

64/98

Case No 173/96

**IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

In the matter of:

THE NATAL RUGBY UNION

Appellant

and

RODNEY LLOYD GOULD

Respondent

CORAM: HOWIE, HARMS, ZULMAN, PLEWMAN JJA *et*
MELUNSKY AJA

DATE OF HEARING : 24 August 1998

DATE OF DELIVERY : 10 September 1998

J U D G M E N T

/HOWIE JA:...

HOWIE JA:

For about forty years before 1995 it had been unnecessary to hold an election at the annual general meeting of the Natal Rugby Union with regard to the office of president. At the meeting in that year an election was required because there were two nominees. They were Keith Parkinson and Rodney Lloyd Gould, the retiring president and deputy president respectively. The meeting was held on 3 March 1995. Parkinson, as president, was chairman during the disposal of all such business as preceded the matter of the election of president. When that item came up he called upon the Union's general manager, Brian James van Zyl, to conduct the election. Parkinson had decided in advance that the election would be by secret ballot and had arranged for voting papers to be prepared accordingly. A voting paper was furnished to each of the twenty-eight eligible voters present, the candidates among them. Van Zyl appointed two honorary vice-presidents of the Union to act as scrutineers.

Having counted the votes, they advised Van Zyl of the result. He announced the meeting's decision that Parkinson had been duly elected.

The ballot papers were later destroyed. In every one of these respects the election proceeded with the concurrence of all those at the meeting or at least without objection. It subsequently transpired, and is not in dispute, that the voting was 15 to 13 in favour of Parkinson.

Some weeks later, on 29 March, Gould brought a review application in the Natal Provincial Division, alleging that the outcome of the election was invalidated by procedural irregularities, *inter alia*, in that Parkinson either appointed Van Zyl chairman of the meeting during the election or himself remained chairman. He accordingly sought the setting aside of the decision electing Parkinson president and an order requiring the Union to hold a re-election. The application succeeded. The Union was directed to hold a special general meeting for the purpose of electing a president "in terms of its constitution".

Immediately after judgment had been handed down on 12 April 1995 an application for leave to appeal was noted and postponed for later hearing. This had the effect of suspending the order but on 21 April Gould enrolled an application that the order be implemented. While that application was pending the council of the Union met on 2 May. At this meeting it was resolved to defer a decision to pursue the appeal until after 4 May when the application for leave was expected to be heard. It was also decided to convene a special general meeting in order to hold a fresh presidential election. On 15 May that was done. Parkinson on this occasion recused himself from the meeting. He was duly elected by 17 votes to 11. In these circumstances Gould's application for implementation of the Court's order was abandoned.

The application for leave to appeal was eventually heard on 27 March 1996 and granted.

The parties' competing contentions on appeal give rise to the

following questions:

- (a) Whether the decision electing Parkinson was invalidated by
 - (i) his appointing Van Zyl, or himself being, chairman of the meeting throughout the election process, and/or
 - (ii) the voting being by ballot instead of by way of a show of hands.
- (b) Whether the right to appeal has not in any event been preempted by the Union's having, in effect, complied with the order against which it is sought to appeal.
- (c) Whether the appeal should be entertained at all if, in essence, the only issue concerns the costs in the Court *a quo*.

Relative to (c), counsel had, prior to the hearing of the appeal, been requested to present argument as to whether it was not appropriate to deal with the matter in terms of s 21 A of the Supreme Court Act, 59 of 1959, according to which this Court may dismiss an appeal where a judgment or order in favour of the appellant on the merits

would have “no practical effect or result”. In the view I take of the case this question, in conjunction with question (c), can be left until last.

Beginning with question (a), it is necessary to refer at this point to the relevant provisions of the Union’s constitution.

The Union consists of six bodies including four sub-unions. (clause 7). It is managed by a council comprising, *inter alia*, an annually elected president and deputy president, and one representative of each of the Union’s six constituent bodies just mentioned (clause 10).

Clause 13 is headed “Proceedings of Council Members” and reads as follows:

- “(a) The President, or in his absence the Deputy President, shall act as Chairman of all meetings of the Union and Council and, in their absence those entitled to attend and vote at a General Meeting, in the case of the meetings of the Union, or the remaining Council Members, in the case of a Council meeting, shall choose one of their number to act as Chairman at such meeting. In the event of an equality of votes, the Chairman shall have a second or casting vote.

- (b) The quorum necessary for the transaction of the business of the Council may be fixed by the Council and, unless so fixed be eight. If the number of Members personally present does not constitute a quorum, the meeting shall stand adjourned for seven (7) days from the date thereof and if at the adjourned meeting the number of Members personally present does not constitute a quorum, such Members as are personally present shall be deemed to constitute a quorum and the proceedings of such meeting shall be valid.
- (c) A Council Member may, and the General Manager on the requisition of a Council Member shall, at any time summon a meeting of the Council.
- (d) The continuing Council Members may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the Constitution of the Union as the necessary quorum of Council Members, the continuing Council Members may act for the purpose of increasing the number of Council Members to that number, or of summoning a General Meeting of the Union, but for no other purpose.
- (e) The Council may delegate any of their powers to committees consisting of such Members or Member of their body as they think fit; any committee so formed shall, in the exercise

of the powers to delegated, conform to any regulations imposed on them by Council. The President shall, ex officio, be a Member of all such committees.

- (f) A committee may elect a Chairman of their meetings; if no such Chairman is elected, or if at any meetings the Chairman is not present, the Members present may choose one of their number to be Chairman of the Meeting.
- (g) A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the Members present, and in the case of an equality of votes, the Chairman, unless otherwise determined by the Council, shall have a second or casting vote.
- (h) All business to be transacted by the Council shall be decided by the vote of the Council, every Member of which shall have one vote except as provided in terms of Para. 13 (a) and (g) above.
- (i) Voting will be by a show of hands provided, however, that if a majority of Members so desire, voting on any particular matter shall be by secret ballot.
- (j) Voting by proxy shall not be allowed.

- (k) No person, unless he be a Member of Council or an alternate in terms of Para. 10 (vi) above, shall attend any meeting of the Council unless specially invited under authority of the President.”

Clause 15 deals with disqualification of council members.

It reads thus:

- “(a) The office of Council Member shall be vacated if he gives notice in writing to the Council of his intention to resign office; or if he ceases to be a Council member or if he is found lunatic or becomes of unsound mind, or if he becomes insolvent, or becomes prohibited from being a Council Member or, if being a Council Member nominated by a Sub-Union, or the Natal Rugby Referees Society or the Natal Schools Rugby Association in terms of Sub Paras. 10 (i) (c), 10 (i) (d) and 10 (i) (e) hereof, such nomination is withdrawn by such Sub-Union, Society or Association.
- (b) Should the President, Deputy President or any Vice-President absent himself from three consecutive meetings of the Council, or four times in all, without leave of absence having been granted to him, he shall, at the discretion of the remaining Members of the Council be deemed to have forfeited his seat, and the vacancy so caused shall be

deemed a casual vacancy. The representative of any Sub-Union, Society or Association, who shall absent himself from three consecutive meetings of the Council, or four times in all, without leave of absence having been granted to him or without his being represented by a duly appointed alternate, shall be deemed to have forfeited his seat, and the Sub-Union, Society or Association shall forthwith fill the vacancy.

- (c) A Council Member shall not be disqualified by his office from entering into contracts, arrangements or dealings with the Union, nor shall any contract, arrangement or dealing with the Union be voided, nor shall a Council Member be liable to account to the Union for any profit arising out of any contract, arrangement or dealing with the Union by reason of such Council Member being a party to, or interested in, or deriving profit from any such contract, arrangement or dealing and being at the same time a Council Member of the Union, provided that such Council Member, unless the whole of his interest is apparent on the face of the contract, discloses to the Council with sufficient particularity at or before the time when such contract, arrangement or dealing is determined upon, his interest therein, or if his interest be subsequently acquired, provided that he on the first occasion possible discloses to the Council the fact that he has acquired such interest.

- (d) A Council Member shall not be disqualified from holding office by reason of holding any other office of profit under the Union provided, however, that he shall not hold the office of Auditor, nor shall he be an employee of the Union.”

Clause 24 is entitled “Votes of Members”. It provides as follows:

- “(a) At any General Meeting the following shall be entitled to vote, such individual present in person having one vote, namely:
- (i) Each Member of the Council;
 - (ii) Representatives from each Sub-Union proportionate to the number of teams registered with that Sub-Union on the basis of one representative for every ten (10) teams fielded at the conclusion of the previous season; provided that each Sub-Union shall be entitled to be represented by a minimum of two (2) representatives and provided further that no single Sub-Union may have a greater number of representatives than the aggregate of all other Sub-Unions.
- (b) Voting by proxy shall not be allowed at either a General or Council Meeting.
- (c) Whenever voting is by ballot, either at a General or Council

Meeting, each person entitled to a vote shall record his vote or signify his abstention from such ballot.

- (d) When such ballot shall involve the election of more than one office-bearer, then each person who is entitled to vote, and does so vote, shall vote for as many individual candidates as there are vacancies. Any ballot paper reflecting the names of more or less than the number required, shall be rejected.
- (e) In the event of an equality of votes, whether in General or Council Meeting, the Chairman shall have a casting vote.”

Finally there is clause 30, headed “General”, sub-clause (b)

of which says —

“On all questions of Meeting Procedures, the ruling of the Chairman shall prevail at all meetings of the Union or Council.”

In his judgment the learned Judge found that Parkinson had appointed Van Zyl as chairman of the meeting for the purpose of the election process and that this was clearly in conflict with the constitution and consequently irregular. Undoubtedly it would have been. Van Zyl was not eligible to vote, much less chair the meeting. The question is

whether he did act as chairman.

In his founding affidavit Gould alleged that Parkinson instructed Van Zyl to act as chairman and that the latter took control of the meeting. However, according to Van Zyl and Parkinson the latter acted as chairman for the entire meeting and he (Van Zyl) was called on not to act as chairman or to control the meeting but to conduct the election. In his replying affidavit Gould admitted these allegations by Van Zyl, acknowledging specifically that Parkinson acted throughout as chairman of the meeting. It follows that the finding that Van Zyl was chairman during the election proceedings in issue does not accord with the evidence and the irregularity found in this regard did not occur.

The Court *a quo* went on to hold, in the alternative, that if Parkinson did remain chairman this was in violation of the principle that one should not act as judge in one's own cause. He was therefore disqualified by his interest in the outcome of the election and in that sense

“absent” within the meaning of clause 13 (a) of the constitution. He should thus have recused himself and the meeting should have chosen a substitute chairman. In those circumstances, so the learned Judge found, Parkinson’s conduct constituted an irregularity which tainted his election and was prejudicial to Gould.

The Union is a voluntary association. On long standing authority the constitution of such a body is a contract entered into by its members. Whether Parkinson’s having remained chairman vitiated his election must therefore be determined by reference to the terms of that contract.

The fundamental provision of the constitution in this regard is the peremptory requirement in clause 13 (a) - conveyed by the word “shall” - that the president act as chairman of all meetings of the Union and council. There is express provision for a substitute for him as chairman but that only applies in the event of his “absence”. Ordinarily

the word “absence” means the state of being absent, that is to say, physically absent. And the word “present” in sub-clauses (b), (f) and (g) and the contrast with “absence” in sub-clause (a), all with reference to attendance at meetings, demonstrate very clearly that the ordinary meaning of “absence” was intended.

Essentially, the Court *a quo* attached an extended meaning to the word “absence” viz “legally disqualified” but nothing in the constitution says or even implies that it has that or any other extended meaning. The subject of disqualification is indeed dealt with in clause 15 where a number of grounds of disqualification are laid down in sub-clause (a). Legal disqualification by reason of personal interest in the subject matter of a decision to be taken at a meeting is not one of them. Sub-clause (b) provides for possible forfeiture of the president’s seat if he absents himself from three consecutive council meetings, or four in all, without leave of absence. Plainly the words “absent” and “absence”

there connote nothing other than physical absence. In terms of sub-clause (c) a council member is not disqualified from entering into or being a party to contracts with the Union and sub-clause (d) refers to certain circumstances in which he is not disqualified from holding office.

That summarises all that the constitution has to say about disqualification. The type of legal incapacity which the Court below held to have existed is not dealt with by the constitution at all. This has distinct significance. It is commonplace in associations and clubs that retiring office bearers are eligible, and offer themselves, for re-election. That the framers of the constitution knew that is scarcely open to doubt. Yet the strong possibility of a retiring president's being chairman of the general meeting at which his re-election was on the agenda did not cause them to attach any proviso or condition to the requirement that the president be chairman or to his freedom to vote.

There is therefore nothing in the express terms of the

constitution which supports the Judge's conclusion that "absence" includes legal disqualification.

Whether a tacit term is to be inferred that the president or any other office bearer may not act as judge in his own cause is a question which it is unnecessary to determine. Such action will ordinarily amount to an irregularity in any decision making process which requires procedural fairness and will render that process liable to correction by way of judicial review. In other words, a reviewable irregularity will be a fit subject for such review whether the contemplated tacit term exists or not. The inquiry, then, is whether Parkinson did conduct himself as chairman in any respect that was reviewably irregular.

As authority for the finding that he did, the Judge relied upon the Irish case, Fanagan v Kernan [1881] 8 LR Ir 44 at 46-7 and the statement in LAWSA, vol 21, par 233 (g) at 186 that

“(w)here the duties of a chairman conflict with his own

interests he must recuse himself.”

In Fanagan's case an alderman presided at an election in which he was a candidate and it was held that his having done so vitiated the proceedings. The relevant passage is quoted in the judgment of the Court below and reveals the essential feature on which the decision in Fanagan's case was based. It was that the alderman had to discharge “very substantial duties of a judicial character”. It was for him to decide whether a voter was on the roll and whether a vote was valid, and in a closely contested election he would have had a “vital interest in being prejudiced in his own favour”. In addition he had a casting vote.

The sole authority for the passage in *LAWSA* is the case of Rose v Johannesburg Local Road Transportation Board 1947 (4) SA 272 (W). There, the body concerned was quasi-judicial and the chairman was accordingly held to have been under a duty to act in accordance with the proper exercise of quasi-judicial functions.

In argument before us counsel for Gould relied on Fanagan's case and on two English cases in support of the finding that Parkinson acted as judge in his own cause. There can be no doubt that these authorities, as well as Rose's case, correctly state the position where duties or conduct of a judicial or quasi-judicial character are involved. In my view, however, on the facts of the present matter Parkinson's conduct as chairman during the presidential election did not involve any decision making of a judicial or quasi-judicial nature.

Whether the voting was to be by ballot or a show of hands was a question which, in the event of its arising at the meeting, clause 30 (b) empowered him alone to decide. Gould suggested more than once in his affidavits that the result of the voting might well have been different had a show of hands been involved. This, he explained, was because he had been nominated by certain sub-unions and had their delegates voted in line with such nominations he had expected to win. There is certainly

evidence on the papers to suggest that Gould's expectation was justified and that some voters either changed their allegiance or disregarded the nominations of the sub-unions they represented. Gould's keen disappointment at the outcome is therefore readily understandable.

However, given the anticipation of a close contest between two leading figures of the Union, the sensitivity of the issue and the rarity of a presidential election, it was not unreasonable or unfair of Parkinson to have prepared the ground in advance for a ballot. Moreover, once Van Zyl indicated that a ballot would take place it was in any event open to any voting member to request voting by way of a show of hands. Only if that had been requested would the nature of the voting procedure have become a question for Parkinson to resolve. It did not arise.

When the meeting began he was entitled, and obliged, to act and to continue acting as chairman. In the course of the meeting no decision was required as to who was eligible to vote or whether any votes

were invalid. As to a casting vote, it is true that the constitution accorded him one. Had the voting been equal there is reason to contend that he might have acted irregularly in exercising his casting vote in his own favour. But it is unnecessary to decide that. And, furthermore, these were, after all, the proceedings of a private association governed by contract, not the proceedings of a public body governed by administrative law. Parkinson's casting vote was neither implemented nor, to judge from the papers, even contemplated.

There remains his decision to instruct Van Zyl to conduct the election. It is plain, however, that this did not clothe Van Zyl with any powers he was disqualified from exercising. In addition, that decision was not of a judicial or quasi-judicial character: it did no more than enable Van Zyl to fulfil the purely formal and technical requirements of the election process. Therefore, nothing can be made of it.

My conclusion, therefore, is that Parkinson did not act in any

way irregularly in remaining chairman during the election.

The next question is whether voting should have been by way of a show of hands. The argument in favour of an affirmative answer was based on the terms of clause 13 (i). It will be recalled that this says that voting will be by a show of hands unless members wish a vote by secret ballot. In my view, however, this sub-clause does not provide the support necessary for the argument. Clause 13 (a) explicitly covers meetings of the Union and the council but the rest of clause 13, in line with its heading, is confined to council meetings. In addition, sub-clause (h) is the first of the clause's various provisions to deal with the subject of voting in council meetings. Following immediately upon that as it does, sub-clause (i), in context, must be intended to refer to the voting just referred to in (h), namely, voting in council.

The subject of voting in general meetings is dealt with in clause 24. As to voting procedure, sub-clause (c), unlike sub-clause(i)

of clause 13, does not fix upon the one method as the one to be used, subject to a majority request for the other. On the contrary, clause 24 (c) merely says that whenever voting does take place by way of ballot everyone must record a vote or an abstention. Accordingly there is no provision requiring a vote at Union meetings to be according to the one procedure or the other. It is open to the chairman to choose in the first instance before any indications from the floor. If, contrary to his chosen procedure, the other is then requested, it will be for him to decide which will be employed. Parkinson made his choice initially. No objection or counter suggestion was made. Accordingly, a vote by secret ballot was not irregular in the present instance.

In the light of that conclusion it is unnecessary to consider the effect of everybody's assent (or non-objection) had there been some irregularity.

It follows that Gould's review application ought to have been

dismissed.

Turning to question (b) - the matter of peremption - it is settled law that Gould bears the onus of showing conduct on the part of the Union which points "indubitably and necessarily" to the conclusion that its decision to hold a re-election is inconsistent with an intention to attack the judgment of the Court below. If the Union's decision is equivocal and consistent with some intention other than the intention to appeal, Gould will have failed to establish peremption. Dabner v South African Railways and Harbours 1920 AD 583 at 594.

Some of the relevant facts have already been mentioned. Straight after judgment was given counsel for the Union noted an application for leave to appeal. That was on 12 April 1995. The Union's council met on 18 April. The meeting was specially called to consider the judgment and was chaired by the newly elected deputy president, C J Edwards. (Gould did not stand for re-election as deputy

president.) The council members present were equally divided as to whether to appeal. That issue, and the question whether to petition the Chief Justice if the application for leave to appeal failed, were only decided by Edwards's casting vote in favour of steps being taken to pursue an appeal. Edwards then asked members to give consideration to the possibility of eventually holding a re-election. No conclusion was reached on that aspect and further discussion, if necessary, was deferred to a subsequent council meeting.

Later that month three sub-unions indicated their opposition to an appeal. Two of them also proposed the holding of a re-election. Both subjects were discussed at a special council meeting on 2 May. It was unanimously decided to proceed with a presidential re-election at a special general meeting to be held on 15 May. As to an appeal, it was agreed to defer this matter to the next routine council meeting which would be held after 4 May when the application for leave to appeal was

expected to be heard and decided. As already mentioned, the application was not heard then and the issue of an appeal was still unresolved when the monthly council meeting of 8 May was held. After discussion it was agreed again to defer a final decision on an appeal until after the outcome of the application for leave to appeal was known.

On 15 May the re-election was held, with the result mentioned above. The question of the appeal was not referred to at all.

It is clear that in these circumstances the re-election proceeded subsequent to a decision to appeal which was never rescinded and without regard to whether an appeal would in fact be pursued. In conjunction with that consideration, the evidence on record indicates that the litigation in this case left Union and council members disturbingly but understandably divided and that the motive in proceeding with the re-election was to terminate dissension if at all possible and to get on with the work of administering rugby in what was, with the scheduled holding

in Durban of some of the 1995 rugby World Cup events, a momentous season in the Union's history.

Accordingly I find that the decision to hold the re-election was consistent with administrative considerations and certainly not inconsistent with the intention to appeal. Gould has therefore failed to establish peremption.

Turning, lastly, to question (c), it is manifest from the minutes of the general meeting on 15 May that the election procedure adopted there was greatly influenced by the decision of the Court *a quo*. That is hardly surprising. The Court's order was to elect "in terms of (the) constitution" and that meant in terms of the Court's interpretation of the constitution. Parkinson recused himself "to obviate any suggestion of his being a judge for his own cause" and did not vote. He therefore handed the chair to Edwards. Despite the latter's being the duly elected deputy president, he nonetheless thought it advisable, despite the terms of

clause 13 (a), to ask whether anybody objected to his being chairman. (Nobody did.) Personnel from the Union's auditors were specially engaged to act as scrutineers. As regards the voting procedure, Edwards announced that the constitution was "unclear as to how this should be done at a general meeting" and invited those present to decide. A vote was then taken that voting be conducted by a show of hands.

From what I have said above it follows that all those precautions and uncertainties were unwarranted. According to the constitution Parkinson was required to act as chairman and entitled to cast his deliberative vote. Failing him, Edwards was required to be chairman. And it was for whoever the chairman was to decide upon the scrutineers and the method of voting.

Had there been no appeal the judgment of the Court below would in all probability have continued to influence the procedure adopted in respect of office bearer elections at future Union meetings. There was,

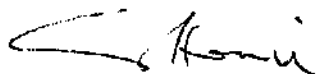
of course, nothing irregular or unfair in the procedures adopted at the re-election meeting, viewed purely in isolation, without regard to the constitution. But the Union does have this constitution. It is the chosen instrument by which the Union's affairs are to be regulated and the Union, its office bearers and council members are entitled to have it interpreted in order to guide them for the future. In the circumstances I consider that determination of the appeal, will quite apart from the issue of costs in the Court below, have a "practical effect or result" within the meaning of s 21 A of the Supreme Court Act. (The section was amended subsequent to the grant of leave in this case but in the result it is unnecessary to decide if the section in its pre-amendment or post-amendment form would have applied.)

It is therefore ordered as follows:

1. The appeal is allowed with costs, including the costs of two counsel.

2. The order of the Court *a quo* is set aside and substituted by the following:

“The application is dismissed with costs, such costs to include the costs of two counsel.”



C T HOWIE

HARMS JA)
ZULMAN JA)
PLEWMAN JA)
MELUNSKY AJA)