

Appeal Decision

Mr Mkhululi Jack vs Border Athletics: Mr. Mkhululi Jack

Prepared by: ASA Disciplinary Committee Chairperson

Executive Summary

The disciplinary proceedings against Mr. Mkhululi Jack are fundamentally and irredeemably flawed. The process violates nearly every tenet of natural justice, the ASA Disciplinary Code, and Section 34 of the Constitution of the Republic of South Africa (Right of Access to Courts/Fair Hearing).

The "conviction" and "suspension" imposed on 20 May 2026 are a nullity (*void ab initio*) for three primary reasons:

1. Res Judicata / Double Jeopardy: The matter was already finalised on 31 March 2026 with a written warning.
2. Gross Procedural Irregularity: The hearing of 16 May 2026 was conducted without notice, without the athlete, without specific charges, and in violation of the *audi alteram partem* rule.
3. Lack of Jurisdiction/Constitutionality: BORA failed to follow its own constitution regarding mediation and the composition of the disciplinary committee.

Part 1: Chronological Assessment of Fairness

Phase 1: The Initial Investigation & First Sanction (March 2026)

- Event: On 31 March 2026, BORA issued a letter stating that an investigation confirmed Mr. Jack's remarks were "unproven and accusatory." The proposed sanction was a Written Warning valid until 31 December 2026.
- Legal Assessment: This is the first legally operative act. Under the ASA Disciplinary Code (Chapter 12, Section 4.3), discipline is substantively fair only if the offence warrants the penalty. A written warning is a standard, low-level sanction.
- Finding: Once the 31 March letter was issued and accepted (or not rejected within 5 days), the matter was, in legal terms, *functus officio*. BORA had exercised its discretion and concluded the matter.

Phase 2: The "Second" Hearing (May 2026)

- Event: Despite the March warning, BORA summoned Mr. Jack to a "hearing" on 16 May 2026. The letter dated 8 May 2026 described the purpose as "to discuss and investigate" and notably failed to state that it was a disciplinary hearing with potential for suspension.
- Procedural Breaches:
 1. Inadequate Notice: The letter was sent on 8 May for a hearing on 16 May. While 8 days might suffice for a minor meeting, the complexity of the case (constitutional claims, rule interpretation) required more time.
 2. Misrepresentation: BORA described the meeting as an "investigation." Under Section 2.1.3 of the ASA Code, an investigation *precedes* discipline. By May, the investigation was

already concluded (per March letter). Calling a disciplinary hearing an "investigation" is a material misrepresentation that lulled the athlete into a false sense of security.

3. The Athlete's Response: Mr. Jack responded on the same day (11 May) stating he was unavailable due to Comrades Marathon preparation and asked for specific charges and evidence. BORA did not respond to his request for particulars nor did they explicitly deny his request for a reschedule.

Phase 3: The Default Conviction (May 2026)

- Event: BORA proceeded with the hearing in Mr. Jack's absence (in absentia) and issued a 6-month suspension on 20 May 2026.
- Legal Assessment: Under common law and the ASA Code (Section 4.2.5 & 4.2.7), a hearing in absentia is only permissible if the party has *deliberately* delayed or waived their right to attend.
 - *The Facts:* Mr. Jack did not waive his rights. He requested a postponement due to a prior athletic commitment (Comrades long run) and asked for disclosure of evidence.
 - *The Violation:* BORA's failure to respond to his reschedule request implies either acceptance of his unavailability or deliberate ignorance. Proceeding without clarification is a gross violation of Section 34 of the Constitution (fair hearing).

Part 2: Specific Analysis of Fairness

In assessing whether fairness was practiced, I evaluated the two pillars of justice: Procedural Fairness (the process) and Substantive Fairness (the punishment).

1. Procedural Fairness (The Process) – NOT FAIR

The process employed by BORA fails to meet the minimum standards set by the **ASA Disciplinary Code (Chapter 12)** and International Best Practices (e.g., World Athletics).

Right under ASA Code (Sec 4.2)	BORA's Action	Verdict
4.2.1: Right to be told the nature of misconduct	The charge was vague: "Facebook accusations." No specific post, date, or exact wording was provided to Mr. Jack. A charge must be specific enough to allow a defence.	Defective
4.2.3: Right to adequate notice	The notice conflated a "discussion/investigation" with a "hearing." The athlete was not clearly warned that a 6-month ban was on the table.	Defective
4.2.5 & 4.2.4: Right to call witnesses & Representation	The hearing proceeded while the athlete was absent and his representative (the Club) was unavailable. BORA did not verify if the reasons for absence were legitimate.	Defective

Right under ASA Code (Sec 4.2)	BORA's Action	Verdict
4.2.7: Right to a reasoned finding	The suspension letter merely states a conclusion; it does not weigh evidence or explain why the Facebook post constitutes "gross misconduct" as opposed to protected free speech or a legitimate grievance.	Defective

Critical Constitutional Breach: Section 33 of the Constitution (Just Administrative Action) requires decisions to be procedurally fair. Because BORA is a powerful voluntary association controlling the athlete's livelihood/career, its disciplinary committee exercises a public function. The failure to provide a fair hearing renders the decision *ultra vires* (beyond their legal power).

2. Substantive Fairness (The Punishment) – NOT FAIR

Even if the process was fair (which it was not), the punishment fails the proportionality test.

- Disproportionate Response: The "offence" was a Facebook post stating: "My region DISQUALIFIES ME every race now, it's OK. Mabaqhubeke!". This is an expression of frustration regarding inconsistent rule enforcement (Rule 33.10.6 regarding headphones/speakers).
- Gap Analysis:
 - 31 March Sanction: Written Warning (for "negative comments").
 - 20 May Sanction: 6-month Suspension (for "not rescheduling" and the same comments).
 - Finding: No new misconduct occurred between 31 March and 20 May. The escalation from a "warning" to a "6-month ban" without

a fresh, serious infraction is irrational. It violates Section 4.3 of the ASA Code.

- Double Jeopardy: BORA cannot punish the athlete twice for the same Facebook post. The principle of *ne bis in idem* (no double jeopardy) is a bedrock of civilised legal systems. The March warning closed the matter; the May hearing re-opened it illegally.

3. The "Bluetooth Speaker" vs. "Misconduct" Distinction

It is critical to distinguish between the alleged rule violation (music device) and the misconduct (Facebook comments).

- The Rule (ASA 33.10.6): The athlete argues the rule prohibits *headphones* for safety, not speakers. The fact that other provinces allow speakers supports his interpretation or highlights inconsistent enforcement.
- The "Disrepute" Argument: BORA claims the Facebook post brought the sport into disrepute.
 - Defence: Truth is a defence. If Mr. Jack was treated differently in BORA than in other provinces, pointing that out is not "disrepute"; it is a legitimate grievance protected under the BA Constitution (Section 1.3.2.16): "Promoting fair competition... including the right of the individual to develop without being disadvantaged by administrative constraints."

Part 3: Arguments for the Athlete

Argument 1: The Appeal is Actually a "Re-hearing" of a Dead Matter (*Functus Officio*)

The letter of 31 March 2026 was a final determination. BORA, having issued a warning, became *functus officio* (they had performed their function and were done). They cannot wake up two months later, call a second "hearing" on the same facts, and impose a harsher sentence just because they did not like the athlete's tone. The May hearing is an illegal collateral attack on the March decision.

Argument 2: The "Right to be Heard" was an Empty Formality

The *audi alteram partem* rule (hear the other side) requires a *genuine* opportunity to be heard.

- BORA ignored the athlete's request for particulars (which Facebook post?).
- BORA ignored the request for a reschedule.
- BORA held the hearing anyway.

Argument 3: Suspension is Mala Fides (Bad Faith) – The Comrades Marathon

The suspension runs from 1 June to 31 December 2026. The Comrades Marathon is on 14 June 2026. The timing of this suspension is suspicious. It effectively bans the athlete from the biggest ultra-marathon in the world based on a vague Facebook post about a speaker. This timing, coupled with the lack of due process, strongly suggests pre-determination and ulterior motive (personal vendetta or abuse of power to silence criticism).

Part 4: Counter-Argument – Finding in Favour of Border Athletics (Devil's Advocate)

Considering BORA did not submit appeal defence documents for scrutiny the following are hypothetical arguments BORA could make, though they are weak given the facts.

Possible BORA Argument 1: Failure to Exhaust Internal Remedies

BORA might argue that because Mr. Jack did not attend the 16 May hearing despite being "invited," he waived his right to be heard. They might cite Clause 5.3.4 of the BA Constitution requiring exhaustion of remedies.

- Rebuttal: An invitation to an unfair process is not a remedy. A person does not "exhaust" a remedy by walking into a trap. Because the notice was defective (no specific charge), attending would have been futile.

Possible BORA Argument 2: Misconduct is "Gross" due to Status

BORA notes that Mr. Jack is a "former Exco Board member" and therefore should know better.

- Rebuttal: Higher knowledge demands higher procedural fairness from the federation. Punishing a former board member for interpreting a rule differently (speaker vs headphones) sets a dangerous precedent of suppressing intellectual debate within the sport.

Possible BORA Argument 3: The 31 March Letter was "Proposed," not Final

BORA may argue the 31 March letter was merely a "proposed sanction" requiring acceptance, not a final conviction.

- Rebuttal: The letter explicitly states: *"The proposed BORA sanction... is a Written Warning... If BORA does not receive a response... they will be deemed... accepted the proposed sanction."* This is a standard "plea bargain" or admission of guilt clause. Once the deadline passed with no rejection, a binding contract/warning was formed. They cannot retroactively change it to a suspension.

Conclusion & Recommendation

Finding: The conviction and 6-month suspension of Mr. Mkhululi Jack must be set aside (null and void).

Reasoning:

1. Procedural Defects: The hearing on 16 May 2026 was a sham; it violated the ASA Code, natural justice, and Section 34 of the Constitution.
2. Res Judicata: The matter was conclusively settled with a written warning on 31 March 2026.
3. Substantive Irrationality: There is no rational link between the Facebook post (grievance about disqualification) and the penalty (loss of livelihood/sport for 6 months), nor between the written warning and the subsequent suspension.

Proposed Order Sought:

1. That the decision of 20 May 2026 be declared unconstitutional and invalid.
2. That the letter of 31 March 2026 (Written Warning) be reinstated as the final determination.
3. That Mr. Jack is eligible to run all Boarder & ASA sanctioned events.
4. That Border Athletics pay the costs of this appeal for acting in bad faith.

Final Statement:

Mr. Jack should be immediately reinstated.



Selby Thabethe

31 August 2026

Chairperson

ASA Disciplinary Committee