REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: **2024/064618**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

..... **26 June 2024**
SIGNATURE **DATE**

NB LA MASIA FOOTBALL CLUB	Applicant
and	
MARUMO GALLANTS FOOTBALL CLUB	First Respondent
NATIONAL SOCCER LEAGUE	Second Respondent
SOUTH AFRICAN FOOTBALL ASSOCIATION	Third Respondent
ADVOCATE NAZIR CASSIM SC N.O.	Fourth Respondent

JUDGMENT

GOEDHART AJ:

Introduction

[1] This is an urgent application to review, set aside and substitute the award made by the fourth respondent, Adv Cassim SC, in his capacity as arbitrator

on 4 June 2024.

[2] The application is opposed by the first respondent.

[3] The second respondent, the National Soccer League (NSL), a private association with 32 professional football clubs as members, including the applicant and the first respondent, has served a notice to abide.

[4] The NSL is a special member of the third respondent, the South African Football Association (SAFA) and recognised as such under the SAFA Statutes. SAFA is the national administrative governing body of football in South Africa.

[5] *Fédération Internationale de Football Association* (FIFA), SAFA and the NSL have exclusive competence to regulate professional football in South Africa.

[6] The NSL's Handbook and its Compliance Manual read together with the Constitution and rules set out in the Handbook and Compliance Manual bind all member clubs, their players, administrators and staff.

[7] Although the NSL and SAFA are private associations, they enjoy regulatory powers that discharge public functions which renders their actions open to scrutiny by way of judicial review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[8] The principle was established in ***Ndoro***[1]*,* in which Unterhalter J (as he then

[1] Ndoro and Another v SAFA and Others 2018 (5) SA 630 (GJ) (***Ndoro***) at para 33; Ajax Cape Town Football Club and Another v Mokhari NO and Others (18413/2018) [2018] ZAGPJHC 435 (2 July 2018); [2018] JOL 40105 (GJ) at para 29; Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd 2022 (4) SA 57 (SCA); [2021] ZASCA 51 at para 17.

was) held:

> "*I am of the view that the decision of Mr Cassim is administrative action and, unlike the position in Sidumo, I can see no reason why the regulatory powers of Fifa, Safa and the NSL, which include their settlement provisions (as I have found), should not permit of the application of the public-law disciplines of PAJA. Indeed, it is precisely because these private entities have assumed such sweeping exclusive regulatory powers that the need for such disciplines is apparent.*"[2] (footnotes omitted)

Urgency

[9] I find that the application is indeed urgent as contemplated by Rule 6(12). The application was brought as soon as it was reasonably possible for the applicant to do after the award of 4 June 2024 and, taking into account the timelines for the finishing of the current season, the expiry of contracts at the end of June 2024 and the beginning of the new season it is in the interest of all parties to have the matter heard on an urgent basis.

Background

[10] The genesis of the applicant's complaint against the first respondent is that it fielded an ineligible player, Tapelo Dhludhlu (*Dhludhlu)*, in six matches in the Motsepe Foundation Championship over the period February 2024 to May

[2] Ndoro at para 48.

2024.

[11] It is common cause that:

[11.1] Dhludhlu was registered for three clubs during the 2023/2024 season namely, Mpumalanga Football Academy FC (under MYSAFA Reg No: 01RFM) in the AB Motsepe League in SAFA Nkangala, and Mpumalanga Future United (also for the Motsepe League in SAFA Nkangala) as an amateur player, and as a professional player for the first respondent in the Motsepe Foundation Championship;

[11.2] Dhludhlu played for all three clubs during the 2023/2024 season; and

[11.3] the applicant finished in the 15th position on 31 points and the first respondent in the 11th position on 38 points.

[12] In terms of Article 5.4 of the FIFA Regulations, a player is not permitted to be registered for three clubs and to play for three clubs in the same football season. Article 5.4 provides:

> "*Players may be registered with a maximum of three clubs during one season. During this period, a player is only eligible to play official matches for two clubs….*"

[13] On 12 May 2024, the applicant had lodged a protest against the first

respondent's use of Dhludhlu. The first respondent then removed him from the starting 11 players, did not play him and he was not seated in the technical area. Dhludhlu was thus withdrawn from the match, the team sheet and the bench following the applicant's protest.

[14] On 27 May 2024, the applicant lodged a written complaint with the NSL which set out that its first complaint and act of misconduct as defined in Rule 55.3.6.2[3] related to the first respondent having played an improperly registered player, Dhludlhu, jersey number 11 (PSL Reg No 7678) in a number of matches in the Motsepe Foundation Championship for the first respondent being:

[14.1] versus Venda FC on 14 February 2024;

[14.2] versus Upington City FC on 9 March 2024;

[14.3] versus Milford FC on 16 April 2024;[4]

[14.4] versus Maritzburg United FC on 19 April 2024;

[14.5] versus Platinum City Rovers FC on 28 April 2024; and

[14.6] versus Black Leopards FC on 1 May 2024.

[15] After the complaint was lodged on 27 May 2024, the applicant also became

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[3] Rule 55.3.6.2 provides: "*Without derogating from the generality of what constitutes an act of misconduct, the following are specifically declared to be acts of misconduct on the part of any person or body falling under the jurisdiction of the League; - …*
55.3.6.2 Any corrupt, dishonest or unlawful practice in connection with a match or in connection with the affairs of the League;"

[4] This match was not listed in the founding affidavit in support of the review.

aware that the first respondent fielded and played Dhludhlu in a match against Baroka FC on 5 May 2024.

[16] Accordingly, Dhludhlu was fielded and played in six matches[5] in contravention of Regulation 5.4 that a player may be registered with three clubs but only play for two in the same season.

[17] The applicant's complaint was referred by the Chief Executive Officer of the NSL directly to arbitration in terms of Rule 64 of the NSL handbook. Rule 64 stipulates:

> "*64.* ***DISCIPLINARY RULES AND URGENCY***
>
> *64.1 If the Chief Executive Officer is of the opinion that the prosecution of a complaint, protest, disciplinary matter or appeal according to the prescribed timelines will prejudice the League, he may escalate the relevant issue directly to arbitration as provided for in terms of the SAFA statutes.*
>
> *Until an order as to cost is made by the Arbitrator, the cost of the arbitration in terms of this rule will be borne by the party lodging the dispute.*"

[18] Where the NSL refers a matter directly to arbitration in terms of the SAFA statutes, the applicable reference is to the SAFA disciplinary code. Article 81

[5] Six because match against Milford FC on 16 April 2024 was not mentioned in the review application.

thereof which deals with arbitration and matters incidental to the arbitration.

[19] Articles 81.9, 81.11, 81.12 and 81.13 of the SAFA disciplinary code stipulate that:

> "*81.9 The arbitration shall be carried out informally and in a summary manner. It will not be necessary to observe strict rules of evidence or procedure.*
>
> *81.11 Notwithstanding anything contained in these Rules, the powers of the arbitrator shall be wide and shall be determined by the arbitrator at his sole discretion.*
>
> *81.12 The arbitrator shall have the power to award costs to any party, and shall decide what portion, if any, of the deposit shall be refunded. Should the cost to SAFA of the arbitration exceed the deposit, the arbitrator shall decide who is responsible for such costs. Failing a decision of the arbitrator in this regard, the parties to the arbitration shall be jointly and severally liable to SAFA for such costs.*
>
> *81.13 The arbitrator's decision shall be final and binding on all parties.*"

<u>The award</u>

[20] Pursuant to the summary arbitration proceedings, the arbitrator found that it was common cause that Dhludhlu was registered for three clubs during the 2023/2024 season and that he had played for all three clubs during the 2023/2024 season. Accordingly, the first respondent breached regulation 5.4 of the FIFA Regulations dealing with the status and transfer of players.

[21] The arbitrator upheld the first respondent's special plea regarding prescription with reference to Rule 52.2 of the NSL handbook. Rule 52.2 deals with the time periods for filing a complaint relating to an improperly registered player.

[22] The arbitrator also found that upholding the plea of prescription was not the end of the matter, and that the conduct of the first respondent amounted to misconduct.

[23] The misconduct was that the first respondent did not report itself to the NSL or SAFA as it was obliged to do, after the applicant had noted a protest on 12 May 2024 that the first respondent could not field Dhludhlu.

[24] The arbitrator found that Rule 55.3.12 prohibits the failure to report alleged misconduct to the NSL and that the conduct of the first respondent potentially brings the NSL into disrepute.

[25] The applicant argued that the failure by the first respondent to report itself to the NSL and SAFA was a strong indication that it knew that what it had done was wrong and knew that this was tantamount to misconduct.

[26] The relief sought by the applicant in the arbitration proceedings was that, if

the applicant were successful in its complaint, the arbitrator should order the forfeiture of the points which the first respondent won on the soccer pitch in the fixtures mentioned in paragraph 4 of its complaint ranging in the period 14 February 2024 to 1 May 2024 which would result in the first respondent finishing behind the applicant, and in the applicant not being demoted or relegated.

[27] Although the arbitrator found that the first respondent was guilty of misconduct, he did not uphold the relief sought by the applicant, which was a sanction as provided for in Rule 57.13.16, alternatively Rule 57.13.17.

[28] Rule 57 provides that the disciplinary committee deals with all cases of alleged misconduct, protest and complaint. Rule 57.13 of the NSL Handbook sets out the list of sanctions that may be imposed on both natural and legal persons. Rule 57.13.2 provides for a reprimand, Rule 57.13.16 provides for the forfeiture of a match, Rule 57.13.17 provides for a deduction of points and Rule 57.13.18 provides for a relegation to a lower division.

[29] The arbitrator found that an appropriate sentence in the circumstances is a reprimand as provided for in Rule 57.13.2 and ordered the first respondent to pay the costs of the arbitration as well as the legal costs incurred by the applicant including the costs of senior counsel.

[30] Unhappy with the award, the applicant launched its review.

Review of the award

[31] The applicant sets out, with reference to paragraph 4.1 of the NSL Compliance Manual, that the clubs agree that the fielding of an ineligible player will result in forfeiture and the player may also be sanctioned.

[32] Paragraph 4.1 of the Compliance Manual provides:

> "*Decision making by the League will always have regard to the purpose of the NSL handbook, the Compliance Manual and other binding League prescripts, be lawful and reasonable, and will be arrived at in a procedurally fair manner taking into account the circumstances and need for expedition and matters affecting professional football.*"

[33] Footnote 14 to paragraph 4.1 of the Compliance Manual stipulates:

> "*Where rules are mandatory, the League has no discretion to permit a departure. Where there is a discretion, the policy of the League in respect of the matter, and the views of any affected parties, will be taken into account.*"

[34] Rule 58.1 deals with the sanctions for fielding an ineligible player and reads:

> "*Rule 58.1 Ineligibility: -*
>
> *If a player takes part in a match (he is on the team sheet, the field of play or on the substitutes bench at any time)*

despite being ineligible, the member club which fielded him will be sanctioned with a forfeit of the match and a minimum fine of R100 000.00. The player may also be sanctioned."

[35] The applicant's case is that the award is reviewable under the following sections of PAJA:

[35.1] Section 6(2)(b) in that the arbitrator failed to take into account the mandatory provisions set out in the NSL handbook (Rule 58) read together with paragraph 4.1 of the Compliance Manual;

[35.2] Section 6(2)(d) in that the decision of the arbitrator was materially influenced by an error of law in that the arbitrator referred to the "registration" of the player having regard to Rule 52.2 of the NSL Handbook in circumstances where the matter concerned the "eligibility" of the player;

[35.3] Section 6(2)(e)(iii) in that the arbitrator took into account irrelevant considerations and ignored relevant considerations in that the matter involved the inherent fairness of the game and the applicability of the rules as held by Fisher J in the judgment of ***Ajax Cape Town Football Club***[6] and not as found by the arbitrator that matches should not be decided off the field; and

[35.4] Section 6(2)(f) in that the arbitrator's award is irrational in that he failed to give any rational reasons for his decision in

[6] Footnote 1 above.

circumstances where he found the first respondent guilty of misconduct and where the first respondent had no valid defence.

[36] The award was unreasonable given that the first respondent was found guilty of fielding an ineligible player and yet the fourth respondent sanctioned the first respondent with a reprimand and a costs order, not a forfeiture or a deduction of points.

[37] The applicant accepts that the general remedy is that the decision ought to be set aside and referred back to the arbitrator to take the decision again with the benefit of the court's judgment. However, it argues that this is an exceptional case.

[38] In exceptional cases the court will step in to give a substituted remedy when it is just and equitable to do so. The applicant contends that the substitution may occur under circumstances where the facts are common cause and the outcome is a foregone conclusion. Here, where the first respondent fielded an ineligible player in six Motsepe Championship matches in circumstances where the NSL Constitution and Rules do not permit them to do so on pain of forfeiture, it is argued that forfeiture is a foregone conclusion and therefore remittal to the arbitrator would serve no purpose.

[39] The applicant submits that a substitution would be just and equitable in that the circumstances are exceptional given that the timelines for finishing of the current season, the expiry of contracts at the end of June 2024 and the beginning of a new season not only makes the matter urgent, but also

appropriate for the remedy of a substitution in the terms sought by the applicant. The remedy which the applicant seeks is that the award be substituted with an order that any or all points earned by the first respondent be deducted in accordance with Rule 57.13.17.

The respondent's opposition

[40] The first responded denied urgency. It contended it was not the award of the arbitrator which resulted in the relegation of the applicant. The applicant had already been relegated on 19 May 2024. According to the first respondent, the applicant finished the season in position 15 on the log having played 30 matches in the season and having failed to win substantial points in these matches to avoid relegation.

[41] The first respondent further contended that the applicant, having lodged a complaint under Rule 52 was limited to the sanctions set out in Rule 52, that Regulation 5.4 did not apply as the applicant had not lodged a protest and that forfeiture could only be ordered as a sanction where the NSL charged the offending club with misconduct and not, as it alleged happened here, where the NSL did not charge the first respondent, but merely referred the letter of complaint for arbitration for determination and validity of the alleged misconduct. Lastly, the respondent argued that the remedy proposed by the applicant was not competent.

[42] In its replying affidavit, the applicant did not answer to the allegation that it was relegated already on 19 May 2024.

[43] Dealing with the grounds of opposition, I have found that the matter is urgent. In regard to the respondent's argument that the applicant was limited to the sanctions set out in Rule 52, the heading of the letter of referral explicitly sets out that the complaint is to be read with Rules 55, 56, 57 and 58.[7] The arbitrator found that there was misconduct as contemplated by Rule 55.3.12 and imposed a sanction contemplated by Rule 57.13.

[44] There were evidently charges against the first respondent, as it pleaded to the charges. Whether the proposed remedy is competent or not need only be decided if the applicant's grounds for review succeed.

Analysis of the grounds of review

[45] I now turn to the specific grounds of review.

[46] The first ground is that the award falls to be reviewed in terms of section 6(2)(b) of PAJA on the basis that the arbitrator failed to take into account the mandatory provisions set out in the NSL handbook read with paragraph 4.1 of the NSL manual.

[47] The applicant argues that the sanction provided in Rule 58 ought to have been considered as it was common cause that the first respondent fielded and played an ineligible player.

[48] In the arbitration proceedings, the applicant did not seek a forfeiture as contemplated by Rule 58. In paragraph 14 of the referral, it requested that

[7] The heading to the referral describes it as being a complaint in terms of Rule 52 as read with Rules 55, 56, 57 and 58.

the sanctions contemplated by Rule 57.13.16 (forfeiture) alternatively Rule 57.13.17 (deduction of points) be imposed.

[49] The powers of the arbitrator are defined by Article 81 of the SAFA disciplinary code.[8]

[50] The election by the arbitrator in the exercise of his sole discretion to select one of the available sanctions in Rule 57.13, but which was not the sanction requested by the applicant from the permissible list, does not make the award reviewable in terms of section 6(2)(b) of PAJA.

[51] The second ground for review is that the decision of the arbitrator was materially influenced by an error of law as contemplated by section 6(2)(d) of PAJA in that the arbitrator referred to the registration of the player having regard to Rule 52.2 of the Handbook in circumstances where the matter concerned the eligibility of the player.

[52] The applicant's letter of referral dated 27 May 2024 refers in paragraph 4 thereof to the first respondent having played an "improperly registered player". The arbitrator was obliged to deal with the referral in its terms. The applicant formulated its complaint as being one of fielding an improperly registered player and the complaint as formulated was dealt with by the arbitrator.

[53] The award reflects that the arbitrator dealt with both issues, being the issue of an improperly registered player as well as the issue of an ineligible

[8] See Article 81.11 quoted in paragraph 19 above.

player. I find that there was no error of law as contemplated by section 6(2)(d) of PAJA, and thus a review on this basis cannot succeed.

[54] The third ground of review is that in terms of section 6(2)(e)(iii) of PAJA the arbitrator took into account irrelevant considerations and ignored relevant considerations in that the matter involved the inherent fairness of the game and the applicability of the rules and not, as found by the arbitrator, that matches should not be decided off the field.

[55] The arbitrator found that Rule 52.2 has a precise function and that it is to avoid the kind of turmoil that happens if there is no time limit on raising complaints and if complaints are raised (as in this case) at the end of the season with the potential of uncertainty and litigation substituting for what happens on the soccer pitch.

[56] The referral to the arbitrator was made in terms of Rule 64.1 which takes into account potential prejudice to the League.

[57] The NSL Handbook clearly envisages that all complaints should be brought as soon as possible bearing in mind that Rule 52.3, which deals with all complaints, provides that a complaint should be brought within 40 days of the date that the alleged misconduct took place. Paragraph 4.1 of the Compliance Manual refers to the need for expedition.

[58] The arbitrator's reference in paragraph 11 of the award to the potential impact of late complaints and the concomitant turmoil, uncertainty and

litigation that could ensue does not, in my view, constitute an irrelevant consideration as contemplated by section 6(2)(e)(iii) of PAJA. The award is to be read as a whole and the potential impact on other football clubs and the League is a relevant consideration, as recognised in the footnote to paragraph 4.1 of the Compliance Manual.

[59] In the circumstances, reliance on section 6(2)(e)(iii) of PAJA does not avail the applicant.

[60] The last ground of review is based on section 6(2)(f) of PAJA.

[61] Section 6(2)(f)(ii) provides that a court has the power to judicially review an administrative action if the action itself is not rationally connected to: (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator.

[62] Article 81.9 empowers the arbitrator to conduct the arbitration in a summary manner, and that it will not be necessary to strictly observe the rules of evidence and procedure.

[63] The arbitrator made specific mention in his award of the relief sought by the applicant. He found that it was common cause that the first respondent had transgressed Regulation 5.4 of the FIFA regulations. Against this background he nonetheless elected a different sanction from the available sanctions in Rule 57.13 to that which the applicant proposed. The election

he made was a permissible given the range of available sanctions listed in Rule 57.13.

[64] As stated, the applicant itself did not seek a mandatory forfeiture in terms of Rule 58, but requested that a sanction be imposed with reference to Rule 57.13. 16, alternatively Rule 57.13.17.

[65] The sanction imposed by the arbitrator followed after a finding of misconduct and a consideration of the impact and consequences of the late complaint on the League. The list of permissible sanctions set out in Rule 57.13 included a reprimand.

[66] In the application for review, the applicant submitted that the appropriate sanction ought to be limited to Rule 57.13.17 with due regard to the far-reaching consequences on the League that would flow from a mandatory forfeiture. The arbitrator was alive to the far-reaching consequences, given the content of paragraph 11 of the award.

[67] The arbitrator was required to address the acts of misconduct referred to in the letter of referral and he did so by imposing a sanction from the range of sanctions prescribed in Rule 57.13 of the NSL Handbook. He was empowered to impose the sanction he elected in the exercise of his sole discretion, even if it was not one of the sanctions sought by the applicant. The critical question, as was stated by Sutherland DJP in ***Polokwane Football Club***[9] is not about "correctness", but only whether the arbitrator

[9] Polokwane Football Club v South African Football Association and others; TS Sporting Football Club v South African Football Association and others (25191/2021; 26189/2021) [2021]

fulfilled his mandate properly.

[68] I find that the award, read as a whole, is not irrational and it is therefore not subject to review under section 6(2)(f) of PAJA.

[69] Accordingly, the award is not subject to review on the grounds raised for review by the applicant. There was no irregularity.

[70] In light of the decision to which I have come, it is not necessary to deal with the applicant's submissions on substitution as an appropriate remedy. I do not, however, consider that the circumstances of this case are such that exceptional circumstances have been demonstrated as set out in ***Trencon***,[10] such that a substitution of the arbitrator's decision would have been appropriate.

Conclusion

[71] In the circumstances, I make the following order:

[71.1] The application for a review is dismissed with the costs of the application to be paid by the applicant.

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GOEDHART AJ
ACTING JUDGE OF THE HIGH COURT

ZAGPJHC 64 (15 June 2021) at paras 17 and 32.

[10] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC); [2015] ZACC 22, paras 34-81.

Date of hearing:	19 June 2024
Date of judgment:	26 June 2024 (This judgment was handed down electronically by circulation to the parties' representatives via email.)
For the Applicant:	Adv N Arendse SC
Instructed by:	AJ Tappenden & Co c/o Tshabuse Inc.
For the First Respondent:	Mr Thobejane
Instructed by:	Botha, Massyn & Thobejane.