as expected, but were not subjected to intervention because they were not political opponents of the SAFA President.

Generally, experience has shown that when this Article was invoked, it left little room for such a decision to be challenged and the Members of the Regional Executive Committee were not typically equipped with the resources to challenge the decision, understanding it to be a political decision from the higher decision-making structure.

When this Article was invoked, it traditionally meant that entire elected executive committees must be removed – although there is no language to this effect in any SAFA regulation, especially in the particular language of Article 2.17.16 – the go-to provision for such drastic intervention.

Executive committees are not routinely schooled on some key principles of governance, key among which is the

separation of powers doctrine and some other governance practices commonly found in well-governed organisations. Heck, they do not even read the plain language of the rules to comprehend the meaning of such, as is the case with Article 2.17.16, as I shall demonstrate in detail in this section.

There is an abiding belief that the provisions of the constitution must be delegated by the leadership instead of them following its mandates. So, the weaponisation of the Statutes and Regulations should not come as a surprise.

### Dissecting the Meaning of Article 2.17.16

What then is the significance of Article 2.17.16 (*Aims, Objectives and Powers of the Association*)? This Article reads as follows:

*2.17.16  
to inquire into the administrative and/or financial affairs of Members, and, where necessary, to recommend corrective measures in this regard, and if these measures are not implemented to take over the administrative and/or financial affairs of the Member until these are placed on a satisfactory footing.*

Let us break this down and examine what the role of an executive committee is in the operationalisation of this Article. There are two major dimensions and four key phrases in this Article that needs detailed examination:

Dimension No.1 is *inquisitorial*, such as investigating the administrative and/or financial affairs of a Member.

Dimension No. 2 is *punitive* in nature, such as the imposition of a sanction in the form of a takeover of the administrative and/or financial affairs of a Member. It is described as a sanction because it is disciplinary by nature and affects the condition of the recipient in a negative way,

such as being removed from an elected position, sometimes permanently. This therefore subjects this type of action to the principles of procedural fairness and legality.

These two dimensions are constitutionally assigned to different bodies of the Association, but a fundamental misapplication of the clause has led to serious abuses of power throughout the organisation. Executive Committees have typically read more into the clause than its literal meaning and have given it an implied status far beyond its actual meaning.

Let us examine the meaning of the first operative phrase of *Dimension No.1*: ‘*to inquire*’. In its ordinary dictionary definition it means ‘*to ask for information*’. In its legal context, the dictionary at [findlaw.com](http://findlaw.com) defines it as:

- i. a request for information;  
[or secondarily]
- ii. a systematic official investigation often of a matter of public interest especially by a body (as a legislative committee) with power to compel testimony.

As will be shown further down in the example of the Constitutional Court judgement, the failure to understand the meaning of the clause has serious implications for the rule of law throughout SAFA structures.

The second operative phrase in Article 2.17.16 is ‘*into the administrative and/or financial affairs of Members*’. This requires an examination of what constitutes administrative and/or financial affairs.

First, let us look at the division of responsibilities in the running of the Association. The football governance structures consist of several bodies, including:

- i. A Congress (the supreme and legislative body), Article 19.1(a);
- ii. An Executive Committee (the executive body), Article 19.1(b);
- iii. A Secretariat (the administrative body), Article 19.1(c);
- iv. The Judicial Bodies (Disciplinary Committee, Appeal Board and Ethics Committee), Article 19.1(f) [referenced as Independent bodies in the 2022 Statutes.

Parenthetically, the other bodies of SAFA are: the Emergency Committee and the standing and ad-hoc committees. Each of these bodies have specific roles assigned to them consistent with the separation of powers doctrine which is expressed throughout the Statutes. It follows that both the Executive and the Secretariat perform “administrative actions” *for the purposes of review in the South African judicial system only*, as expressed by the courts, with the Executive Committee also having obvious executive/policymaking responsibilities.

But, the Secretariat’s specific administrative responsibilities are contained in fourteen (14) separate Articles throughout the Statutes and these are insulated from executive interference by Article 34.1.1. The same Article prohibits the executive committee from interfering in the responsibilities of the other bodies of the Association.

The Executive’s role is limited to that of a governance and policymaking nature and those areas specifically not provided for in the Statutes as captured in Article 73 (*Unforeseen Contingencies and Force Majeure*). This distinction becomes important in the consideration of what constitutes “administrative affairs” explained later in this chapter.

In a well-known sports case, the South African Constitutional Court defined

“administrative affairs” and “administrative action,” with “administrative action” contextualised in respect to Section 33 of the Constitution and judicial review. The term “administrative affairs” is used to describe the various functions that constitute administrative affairs. Understanding the meaning of these two important clauses will demonstrate how Article 2.17.16 has been misinterpreted and used incorrectly in SAFA.

The third operative phrase in this clause, which constitute *Dimension No.2*, is to ‘*recommend corrective measures in this regard*’. Once the entity tasked with conducting the investigation has completed it, the Executive will then determine if any further steps are warranted and what the nature of those further steps are.

It can conduct its own inquiry into potential ethics infractions by creating an ad hoc committee for that purpose (Article 56.6), but the results must still be forwarded to the Ethics Committee for adjudication if disciplinary action is considered appropriate. Unlike the interpretation of a Senior Counsel discussed elsewhere in this book, this phrase does not apply to all alleged ethics violations and should be interpreted *ejusdem generis*.

The *ejusdem generis* principle finds application “*from the canons of statutory interpretation in law. When more general descriptors follow a list of many specific descriptors, the otherwise wide meaning of the general descriptors is interpreted as restricted to the same class, if any, of the preceding specific descriptors*”<sup>2</sup>.

“*In South African law, the principle also asserts that a general phrase which is contained at the end of the list is to be*

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<sup>2</sup> Wikipedia – List of Latin Phrases

*limited to the same category as found in the specific list.”<sup>3</sup>*

*“It is one of our acknowledged principles of construction that where words of limited meaning are followed by others of general application the latter are limited to things ejusdem generis with those enumerated before them. The principle is known as the ejusdem generis rule and before it can be applied some common quality or common denominator must be found which belongs to each limited meaning.”<sup>4</sup>*

Thomson Reuters Practical Law also describes *ejusdem generis* as:

*The rule requires that where in a statute there are general words following particular and specific words, the general words must be confined to things of the same kind as those specifically mentioned.<sup>5</sup>*

It is not true that Article 56.6 can be used for suspected violations that do not fall within the class of ethics violations. For any other disciplinary measure, the Executive Committee must act in accordance with Article 109 of the SAFA Disciplinary Code and hand the matter over to the Disciplinary Committee approved by Congress for adjudication. As shown above, an [Executive Committee’s disciplinary powers](#) are constitutionally restricted to only three areas.

It must be clear at all times that the corrective measures referred to in Article 2.17.16 are restricted to matters “*in this regard*”, meaning the administrative and/or financial affairs of the Member. So, even the judicial bodies cannot exit this clause by imposing penalties not related to the

misconduct related to the administrative and/or financial affairs of the Member.

This also means that executive committees may not be removed by operation of this Article 2.17.16. The removal of an Executive Committee must of necessity be in response to the total collapse of governance that cannot be remedied through a recall or a motion of no confidence (which is allowed as a main motion in parliamentary procedure) at a Congress using the constitutional mechanisms to propose a motion for recall or through Section 62 of the Parliamentary Authority (RONR) that provides the mechanism to remove elected officials from office for gross neglect of duty or gross misconduct – but still not without a trial.

The Executive Committee performs an executive function and can be instructed to apply the corrective measures to correct the flaws in the administrative and/or financial affairs of the said Member. If indeed the Executive Committee is proven to be responsible for the malaise, then they can be collectively charged with misconduct and subjected to a fair disciplinary process which may eventually yield the desired outcome – but not before!

Following the announcement of the disciplinary sanction by a judicial body, the fourth operative phrase “*until these are placed on a satisfactory footing*” enters the equation. This section clearly creates an expectation that the sanction or the administrative action taken has a defined end in mind in the same manner that all penalties for misconduct are for a defined period – with the possible exception of an expulsion. However, even expulsions are not by definition permanent as sports jurisprudence generally allow re-

<sup>3</sup> Dissertation: Faheem Mohamed –A Critical Analysis of the Winding Up Grounds as Set Out in S81(1)(b) of the Companies Act

<sup>4</sup> Colonial Treasurer v Rand Water Board 1907 TS 479 at 484; R v Nolte 1978 AD 377 at 382.

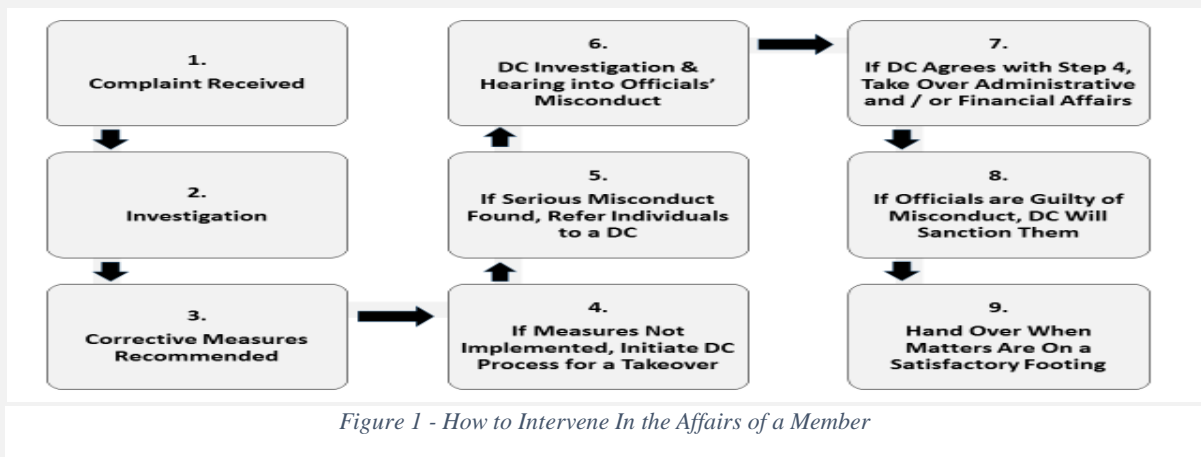
<sup>5</sup> <https://ca.practicallaw.thomsonreuters.com/>

application after a period of six years has lapsed.

The architects of the Statutes never intended for any sanction to be open-ended. However, common practice has turned the activation of Article 2.17.16 into a permanent removal of an elected Executive Committee without consideration for the actual meaning of this Article. The clause itself signals an expected termination of the sanction (*until these are placed on a satisfactory footing*) thereby adhering to the principle of proportionality.

It is trite that the separation of powers doctrine dictates that there are executive, administrative and judicial functions to be exercised in the implementation of Article 2.17.16 of the Statutes.

- iv. If the corrective measures are not taken, a disciplinary process is initiated to impose a sanction such as a takeover of the administrative and/or financial affairs of the Member;
- v. If serious misconduct is suspected, the matter is then referred to a judicial body;
- vi. In terms of Article 110 of the SAFA Disciplinary Code, investigations into disciplinary complaints are to be conducted by the SAFA Secretariat under the guidance of the Chairperson of the SAFA Disciplinary Committee;
- vii. Once the judicial body has pronounced guilt, it can then prescribe the takeover



There are nine (9) possible process steps in the implementation of this Article which takes a progressive approach to remedying perceived or actual misconduct:

- i. The Executive receives a complaint of possible misconduct;
- ii. The Executive takes a decision to inquire by way of an *ad hoc* committee or by tasking the Secretariat to look into the matter;
- iii. Corrective measures are recommended if the investigation has identified problems;

of the administrative and/or financial affairs of the Member in line with Article 2.17.16 or any other remedy it deems fit. The duration and implementation of the sanction will of course be included in the ruling itself.

Since the Executive Committee's disciplinary powers are limited to that which is conferred in Articles 14, 34.1.14 and 36 of the Statutes, they cannot exercise disciplinary authority beyond those provisions. To be sure, Article 2.17.16 merely prescribes the powers of the Association in broad terms, but expressly does not confer the power on an Executive Committee to

impose unilateral sanctions under this provision. The language of the Article draws explicit lines on the separation of powers, as described above. The *expressio unius est exclusio alterius* principle prevents reading anything more into the Article than what is in the text.

The takeover is an administrative process that can be performed by using an Administrator or an *ad hoc* committee in accordance with Article 32.6 read together with Articles 32.13 and 56.6 (if there are suspected ethics violations) of the SAFA Statutes. The scope of an Executive Committee's powers can be found in Article 32 of the Statutes. The reporting lines of the Administrator or *ad hoc* committee can be defined in the empowering resolution for the takeover.

- viii. The Administrator or the *ad hoc* committee must then submit reports to the Association to indicate whether those administrative and/or financial affairs have been placed on a satisfactory footing.
- ix. Hand back to the Region when administrative and/or financial affairs have been placed on a satisfactory footing.

### Why a Takeover Constitutes a Sanction

Let us turn our attention to whether taking over the administrative and/or financial affairs of a Member constitutes a sanction for the purposes of determining whether it is reviewable under Section 33 of the Constitution and PAJA.

Sanctions are generally intended to ensure obedience to the law, a rule, a regulation or a decision by an authorised body. CAS eloquently stated in *Olympiacos Football Club (Olympiacos) v. Hellenic Football Federation (HFF) & Others* in 2020 that:

*The purpose of disciplinary sanctions is to influence the behaviour of its members, in particular to encourage them not to engage in certain unwanted activity by threatening to sanction them. In order to achieve this goal, there must be clarity for all stakeholders on what constitutes misconduct.*<sup>6</sup>

The imposition of a takeover is a response to a violation of a rule or decision and is clearly a sanction because it affects the legal status of the recipient of that decision in an adverse manner. It follows that sanctions, as administrative actions, require due process to be followed, meaning that adequate notice must be given, along with a fair hearing which must be devoid of bias.

These rights extend also to juristic persons such as SAFA and its Members, who are all *universitates*. These are rights enshrined in Section 8(2) of the South African Constitution and enforced in law through the *Promotion of Access to Administrative Justice Act, Act 3 of 2000* (PAJA). As explained above, judicial precedent has deemed SAFA and its affiliates as exercising a public power and therefore subject to the provisions of PAJA<sup>7</sup>. The Cape High Court eloquently stated in *Tirfu Raiders Rugby Club v SARU & Others* which specific actions of a private body constitute public power.<sup>8</sup>

<sup>6</sup> CAS 2020/A/7019 Olympiacos Football Club (Olympiacos) v. Hellenic Football Federation (HFF) & Club Panthessalonkeios Athlitikos Omilos Konstantinoupoliton PAOK (PAOK) & "Xanthi" Athletic Group Football Club (Xanthi FC) & CAS 2020/A/7035 PAOK v. HFF, award of 14 August 2020 (operative part of 10 July 2020)

<sup>7</sup> *Ndoro-Ajax Cape Town v SAFA, and others Case No. 16/16836 – 24 April 2018*

<sup>8</sup> *Tirfu Raiders Rugby Club v South African Rugby Football Union & Others*, in the Cape High Court, Case No: 8363/2005, para. 25

Also, in terms of CAS jurisprudence, it is clear that when a sanction needs to be imposed, sports regulations must proscribe the misconduct with which the subject is charged. This means that there can be no penalty without a rule or law so that the principle of legality can be established (*nulla poena sine lege*). The rule or law must also be clear and precise to ensure that the principle of predictability is realised (*nulla poena sine lege clara*).<sup>9</sup>

The principle of legality then requires a test of whether the accused committed an illegal act and whether the rule in question was clear and precise. It is irregular for an executive committee to short-circuit all of these processes and to conflate all the steps outlined in Article 2.17.16 and thereby abrogating the powers of investigation, prosecution and sanction to itself – some of which have lasted for many years. Invariably, these decisions have turned out to be primarily politically motivated.

We must now examine what is meant by “*taking over the administrative and/or financial affairs*” of the Member. In the past, Executive Committees would simply take a decision and appoint an Administrator to run the affairs of a Member and summarily remove the elected Members of that Executive Committee, effectively stripping them of their constitutional mandate. We must therefore examine whether this sanction is lawful both procedurally as well as substantively.

As already indicated above, the imposition of the sanction in the form of a takeover and in the manner it has been done in SAFA to date, is procedurally irregular and, as will be shown below, is also substantively unlawful.

The structure of SAFA and each of its Members consist of various bodies, each

with original constitutional powers as defined in the Statutes:

- i. The *Congress is the supreme legislative body* which makes the laws under which the sport functions in its jurisdiction – all of which must not be in conflict with that of the mother body;
- ii. The *Judicial Bodies are responsible for interpreting* the laws and sanctioning any violation;
- iii. The *Executive is concerned with developing policies* for implementation of these laws;
- iv. The *Secretariat is responsible for implementing the policies* made by the Executive Committee and Congress.

Article 34.1.1 (Article 32.1 of the 2022 edition) of the 2018 SAFA Statutes and the Standard Statutes for Regions and LFAs guarantee the separation of these powers.

So, how did an executive committee exercise the suspension and dismissal powers granted within the confines of Articles 14, 34.1.14 and 36? Is the *ad hoc* committee route the only way for the executive committee to get to the decision to expel a Member or dismiss a body or a person? Remember, until 26 March 2022, the SAFA NEC had no authority to suspend a person.

The Statutes clearly reserve the right of final suspension, expulsion and dismissal for the Congress – at the recommendation of the Executive as it relates only to Articles 14 and 36 of the 2018 Statutes. The powers of the judicial bodies in relation to suspensions, expulsions and dismissals are prescribed in the Statutes.

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<sup>9</sup> CAS 2017/A/5086 - Mong Joon Chung v. FIFA

The judicial bodies can pronounce these specific sanctions in their sporting context, but the final say on non-sporting suspensions, expulsions and dismissals was left to the Congress in accordance with Articles 14, 15 and 36 following a recommendation from the Executive Committee in the case of Articles 14 and 36. Article 15 left no room for an Executive Committee to recommend any expulsion to Congress. The 2022 edition of the Statutes retains this status quo.

The Executive Committee exercises its power through a process which emanates from a decision of a judicial body *in this regard* and culminates in a recommendation to Congress if one of these sanctions need to be applied. It can take temporary measures – albeit only after following due process.

The Statutes originate from FIFA and is steeped in FIFA jurisprudence. FIFA does not see itself as an intervening authority in the internal affairs of its Members and will act only in exceptional circumstances. If it needs to intervene, then it is supported by a clear and precise regulation allowing for such intervention. Article 8(2) of the FIFA Statutes gives the FIFA Council the power to intervene in matters that FIFA deems to be antithetical to the stability and development of the game in the territory of the affected Member.

There is no equivalent provision in the SAFA Statutes. The intent of the legislature (the SAFA Congress), combined with that of the originator, clearly points in the direction of intervention only in exceptional circumstances – and only in administrative and/or financial affairs of the Member.

### **What is Administrative Action?**

The purpose of this section is to clarify the meaning of administrative action by

highlighting a Constitutional Court ruling wherein it confirmed the meaning of administrative action in the context of a constitutional right to fairness as well as making a distinction between executive and administrative functions. This is particularly important in understanding the meaning of Article 2.17.16.

In determining whether an inquiry into the affairs of a Member by an executive committee is the performance of an administrative function that is justiciable, let us take a look at how South African jurisprudence defines “administrative action”. This is for the purpose of illustrating the separation of powers doctrine and the inherent limitations of such administrative actions. The commonly understood definition of this term was ventilated at length in the *President of the Republic vs SARFU* case<sup>10</sup>.

SARFU questioned the procedure the late former President Mandela followed in establishing a commission of inquiry into its affairs. It was an attempt to prevent the establishment of the commission of inquiry by applying Section 33 of the South African Constitution which provides for just administrative action that is lawful, reasonable and procedurally fair.

In its ruling, the Constitutional Court confirmed the common law meaning of “administrative action” as follows:

*In Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others, this Court held that “administrative action” as contemplated in section 33 does not include within its ambit, legislative decisions taken by a deliberative and elected legislative body established by the Constitution. Such action, we held, was not action of the public*

<sup>10</sup> Case CCT 16/98, President of the Republic of South Africa v SARFU and Others.

*administration, but action of a constitutionally empowered legislature. Similarly, in Nel v Le Roux NO and Others, the Court held that a summary sentencing procedure was judicial, not administrative, action and therefore it did not fall within the ambit of the administrative justice clause.<sup>11</sup>*

This principle draws a firm line between the functions of the three branches of government, emphasising that it was not who performed the action, but the function itself that determines whether it falls within the ambit of Section 33 of the Constitution. It clearly made a distinction between an original constitutional function vs the implementation of a law, the implementation being defined as administrative action.

Using the above as an example, an executive committee would therefore not be lawfully exercising an original constitutional power when invoking Article 2.17.16 to remove an executive committee because the rule is clear and precise and there are mainly ordinary administrative functions involved in the execution of this function.

Can *inveterata consuetudo* (“chronic habit”) be invoked on the basis that nobody has yet challenged this practice of removing executive committees in this manner, and thereby it has become customary law in SAFA? The answer is no. Because it is not an original constitutional function of an executive committee, the procedure employed in this invocation of this Article lends itself to scrutiny under the laws of natural justice. The framers of this clause understood that three disciplines are required to execute this function, hence the specificity of the language.

The Constitutional Court distinguished between the power to appoint a commission

and the conduct of a commission, drawing a clear line between administrative and executive action:

*In section 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.<sup>12</sup>*

Three distinctions are apparent here:

- i. The focus is not on the functionary as it is on the function being performed;
- ii. The exercise of legislative and judicial powers cannot be considered as administrative actions. Making and interpreting laws are original constitutional functions and subject only to intra-body review such as a higher court reviewing the decisions of a lower court. Each may sometimes perform administrative functions in the execution of their duties, and these may fall within the ambit of administrative action;
- iii. There is a difference between executive and administrative functions. The Court interpreted the adjective “administrative” according to its ordinary meaning, which excludes executive functions. Herein lies the prohibition against taking administrative action against executive bodies – even by another executive body.

The Constitutional Court went further to say that:

*A commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he*

<sup>11</sup> *Ibid.*, para. 140

<sup>12</sup> *Ibid.*, para. 141

*or she can obtain information and advice. When the President appointed the commission of inquiry into rugby he was not implementing legislation; he was exercising an original constitutional power vested in him alone. Neither the subject matter, nor the exercise of that power was administrative in character. The appointment of the commission did not, therefore, constitute administrative action within the meaning of section 33. It should, however, be emphasised again, that this conclusion relates to the appointment of the commission of inquiry only. The conduct of the commission, particularly one endowed with powers of compulsion, is a different matter.<sup>13</sup>*

An Executive Committee may therefore appoint a committee or the Secretariat by custom to inquire into the administrative and/or financial affairs of a Member, but it cannot extend that action to taking over the executive functions of a Member without following a constitutional process. Article 2.17.16 clearly limits the intervention to only taking over the administrative and/or financial affairs of the Member. Any additional action, such as taking over the executive functions of a Member is beyond the scope of Article 2.17.16.

Typical football administration functions includes the management of development programmes, selecting representative teams, organising leagues and competitions, general record-keeping, conducting correspondence, referees and coaching development, financial management and other commonly accepted administrative functions.

Executive functions include all the policy-making functions contained under Article 32 of the Statutes.

To recap, Article 2 is a broad statement of the aims, objectives and powers of the Association – not just that of an executive committee. The powers defined in Article 2 are distributed amongst the bodies articulated in Article 19. Article 32 spells out the specific powers conferred on an executive committee – and disciplinary matters are confined to only two narrowly defined areas. [see CAS 2016/A/4650 *Klubi Sportiv Skenderbeu v. UEFA for additional reference on CAS jurisprudence in this regard*]

The Constitutional Court expounded on the other constitutional constraints on the President of the Republic's execution of his executive authority in the following manner:

*It does not follow, of course, that because the President's conduct in exercising the power conferred upon him by section 84(2)(f) does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under section 84(2) are clear: the President is required to exercise the powers personally and any such exercise must be recorded in writing and signed; until 30 April 1999, the President was required to consult with the Deputy President; the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.<sup>14</sup>*

CAS has also provided its view on the meaning of administrative action, stating in *Lisboa & Benfica v UEFA* that “usually, measures taken by an association are divided into acts of administration and disciplinary measures (cf. also CAS

<sup>13</sup> *Ibid.*, para 147

<sup>14</sup> *Ibid.*, para. 148

*2007/A/1381, no. 55 et seq.) However, it must thereby not be overlooked that all disciplinary measures are also acts of administration.”<sup>15</sup>*

CAS jurisprudence is aligned with the interpretation of the Constitutional Court in the manner in which it views administrative action. What this means is that disciplinary measures are justiciable administrative actions in sports law.

Over the years, Article 2.17.16 has been used with impunity, skewing the power balance between executive committees, other bodies, and members of the organisation in favour of executive committees. As a result, SAFA has become an illiberal democracy.

CAS warns against this abuse of power arising out of the unequal power relationship between the sport participant and a federation when taking administrative action. In *RFEC v UCI (CAS 2007/A/1381, no. 55)* it ruled that *“there is an imbalance between the association and the person affected. This is expressed by the fact that the person affected only has the choice of whether to accept performing the sport under the conditions dictated by the association or to give up performing the sport altogether. Since this imbalance carries the risk that the association abuses its position of power, certain protective standards must apply (“droits de protection”) in the interests of the person affected.”<sup>16</sup>*

This decision also applies to the relationship between SAFA and its members. Any federation's governance system must give it prominence. The game's future growth and popularity depends on maintaining a fair balance of

power between the organisation and its members.

Executive Committees must dispel the myth that, under Article 2.17.16 of the Statutes, they have the same authority as FIFA to remove executive committees. They have also failed to study the FIFA laws that authorise the FIFA Council to execute this duty, in addition to misinterpreting the meaning of the Article.

In Article 8(2) of the FIFA Statutes, the FIFA Council is specifically given the ability to remove an Executive Committee. FIFA takes action based on the rule's specificity, which is consistent with international public policy. The FIFA Regulation reads as follows:

*Article 8(2):*

*Executive bodies of member associations may under exceptional circumstances be removed from office by the Council in consultation with the relevant confederation and replaced by a normalisation committee for a specific period of time.*

Although there are no standard terms of reference for these normalisation committees, they are appointed when there is third party (mostly government) interference in the Member Association or if there is financial mismanagement, gross violations of the FIFA Code of Ethics, a failure to abide by FIFA's rules and regulations, electoral fraud or when FIFA has determined that domestic governance of the game has irretrievably broken down.

In the case of FIFA, the crucial conclusion is that the FIFA Statutes specifically authorise the FIFA Council to take such action. In the instance of South Africa, however, an executive committee is not

<sup>15</sup> CAS 2008/A/1583 Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD & CAS 2008/A/1584 Vitória Sport Clube de

Guimarães v. UEFA & FC Porto Futebol SAD, award of 15 July 2008, para 35

<sup>16</sup> *Ibid.*, para 35

expressly authorised to use such harsh measures by Article 2.17.16 – or any other Article. In addition, the provision does not allow for the removal of an executive committee. Reading more into this article than a reasonable person would deduce from the content is incorrect.

With the language so clear and precise, why has this Article been so misused? In 2011, SAFA created a membership compliance monitoring tool consisting of more than 30 criteria. The purpose of the tool was to provide timely, progressive interventions before catastrophic failures set in and to invoke sanctions as a last resort. It appears that SAFA has mothballed its Membership Monitoring Tool in favour of a highly subjective political approach to membership compliance. However, this tool was not intended to place a Member in a cryogenic state for failure to perform the functions listed in the tool.

The SAFA Standard Statutes for Regions and LFAs has a clear provision that prescribes when a Member can be declared to be not in good standing. When faced with punitive administrative action such as a declaration of non-compliance which leads to a withdrawal of a fundamental right such as voting at a Congress, Members should be accorded the procedural rights contained in Article 95 of the SAFA Disciplinary Code. This includes the right of a notice of hearing; to be presented with charges of specific violations of a statute, rule or regulation; to be provided with particulars of the charges, including the production of proof and to be involved in the production of proof; and given sufficient notice to prepare for their defence against the stated charges. These *audi alteram partem* rights are deeply ingrained in South African jurisprudence and the international sports law.

Such action requires that proof of non-compliance with the 12 provisions of Article 13 (Members' Obligations) of the

Standard Statutes has been produced and a guilty judgement has been reached. Withdrawing voting rights is a punitive measure, not a preventative one, and as a result, natural justice should prevail.

The removal of an executive committee falls within the same class as administrative action and must therefore be subjected to due process. It has no parallels with the *Magashule* case because there is no constitutional authority in SAFA for this action and it can only be deemed as arbitrary. Unfortunately, the implementation of Article 2.17.16 at the national level was commonly implemented only in areas led by the perceived political rivals of the SAFA President.

In other areas such as the Western Cape, Kwazulu-Natal, Free State and Limpopo, rivals of some Regional Presidents have been summarily disciplined in similar fashion, especially during election season. These cases are the subject of a forthcoming book on political opportunism and its deleterious effect on interpersonal relations in the sport.

The lack of consistency in the invocation of the power stipulated in Article 2.17.16 clearly points to a political motive for its primary use and contrasts sharply with the principles of predictability and consistency in law, as well as demonstrating a lack of understanding of the sport's governing rules.

There is no doubting that for the sake of football growth and governance in a specific location, harsh measures may be required. Given the existing state of governance in the organisation, SAFA must apply its intellect and urge its congress to authorise such action by way of special legislation or to reserve such a measure for its congress only.