IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 22/2016

In the matter between:

SAFPU	**First Appellant**
HU TOROMBA	**Second Appellant**
LM MALEK	**Third Appellant**
BS SENOKOANE	**Fourth Appellant**

and

FREE STATE STARS FOOTBALL CLUB (PTY) LTD	**Respondent**

Heard: **30 November 2016**

Delivered: **21 February 2017**

Summary: **Employees entering into fixed terms contracts which provide for a dispute resolution mechanism – employees dismissed for operational requirements referred their dispute to the Labour Court instead to the dispute resolution forum – Labour Court holding considerations which arose from the contractual obligation were not relevant - staying employees' matter and directing that they refer their dispute to arbitration in the dispute resolution forum in terms**

of their contract of employment. Exceptional circumstances must exist to exempt the employees from complying with agreement to refer their matter to the dispute resolution forum - Labour Court exercising such discretion and appeal court may only interfere if the exercise of the discretion is irrational, capricious or unreasonable – dispute resolution forum onerous for employee who must pay fees unlike in the Labour and Labour Appeal Court – moreover employees would have the benefit of speedy resolution mechanisms of the LRA – matter requiring little evidence as impermissible to retrench fixed term employees - Labour Court more suitable than forum to hear the dispute - such circumstances exceptional so as to warrant interference in the exercise of the discretion by the Labour Court – Appeal upheld and employees directed to proceed with their dispute in the Labour Court.

Coram: Landman JA, Savage AJA and Phatsoane AJA

Neutral citation: **SAFPU v FREE STATE STARS FOOTBALL CLUB (PTY) LTD** (LAC: J22/2016)

JUDGMENT

LANDMAN JA

Introduction

[1] The South African Football Players Union (SAFPU), and Messrs H U Toromba, LM Malek, and BS Senokoane, the first, second, third and fourth appellants, appeal against a judgment of the Labour Court (Matyolo AJ), delivered on 24 November 2015, in terms of which, their application instituted in the Labour Court under case number JS1101/2009, was stayed and they were ordered to refer the dispute to the 'Dispute Resolution Chamber' in terms of their contractual agreements. The appeal is with leave of the court *of quo*.

[2] After hearing the parties, judgment was reserved, and it was indicated that judgment would not be delivered until after 15 January 2017 unless the parties intimated that they could not settle the matter. In the event of the parties not settling the appeal, the parties were directed to file a joint note regarding the status of the collective agreements in volume 9 of the papers and to indicate the status of the Dispute Resolution Chamber/Centre (the DRC).

[3] The parties have advised that they have been unable to file a joint statement, but they agree that the DRC is not a bargaining council and was not established in terms of a collective agreement. A collective agreement between SAFPU and the Employers' Association for the Sport of Professional Football in South Africa exists, but it has no bearing on this appeal. The respondent's statement traverses some of the facts on the papers, but as no application has been made to lead further evidence on appeal, this appeal is decided upon the facts set out in the record.

The facts

[4] The second, third and fourth appellants were professional football players who entered into fixed term contracts of employment with the respondent, a professional football club. Each contract incorporated and included the respondent's 'Employee Handbook' and the 'Football Rules'. They were employees as defined in terms of the Labour Relations Act, 66 of 1995, and professional footballers as contemplated in the Football Rules.

[5] The second appellant commenced employment with the respondent on 1 July 2008 and his employment contract was to terminate on 30 June 2011. The third appellant commenced employment with the respondent on 1 July 2008, and his employment contract was to expire on 30 June 2011. The fourth appellant commenced employment with the respondent on 1 August 2008 and his employment contract was to expire on 30 June 2010.

[6] The sport of professional football is conducted internationally under the auspices of the International Federation of Association Football (FIFA) and the South African Football Association (SAFA). SAFA is an affiliate of FIFA. The National Soccer League of South Africa (the NLS) is the Association of Professional Clubs and a special member of SAFA. The respondent is a member of the NSL and was at all material times bound by the constitution of the NSL as developed and implemented from time to time, read together with that of SAFA and FIFA (the Football Rules) to the extent required.

[7] On 30 June 2009, the second, third and fourth appellants received letters of retrenchment, stating that their services would terminate for operational reasons on 31 July 2009. On 29 July 2009, the appellants referred a dispute that they had been unfairly dismissed to the Commission for Conciliation, Mediation and Arbitration. On 9 November 2009, the appellants delivered their statement of claim to the respondent and the Labour Court. The second, third and fourth appellants claimed, in effect, the following relief in the statement of claim:

- Payment of the remainder of the regular remuneration due in terms of their fixed term contract in terms of section 77(3) of the Basic Conditions of Employment Act (the BCEA);
- Payment of severance pay in accordance with the provisions of the Labour Relations Act (LRA) and BCEA;
- Payment of leave pay due to the appellants;
- Compensation equivalent to 12 month's salary in the event that the court finds the appellants' dismissal to have been substantively and all procedurally unfair;
- Costs of the suit on the scale as between attorney and client.

[8] On 20 November 2009, the respondent delivered its statement of defence. The parties held a pre-trial meeting on 9 December 2009 and a further meeting on 8 April 2015. Paragraph 13.1 of the supplementary pre-trial minute reads:

> 'The Respondent contends that the Dispute should have been referred to the Dispute Resolution Chamber of the NSL ('Chamber') and that the Applicants [Appellants] are not entitled, alternatively premature in referring the disputes to the Labour Court. As a result, the Respondent seeks an order for the stay of the proceedings in the Labour Court pending the Outcome of any proceedings relevant hereto at the Chamber. In this regard and for purposes of determining the appropriate forum for a dispute, such as that alleged in these proceedings the Respondent intends to rely on Article 18 of the NSL Constitution, Rule 36.17, of the National Soccer League Football Rules, the Employment Contracts of the Second, Third and Fourth Applicants [… the Appellants], and section 10.2 of the Constitution of the South African National Bargaining Chamber for the Sport of Professional Football.'

[9] Paragraph 13.10 of the supplementary pre-trial minutes reads as follows:

> 'The Applicants contend that the Court retains jurisdiction to adjudicate the Applicants' claims at all relevant times. In addition, the Applicants shall seek an order that the Honourable Court exercise its jurisdiction in favour of proceeding with the Applicants' claim in the Labour Court. The Applicants shall argue that exceptional and/or special circumstances exist herein in order for the Honourable Court to proceed with the case, the Labour Court. In this regard the applicants intend to rely on the following…' (Paragraph 13.10.1 to 13.10.22 are omitted.)

[10] As the individual appellants' services were terminated on 31 July 2009, their claims relating to the unlawful breach of their employment contracts had to be referred to the DRC towards the end of August 2009.

[11] The hearing of the matter took place on 15 May 2015. Only the jurisdictional point was argued. No oral evidence was led at the hearing. The matter was argued by both parties with reference to the supplementary pre-trial minutes and heads of argument presented to the court.

The terms of the NSL constitution and rules

[12] Articles 18.1 and 18.3 of the constitution of the NSL form part of the individual appellant's contract of employment. Article 18.2 reads as follows:

> 'The following parties are subject to the jurisdiction of the Dispute Resolution Chamber and each undertakes to refer their disputes and differences to the Dispute Resolution Chamber rather than to Courts or administrative tribunal's and to do so timeously and in full compliance of this Constitution and the rules: The league; Clubs; Players; Coaches; Agents.'

It is common cause that the individual appellants are players as referred to in the aforementioned Article 18.2.

[13] Article 18.3 reads as follows:

> 'The Dispute Resolution Chamber will in particular have jurisdiction over and deal with the following issues and/or disputes in accordance with this Constitution and the Rules:
>
> …..
>
> The determination of disputes concerning unfair dismissal and breach of contract and the provision of the appropriate remedies in respect of these, including urgent relief where this is necessary and appropriate.'

[14] Article 18.4 of the NSL constitution reads as follows:

> 'Disputes that arise from allegations of unfair dismissal or breach of contract must be referred to the Dispute Resolution Chamber in the period of 30 days from the date of the dismissal. The Dispute Resolution Chamber is entitled to condone the failure of a party to timelessly refer such dispute, on application, and

may do so in the event that the delay is not excessive, there is an adequate explanation for the delay, and the good prospects of success.'

[15] Rule 36.17 of the NSL Rules reads as follows:

'All disputes of a non-disciplinary nature relating to a contract of employment between a player and his club will be settled by arbitration within the Dispute Resolution Chamber provided for in these Rules.'

Costs of referral

[16] The NSL's Private Dispute Resolution Process consists of three stages, namely:

- Referral to the DRC.
- Referral of appeal to SAFA Appeals Board; and
- Referral to arbitration before the arbitrator appointed by SAFA.

A referral to the DRC must be accompanied by a "dispute fee" of ZAR 1000 excluding Value Added Tax (VAT). This amount is payable to the NSL. In the event of dissatisfaction with an award rendered by the DRC, any party has the right to appeal to the SAFA Appeal Board. The appellant is obliged to lodge a notice of appeal, comprehensively disclosing the grounds of appeal, within 7 days of the date of the award and in addition pay an "Appeal Fee", as determined in SAFA Constitution. At present, the cost of referring the matter to the SAFA Appeals Board amounts to ZAR23 000. A party has the option to refer an award of the SAFA Appeals Board to arbitration. The prescribed in compulsory costs to refer the matter to arbitration amounts to ZAR30 000. The aforementioned fee is payable before the appointment of any arbitrator by SAFA. The total referral costs in order to utilise the aforementioned three stages process amounts to approximately ZAR54 000.

The terms of the employment contracts

[17] Clause 19 of the individual appellants' contracts reads as follows:

'19.1 All disputes arising out or relating to this contract, including disputes as to the carrying into effect of any such provision or as to termination or consequences of termination shall be referred to the Dispute Resolution Chamber in accordance with the NSL Rule from time to time.

19.2. The parties warrant that, in accordance with the Football Rules, any dispute of whatsoever nature shall be determined in accordance with the NSL Rules and in the Dispute Resolution Tribunals of the NSL rather than before any Court other Tribunal insofar as it is a requirement of FIFA and other Football Rules that internal Dispute Resolution mechanisms available in football should be utilised by participants in the game, save where the Football Rules do not provide an appropriate Tribunal to determine the dispute.'

Grounds of appeal

[18] The grounds of appeal are lengthy but can be summarised as follows. The complaint is that the court *a quo* failed to exercise its discretion judicially by finding that the appellants had not shown that they would personally face difficulties at arbitration proceedings and that the factors and circumstances submitted on behalf of the appellants constituted special circumstances for refusing to refer the matter to arbitration. The process prescribed for dispute resolution before the DRC are more onerous and prejudicial as compared to a referral to the Labour Court. The prescribed process at DRC is less favourable to the individual appellants than those prescribed by the court. Consequently, it was contended that the Labour Court should have exercised its discretion against referring the matter to arbitration.

The law

[19] The starting point in this appeal is that identified in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*[1] where the court said at para 83:

[1] 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015).

> 'Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.'

[20] The discretion exercised by the court *a quo*, in this case, was whether to stay or refuse to stay the litigation which the appellants had launched in the Labour Court. The limited options available to the court demonstrate that it was required to exercise a strict or narrow discretion in its true sense. This being so this Court may only interfere with the exercise of that discretion if the court *a quo* "exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself." See *Clipsal Australia (Pty) Ltd and others v Gap Distributors and Others*.[2]

[21] In considering this question, it must be borne in mind that:

(a) The *onus* of satisfying the court that it should not exercise its discretion in favour of referring the matter to arbitration is on the party who instituted the legal proceedings (the appellants). See *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd*[3] and *Universiteit van Stellenbosch v J A Louw (Edms) Bpk.*[4]

(b) The discretion of the court to refuse arbitration may only be exercised when a "very strong case" is made out. See *The Rhodesian Railways Ltd v Mackintosh*[5] and *National Bargaining Council for the Road freight Industry and Another v Carl Bank mining Contracts (Pty) Ltd and Another*[6]. It has also been said that "there should be 'compelling reasons' for refusing to hold a party to his contract to have a dispute resolved by

[2] 2010 (2) SA 289 (SCA).
[3] 1970 (2) SA 498 (A) at 504H.
[4] 1983 (4) SA 321 (A).
[5] 1932 AD 359 at 375.
[6] (2012) 33 ILJ 1808 (LAC) at para 34.

arbitration". See *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*[7]. Lastly, it has been held that a court must be satisfied that "there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement." See *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* relying on *Bristol Corporation v John Aird & Co.*[8]

Evaluation

[22] The court *a quo* examined the statement of case and noted that the appellants claimed that the individual appellants' dismissal for operational reasons was unfair and that it was unlawful to dismiss them for this reason as they were employed in terms of fixed-term contracts. *Buthelezi v Municipal Demarcation Board (Buthelezi)*[9] is authority for the proposition that unless a fixed term contract of employment provided for termination for operational requirements that this measure is not available to terminate such contracts. This judgment was brought to the attention of the court *a quo* by Mr Goosen, who appeared there and in this Court, for the appellants. This decision meant that *prima facie* the appellants had a good claim for payment of the balance of their agreed remuneration. The minimum of evidence would be required. Even if the respondent persisted with its defence, that the appellants had been dismissed for operational reasons and challenged the authority of the *Buthelezi* judgment, this is a matter of which the Labour Court was eminently more suitable than the DRC. The failure to appreciate this is one factor that permits us to interfere with the strict discretion which the court *a quo* exercised.

[23] The court *a quo* correctly inquired whether there were special or exceptional circumstances which showed that the matter should not proceed to arbitration as agreed in the respective contracts of employment. The court *a quo* concluded that considerations which arose from the contractual obligation were not relevant.

[7] 1971 (2) SA 388 (W).
[8] 1913 AC (HL (E)) 241 at 252-257 and 260.
[9] [2005] 2 BLLR 115 (LAC).

The appellants had to show that they would be individually affected by being compelled to resort to arbitration. This, with respect, unduly limits the facts and factors which may be considered.

[24] The fact that the appellants would be obliged to lodge a claim within 30 days is not insignificant. The expeditious resolution of disputes is a foundational value of the LRA and even disputes that are to be resolved outside the courts must be resolved with expedition. Of course, the period of delay has grown longer and, as pointed out by Mr Jackson who appeared for the respondent, the statement of opposition alerted the appellants to this course of action in 2009. The delay may give rise in the DRC to defences that could not be raised successfully in the Labour Court eg prescription.

[25] The contracts that the appellants entered into with the respondent were entered into voluntarily but they are contracts of adhesion. There can be little doubt that a request to delete the dispute resolution clause would have been rejected out of hand. While there is little merit as regards the payment of a referral fee of R1 000 to the DRC, the fact that, in the event of the DRC finding against the appellants, they would be obliged to pay R23 000 to appeal the finding to the SAFA appeals board, is a consideration which should be taken into account and weighed in the context of exceptional circumstances. The same applies as regards the payment of R30 000, in the event of the appellants being dissatisfied with the outcome of the SAFA appeals board, and deciding to refer the dispute to the arbitration tribunal. The payment of these fees should be weighed in the light of the fact that access to the Labour Court and the Labour Appeal Court does not involve any charges.

[26] The result of these misdirections entitles this court to interfere with the strict discretion of the court *a quo* and to consider the matter afresh. Taking all the factors discussed above into account, I would exercise the discretion in favour of hearing the dispute and so to dismiss the application to stay the proceedings.

Costs

[27] Both counsel submitted that costs should follow the result.

Order

1. The appeal is upheld.

2. Paragraph 1 of the order of the court *a quo*, dated 24 November 2015, is set aside and replaced by the following:

   'The point *in limine* is dismissed. The parties are to enrol the matter for trial after holding a pre-trial conference.'

3. The respondent is to pay the costs of appeal including the costs of the application for leave to appeal.

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AA Landman

Judge of the Labour Appeal Court

Savage AJA and Phatshoane AJA concurred in the judgment.

APPEARANCES:

FOR THE APPELLANT:	Adv Goosen
	Instructed by Van Gaalen Attorneys.
FOR THE RESPONDENT:	Adv Jackson
	Instructed by Tim Sukazi Inc.