IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 259/2010**

In the matter between:

BAKERS PRIDE ARSENAL F.C.
Applicant
And
MANZINI REGIONAL FOOTBALL ASSOCIATION **1st Respondent**
LUDZELUDZE KILLERS F.C.
2nd Respondent
SWAZI BANK CUP MANAGEMENT COMMITTEE **3rd Respondent**

Date heard: 03 February, 2009.

Date of judgment: 10 February, 2009.

Mr. Attorney Sabela Dlamini for the Applicant

Mr. Attorney L. M. Mzizi for the 1st Respondent

JUDGMENT

MASUKU J.

[1] By application brought on an urgent basis, the Applicant, Baker's Pride Arsenal Football Club, to whom I shall henceforth refer as "the Applicant" or simply as "Arsenal", approached this Court seeking the following relief:

1. Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits, and

condoning the Applicant's non-compliance with the said rules and hearing this matter as an urgent one.

2. Reviewing, correcting and setting aside the decision of the 1st Respondent to submit the 2nd Respondent as the Manzini Region's representative in the Swazi Bank Knockout Competition.

3. Directing the 1st Respondent to dispatch to the Registrar of the above Honourable Court within two (2) days of receipt of this application or such period as this Honourable Court deems appropriate the record of proceedings which led to the decision sought to be reviewed, corrected and set aside in prayer 2 above, together with any other such reasons as the 1st Respondent is required by law or desires to make and notify the Applicant that this has been done.

4. Pending the finalization of this application, the 3rd Respondent be forthwith interdicted and restrained from proceeding with the Swazi Bank Cup Competition.

5. Declaring the Applicant, alternatively directing the 1st Respondent to submit the Applicant, as the Second official representative of the Manzini Region in the Swazi Bank Cup Competition.

6. Granting the Applicant costs of suit at attorney client scale as against the 1st Respondent and the 2nd 3rd Respondents, only if they oppose this application.

[2] The 1st Respondent is the Manzini Regional Football Association, and to which Arsenal is affiliated. The 2nd Respondent is Ludzeludze Killers F.C, also an affiliate of the 1st Respondent. The 3rd Respondent is the Swazi Bank Management Committee, a Committee that was set up to manage a football tournament hereinafter referred to as "the Swazi Bank Cup".

[3] I should mention at this nascent stage of the judgment that notwithstanding what appears to be good service of the present proceedings on them, both the 2nd and 3rd Respondents do not oppose the present application for they have not filed any papers indicating otherwise.

Facts Giving Rise to Present Application

[4] The facts giving rise to the present application are fairly straightforward and are largely common cause. They acuminate to this: Under the auspices of the National Football Association of Swaziland, (hereinafter referred to as "the NAFS", the Swazi Bank, a financial institution, launched a sponsorship for a soccer tournament in this Kingdom. This tournament involves soccer teams in the Premier League of Swaziland and also some teams from the Regions, including the Manzini District.

[5] Each of the Districts is represented by the two top teams as at the end of the first round of games in the current soccer

season. It is common cause that the 1st Respondent in this regard submitted the names of Luhleko F.C. and Ludzeludze Killers as its representatives in this competition. As at the end of the first round soccer log in the said District, Luhleko F.C. had amassed 31 points and it was followed by Killers with 26 points. Arsenal, are reflected as occupying the third position although they, like Killers, had at the same stage also amassed 26 points.

[6] Arsenal are aggrieved with their positioning in the log and claim that they should, on account of their superior goal difference when compared to that of Killers, occupy the second position and should on that account, have been the second representative of their Region in the stead of Killers. It is common cause in this regard that Arsenal have a superior goal difference of 10 whereas Killers' is 8.

[7] Upon being apprised of their standing in the log and being dissatisfied therewith, Arsenal wrote a letter to the 1st Respondent, dated 21 January, 2010, requesting the 1st Respondent to amend the log accordingly and to reflect them as the second best team in the Region for purposes of having them becoming the second representative in the competition. The pith of their contention is that in compiling the standing in the log, the 1st Respondent employed a wrong principle i.e. the "back to back" principle, whereas they ought to have applied the goal difference rule at this stage. The 1st Respondent, notwithstanding that it was put to terms to respond to the query by 27 January,

2010, did not. It was in the face of this non response that the Applicant approached this Court for the relief mentioned in paragraph 1 above.

[8] In its answering papers, the 1st Respondent initially raised two pints of law *limine,* namely that Arsenal did not exhaust the local remedies afforded it by the M.R.F.A. Constitution and secondly, that it did not establish any facts that entitled it to approach the Court on the basis of judicial review. I interpolate to observe that the question of the urgency of the matter was not raised and correctly so, considering that the Applicant Arsenal duly complied with its obligation exacted by Rule 6 (25) (a) and (b) of this Court's Rules.

[9] At the commencement of oral argument, Mr. Mzizi for the 1st Respondent, indicated to the Court that he was abandoning the point of law relating to review and would only persist in the argument relating to the issue of the exhaustion of local remedies. It is to that point that I presently turn before considering whether it is apt to consider the application on its merits.

Doctrine of Exhaustion of Local Remedies

[10] In his forceful oral address, Mr. Mzizi contended that Arsenal had jumped the gun, so to speak, by approaching this Court when the M.R.F.A. Constitution provided sufficient remedies in

case Arsenal was dissatisfied with the standing accorded to it in the log. It was Mr. Mzizi's contention that for that reason, the application ought to be dismissed with costs.

[11] I must interpose and point out in this regard that the prayer sought by Mr. Mzizi for the dismissal of the application on the grounds of failure to exhaust local remedies is not competent. I say so for the reason that in such matters, the point of exhaustion of remedies amounts to or is at least akin in effect to a plea *lis alibi pendens* which ordinarily means that this Court is moved to stay these proceedings in the interregnum, pending the exhaustion of local remedies. That plea is merely dilatory.

[12] It is clear therefore that the Court would be acting precipitately if it dismissed the application in line with Mr. Mzizi's entreaties because the exhaustion of local remedies is not equivalent to the Court not having jurisdiction altogether, which is not the 1st Respondent's contention at all. I point out that the learned author Baxter, Administrative Law, Juta, 1991, at page 720 states clearly that judicial review may be "suspended or deferred" until exhaustion of local remedies. This clearly shows that the raising of the doctrine is not fatal with finality to any proceedings brought oblivious to or contrary to the doctrine of exhaustion of local remedies.

[13] All that this means is that although the Court does have jurisdiction to entertain the matter, it may not, however, exercise

its jurisdiction at that point, pending the exploration of the remedies availed by legislation, whether primary, subordinate or other type. Should the Court dismiss the application, however, it ordinarily means that the particular applicant may not later bring the matter Court in the light of the dismissal, even if that party may have been unhappy with the decision of the body charged with dealing with the matter in the first instance.

[14] I now revert to the argument raised. Mr. Mzizi, contended that the provisions of article 49 h) of the Constitution of the National Football Association of Swaziland provide the necessary remedies which should serve *pro ha vice* to preclude Arsenal from invoking the jurisdiction of this Court. He placed heavy reliance on a judgment of this Court in *Sidumo Mamba v Norman Mkhwanazi and Three Others* Civ. Case No. 467/2003, where the Court dismissed an application brought by the said applicant on the grounds that he had failed to exhaust the remedies provided in the legislation appertaining to the police service of this country. I shall advert to this judgment shortly.

[15] I should point out that whilst the Court of Appeal confirmed the *Sidumo Mamba* judgment, in Case No.23/2004 it did not however, confirm the view therein expressed that where a party has not exhausted local remedies, then that party must perforce be non-suited. The Court of Appeal cited with approval the case of *Golube v Oosthiuzen And Another* 1953 (3) S.A. 1 (T), where it was stated as follows:

"The mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies."

[16] At page 9 of the judgment, Zietsman J. A. said:

"If the aggrieved person's complaint is that the initial proceedings were conducted illegally, or that a fundamental irregularity was committed in the course of such proceedings, he can *a fortiori* immediately take the matter on review to a court of law. There can be no question of his having first to exhaust his local remedies." See also the cases therein cited.

It would therefor follow, in my judgment, that the High Court judgment, in so far as it purports to lay down the principle that any failure to exhaust local remedies will result in the application for judicial review being unsuccessful is, with respect not correct. This is so because the Court of Appeal stipulated the applicable principle in very clear terms as I have articulated above.

[17] Turning to the relevant provision of the Constitution, i.e. article 49 h), it reads as follows:

"Any club or person aggrieved by a decision of the Premier League, Regional Association or by any member association shall appeal to the FA Appeals Board as per the provisions of this Constitution."

Mr. Mzizi's contention was that the wording employed by the lawgiver in this case is peremptory, hence the word "shall" occurs. For that reason, the Applicant was bound to first exhaust

his local remedies and that failure so to do should result in Arsenal being non-suited. In particular, he referred to my judgment in *Nkosikayikhethi Nxumalo and Two Others v Mashikilisana Fakudze N.O. And Two Others* Civil Case No. 2816/2008, where I quoted generously from the *Mamba* judgment on appeal. In particular, he harped on the point that the provision in question is not merely directory, therefore pointing inexorably in the direction that the local remedies ought first to be exhausted before recourse can properly be had to this Court.

[18] Mr. Dlamini presented strong argument to the contrary. He submitted that the provision quoted above is of no application to the present case. He contended quite forcefully that article 49 h) was not a self-contained clause but one which made reference to other provisions in the Constitution which must perforce be read *in tandem* with the article in question. Mr. Dlamini, in his erudite oral submissions referred in particular to article 49 e) of the Constitution, which sets out the powers of the F.A. Appeals Board, to which pertinent reference is made in h) quoted above.

[19] The relevant provisions of the article stipulate *inter alia* that the said Board is to: i) hear and determine appeals from decisions by committees of member associations; ii) hear and determine review applications in respect of decisions and proceedings of the Appeals and Disciplinary Committee member associations. It was contended and correctly so, in my view, that

the above provisions do not clothe the Appeals Board with the jurisdiction to deal with a matter such as the present as it is one from a decision of the M.R.F.A. and not on appeal from a disciplinary committee of a member. This appears to me to be a wholesome conclusion for it is plain that this article does not offer the Applicant an effective remedy in the circumstances, particular regard being had to the body from which this complaint emanates.

[20] It would appear, from a cursory reading of article 49 h), that although the said article would appear to arrogate the Disciplinary Committee with the power to entertain cases from Regional Associations as well, the powers and functions of the Board, as stipulated in article 49 e), as mentioned above, do not however suggest that the Disciplinary Committee has power to deal with matters from Regional Associations such as the 1st Respondent herein.

[21] Mr. Dlamini also argued that the cumbersome and laborious process stipulated for lodging appeals in terms of the article in question, would not have served the Applicant's interests in that by the time that the time limits stipulated were complied with, the stables would have been locked after the horses had already bolted. By this, I understood him to say that by the time the matter would have served before the Appeals Board, the very harm it sought to forestall would have eventuated, thus dealing the Applicant's aspirations of participating in the tournament a

shattering blow.

[22] I agree entirely with this submission as this renders the remedy stipulated in the aforestated provision not just ineffective but also illusory, considering in particular that the Appeals Board is not possessed of wide ranging powers that would include the effective remedies that a forum such as the present may afford. Mr. Dlamini's submissions in this regard must therefore be sustained.

[23] The ineffectiveness of the remedies provided by the present structures was noted with concern in the case of *Manzini Wanderers F.C. v The Swazi Bank Management Committee* Case No. 1/2004 in a judgment where I served as the chairperson of the NFAS Arbitration Tribunal. I sat with Mr. Z.R. Magagula and the then Senator A.M. Mthethwa (the present President of the NFAS). At page 19 of the judgment then delivered, I observed, with the concurrence of the members, the following regarding the inadequacy of effective remedies in the football structures as exemplified in that matter:

"Firstly, we observed that after the appeal was noted by the Appellant, there was no proper forum where the Appellant could apply for a stay of the matches pending the appeal. The only remedy open was to approach the Courts, a course that is ordinarily frowned upon in the football fraternity. A truce was reached, which culminated in the Respondent deciding to continue with the games, subject to nullifying all the games and stages reached if the Appellant's appeal on conviction was successful. Fortunately, for the Respondent, the appeal on that score was dismissed."

[24] It must be further observed that article 49 f) ii) stipulates that the appeal or review application must be lodged within five working (and not calendar) days from the making of the decision complained of. Added to this is that article 49 f] iv) which provides that the relevant Appeals Board should convene at the latest within ten days a meeting for the determination of the appeal or review, as the case may be. These periods of time, when observed, it would be clear to me, would render any judgment or order in the Applicant's favour hollow for the reason that whilst the matter is pending, there does not appear, from the powers specifically imbued on the Appeals Board by the article in question, any effective remedy that would serve to preserve the status *quo* so that at the time the matter is determined by the said Board, the Applicant's rights are protected, thereby affording them an effective remedy in the end if they turn out to be successful.

[25] Mr. Dlamini further stated that the 1st Respondent is with tongue in cheek, so to speak, calling upon the Applicant to exhaust local remedies yet it deliberately did not respond to the Applicant's letter of 21 February, 2010, referred to earlier. The 1st Respondent was required to amend the log but they did not do so nor did they give any reasons for the decision not to amend the log as requested, furnishing reasons in the process, which may have enabled Arsenal to exhaust the remedies alleged.

[26] I view the position adopted by the 1st Respondent not to respond to Arsenal's query in a very serious light. It was, in my view, downright irresponsible for them to do so, more particularly so when the 1st Respondent now seeks to benefit from its own wrong by arguing that the local remedies were not exhausted. This is hypocritical conduct because the 1st Respondent, by its conscious decision not to respond to the said letter, denied Arsenal the wherewithal with which to successfully exhaust the remedies availed by the Constitution.

[27] The use of the word "shall" in the relevant clause notwithstanding, it is my firm view that the circumstances in this case are such that they amount to a fundamental irregularity. I say so considering the position stated by the Applicant for the review on the one hand, and the response in the answering affidavit, belated as it now is, by the 1st Respondent as to why the log stands as it is. This is a matter that I shall deal with in due course. I am satisfied, however, that the argument advanced by the Applicant on the procedure adopted by the 1st Respondent does amount to a fundamental irregularity and which is one of the grounds upon which a party need not exhaust local remedies. See *Mamba* judgment on appeal at p.9, which I have quoted in full in para [17] above.

[28] I am of the view that even if I may not have been correct in my conclusions regarding the proper analysis of the provisions of the Constitution and how they impact on the present case,

particularly in relation to the argument on the exhaustion of local remedies, the facts of the instant case are such that they fall squarely within the *ratio decidendi* of the *Mamba* judgment. This serves to bring the matter within the rubric of matters in respect of which a party need not necessarily exhaust local remedies before approaching the Court on judicial review. The 1st Respondent's point of law must in the circumstances be dismissed as I hereby do.

_AD_ MERITS

[29] The issue to decide at this juncture is fairly straightforward. It is this: was the 1st Respondent correct in applying the formula it did for placing Arsenal third on the log? According to the 1st Respondent, it applied the provisions of article 9 (3) of its Competition Rules. For a better understanding of the position, I intend to quote generously from the said Rules, the relevant portions of the said article.

[30] Article 9 provides for league positions, relegation, promotion and zonal *[sic]* of clubs. The relevant provisions I intend to quote are sub-articles 1.-6 and they read as follows:

7. The number of points scored shall determine the positions in this Manzini Super League Tournament. The final and officially completed log shall be binding on clubs through out the season.

8. The club scoring the most points on completion of the League shall be declared the winner (league champions)

9. The results of the matches played by the two contesting clubs, which have tied, shall be decided on the back to back principle.

10. If 2 and 3 are not decisive, the club with the best goal difference shall be declared the winner.

11. If 2, 3 and 4 are not decisive, the club having scored the most goals shall be declared the winner.

12. If 2, 3,4 and 5 fail to produce a clear position, then the drawing of lots will be used.

[31] I need to make one major observation regarding the above Rules and this is an observation with which both Counsel, as I understood them agreed. The above-quoted Rules apply at the end of the soccer season i.e. at the end of the league in order to determine the log standings, which include the winner of the tournament. That that is indeed the case, can be seen from 1. above, where the article speaks of "the final and completed log"; in 2. from the words "on completion of the log shall be declared the winner". The words "shall be declared the winner" litter most of the provisions and the use of these words inexorably lead to the conclusion to which I have arrived that the diverse positions related in the above article apply to a determination of the winner and incidental standings, which include relegation of teams, at the end of the season.

[32] This would, in the circumstances, suggest that the 1st Respondent erred when it applied the back to back principle when it did. I say so for the reason that from its own depositions, it is abundantly clear that the standing on the log that was used

to determine the teams to represent the Region was at the midway stage of the season. For that reason, the decision to employ that criterion, which is avowedly reserved for the end of the season, was wrong.

[33] It is also my view that to use the "back to back" principle in the circumstances of this case and at the time it was applied was particularly disturbing and inherently unfair. I say so on the grounds that "back to back" envisages two separate backs and in the context, it means that the two contesting teams must have played the reverse fixtures against each other, that is to say, home and away. That, it stands to reason, can only be done at the end of the season when both the fixtures have been played and the results known. It is for that very reason that the author, in 3. used the words "results" and "matches played by the two contesting clubs which have tied".

[34] Employing that criterion at the midway stage necessarily yields unjust results for the reason that it gives an unfair and distorted picture of the result of the first round of games and before the second round has been played, resulting in a single result becoming the decisive encounter that settles the team to represents the District. This will, in most cases favour the team that plays at home or the one which wins the first round of the two games, whether it has played at home or away.

[35] There is no knowing at that stage how the second "back", so

to speak, will turn out. In this instance, it clear that Arsenal lost the first "back", and for that reason, even before the reverse "back" could be played, Killers were given a full and final advantage of their win even before the season is over. This is, in my view grossly unfair and should not be allowed to stand as it fully represents what was referred to in the *Mamba* judgment as a "fundamental irregularity". It is for that reason that during the hearing, I came to the view that the "back to back principle" was the correct principle but which was applied at the wrong time. My views, which have concretized in that respect, have not been dislodged in any way.

[36] Mr. Dlamini, argued that the proper criterion that should have been employed to good effect by the 1st Respondent, was 4. above, which applies the best goal difference rule. From what I have said before, it is clear that this criterion, like the others, should ordinarily apply at the end of the season and not before. In my view, there is no particular criterion that is legislated for application at the midway stage of the season.

[37] In the array of alternatives stipulated in the article in question, I would incline towards the application of 4. I say so for the reason that the preposterousness and unfairness of applying the back to back principle, as the 1st Respondent sought to do is manifest. A team cannot be disadvantaged by a result of a game that has not yet been played. In juxtaposition, however, the best goal difference represents a true and accurate picture of the

better teams at any stage of the season. This is so because, in my view, that criterion reflects the better team in the offensive sense, represented by the high amount of goals they score and the best defensive team reflected in the least amount of goals conceded.

[38] For that reason, it would seem to me that if any just and equitable principle were to be used to gauge the better team in the event of a tie in the middle of the season, the best goal difference rule passes muster as it captures, as Ihave said the better performing team, points earned expressly excluded. Subject to what I say below, I would lean heavily in favour of the best goal difference principle as opposed to the back to back principle.

[39] I intimated this leaning towards the best goal difference rule to Mr. Mzizi during the hearing and in fairness to him, he had no answer as the manifest inequity of the principle adopted by his client was simply inexcusable; lacking application of thought and totally devoid of fairness. This must be considered in the light of and in contradistinction to the FIFA slogan that puts fairness at the pinnacle of football activities. This principle of fairness, as I stated before at page 11 in the case of *Simunye F.C. v Eleven Men In Flight F.C.* Arbitr. Trib. Case (delivered on 16 January, 2004), must not only be applied in relation to the play in the football field but must exude all footballing activities, including decisions that may take place in the privacy of boardrooms,

away from public glare and scrutiny.

[40] Having come to the view that the article in question is, from the nomenclature employed, one ordinarily to be applied at the end of the season, the question to be determined is what is the proper criterion to apply in the present circumstances? The relevant article which should have been employed by the 1st Respondent in my view, but which was not addressed in argument, requiring as I did, that Counsel make further submissions thereon, are the provisions of article 57 of the M.R.F.A. Constitution.

[41] The said article provides for what is referred to in the heading as "unforeseen circumstances", and to that end, states as follows:

"All cases not provided for by the present statutes, or cases of force majeure shall be decided:

(a)In accordance with the M.R.F.A./N.F.A.S. statutes as much as they provide for the case in question, or

(b)In accordance with COSAFA, CAF and FIFA statutes as much as they provide for the case in question; or

(c) If not, then the Executive Committee shall decide the question and its decision shall be final."

The first port of call, regarding the question to be determined, is whether there is any provision in the statutes referred to in (a) above, i.e. the MRAF or the NFAS statutes. A thorough reading and examination of both sets of statutes reflects that there is no provision in either of the two.

[42] It then becomes necessary, in the circumstances, to search for a possible answer from the regional and international bodies referred to in article 57 (b). It was in that connection that Counsel were required by the Court to make written submissions thereon, providing the necessary texts, beginning of course with the COSAFA statutes.

[43] I must state that I am indebted to Counsel for the 1st Respondent, who made available some of the relevant texts of the statutes. He submitted that none of them provided for the matter in issue and therefore implored this Court to refer this very issue to the Executive Committee, in terms of article 57 (c). Unfortunately, Mr., Dlamini's heads of argument did not at all address the issue that I referred to Counsel and I shall, for that reason, have no regard to his written submissions filed in response to my invitation.

[44] The texts provided to me did not, however, include the COSAFA statutes and I am not in a position to verify if there are any provisions therein that could possibly offer guidance on the issue at hand. Mr. Mzizi is correct in his submissions that there are no directly apposite statutes that govern the present situation from the CAF and FIFA statutes placed at my disposal. What was provided to the Court in addition to the relevant

statutes included the Regulations of the XXIVth African Cup of Nations and the Regulations of the 16th African Youth Championship, 2009.

[45] The Africa Cup of Nations Regulations contain an interesting article for purposes of this case. Article 11 thereof deals with the first round of the tournament and states how the winner will be determined. It provides as follows regarding the case of an equality of points:

"In case of equality of points between two teams at the end of the group matches, the classification of the teams shall be established according to the best goal difference. If the goal difference is not decisive, we shall take into consideration the greatest number of goals scored. . ."

It must be mentioned that Article 11 4 of the Youth Championships also makes similar provisions, in almost identical language. The goal difference rule, it must be mentioned, is not applied at the end of the tournament but at the end of the group stages in order to determine which of the teams proceed to the next round/stage

[46] What is plain from the above provisions is that where there is equality of points, the first port of call is the goal difference rule, which as I said earlier, is the most equitable manner of deciding the best team to proceed. Other criteria are applied later, an *inducium* that the best goal difference rule is the most fair and equitable criterion. Certainly, the "back to back"

principle, as I endeavoured to show above clearly breeds unjust results. I dare say that it is a notorious fact that even in most of the prestigious leagues in the world, where there is equality of points, even during the course of the league, the team with a better goal difference is placed above its counterpart.

[47] I must state that although the relevant statutes placed at my disposal i.e. CAF and FIFA do not specifically provide for the current situation in clear terms, their regulations governing tournaments played under their auspices do provide in very clear terms for the application of the best goal difference rule in the first place in the event of a tie on points. This is a clear pointer as to the correct and fairest approach and which I come to the view, ought to apply in the instant matter both in respect of the available provisions in the tournament rules and when regard is had to the provisions of article 57.

[48] Mr. Mzizi argued that there being no direct reference in the statutes referred to, the matter should be remitted to the Executive Committee to decide it in terms of Article 57 (c). I have already held that the regulations should, in the instant case, provide guidance quite apart from my conclusions on the analysis of the Rules of the Manzini Super League. There is, in the circumstances, no need, in my considered view, to invoke the provisions of article 57 (c).

[49] In the result, I have come to the conclusion that the

Applicant has made out a clear case for the relief it seeks. I am, in view of the conclusions reached above fortified in the view that the wrong criterion was used and that if the correct one had been applied, Arsenal would inevitably have been submitted as the second representative of the Manzini District. The application should therefor succeed.

Costs

[50] Mr. Dlamini applied for costs on the punitive scale, arguing that as a result of the 1st Respondent's failure to respond to their letter requesting the amendment of the log, they have been placed out of pocket. He argued further that the 1st Respondent also did not furnish them with any reasons for the decision that they took, warranting, in the circumstances, that an order for costs on the higher scale be awarded against the 1st Respondent.

[51] The approach of Courts to the granting of costs on the attorney-and-client scale is well trodden. The learned authors Herbstein & van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed, 1997, at p717 to 718, state the following:

"An award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavor and is loath to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have. The grounds upon which the court may order a party to pay his opponent's attorney-and-client costs include the following: that he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious, or frivolous; or that he has

misconducted himself gravely either in the transaction under enquiry or in the conduct of the case. The court's discretion to order the payment of attorney-and-client costs is not, however, restricted to cases of dishonest, improper or fraudulent conduct: it includes all cases in which special circumstances or considerations justify the granting of such an order. No exhaustive list exists."

[52] I am of the considered view that although the 1st Respondent did not render a decision and also did not respond to the Applicant's enquiry, issues that I have commented adversely about in paragraph [26] above, I am of the view that those inactions do not, however show any malice, recklessness or any of the epithets mentioned above. I do not, for that reason, find it fit to mulct the 1st Respondent with costs on the scale applied for. Costs should, in my judgment, be granted on the ordinary scale, as I hereby order, regard being had to entire conspectus of the relevant facts.

[53] In the premises, I issue the following order:

[53.1] It is hereby declared that the Applicant, Bakers' Pride Arsenal Football Club is the second official representative of the Manzini Region in the Swazi Bank Cup Competition.

[53.2] The 1st Respondent be and is hereby directed to submit the Applicant herein as the second official representative of the Manzini Region in the Swazi Bank Cup Competition.

[53.3] The 1st Respondent be and is hereby ordered to pay costs of this application on the ordinary scale.

DELIVERED IN OPEN COURT AT MBABANE ON THIS THE 10th DAY OF FEBRUARY, 2010

T.S. MASUKU
JUDGE OF THE HIGH COURT

Messrs. Magagula & Hlophe Attorneys for the Applicant

Messrs. Lloyd Mzizi Attorneys for the 1st Respondent

No appearance for the 2nd & 3rd Respondents