IN THE HIGH COURT OF SWAZILAND

Case No. 255/2016

In the matter between:

VOVOVO FOOTBALL CLUB		**Applicant**
And		
THE NATIONAL FOOTBALL ASSOCIATION OF SWAZILAND APPEALS BOARD	**1st**	**Respondent**
TINYOSI FOOTBALL CLUB	**2nd**	**Respondent**
LOBAMBA WANDERERS FOOTBALL CLUB	**3rd**	**Respondent**
THE SWAZI BANK CUP MANAGEMENT	**4th**	**Respondent**
HHOHHO REGIONAL FOOTBALL ASSOCIATION	**5th**	**Respondent**
RED LIONS FOOTBALL CLUB	**6th**	**Respondent**

Neutral citation: ***Vovovo Football Club v The National Football Association of Swaziland Appeals Board & 5 Others (255/2016) [2016] SZHC 52 (14th March 2016)***

Coram: **M. Dlamini J**

Heard: **16th February, 2016**

Delivered: **14th March, 2016**

EX TEMPORE JUDGMENT

- *Jurisdiction by court to hear matters of football games - principle of audit alteram partem discussed – it is not sufficient for applicant to establish failure of audi alteram partem - where court is to set aside decision of tribunal – applicant to show prospect of success.*

Summary: This is an urgent application filed on behalf of applicant for *inter alia* review and setting aside first respondent's verdict dated 28th January 2016 which excluded applicant from participating in the league hosted by fourth respondent. The application was vociferously opposed.

The parties

[1] The applicant is, "*a body corporate established in terms of its constitution with power to sue and be sued and with its principal place of business at Motshane area.*"[1]

[2] The first respondent is "*a judicial body established in terms of Article 49 of the National Football Association of Swaziland statutes read together with Article 64 of the Hhohho Regional Football Association Statutes and Article 8 (10) of the Swazi Track Hhohho Regional Super League Rules and Regulations 2015-2016, with its principal place of business at Sigwaca House, Mbabane district of Hhohho, Swaziland*."

[3] Second and third respondents are affiliates of fifth respondent. Fourth respondent is, "*responsible for the administration and management of a soccer tournament for a certain class of teams in Swaziland, including affiliates of the Association and which is sponsored by the Swazi Bank in*

[1] Paragraph 4 page 9 of the Book of Pleadings

the tune of over E1 million under the auspices of the 2016 Swazi Bank Rules and Regulations."

[4] Fifth respondent is a corporate body administering all football clubs under the Hhohho region.

[5] Sixth respondent is, "*an affiliate of the Premier League of Swaziland and also a participant in the Swazi Bank Competition by virtue of being such an affiliate and has been fixtured to play its first game of the tournament on Saturday, 6th February 2016 at 2:00 p.m. at Somhlolo National Stadium*."

Applicant's contention

[6] The events leading to the present application are that on 19th November 2015, applicant appeared before fifth respondent on three counts, *viz*. for assaulting an assistant referee; failure to control its supporters; and causing an abandonment of the game played on 1st November 2015 at Lobamba Sports Ground.

[7] The applicant was convicted on the same day (19th November 2015) on the first count of assault only. It was sentenced to E1000 fine with half suspended for the duration of the season. The fifth respondent further ruled that the game be replayed. The applicant then deposed:

> "*19. The Applicant was advised of its right to appeal as per the rules, particularly within the mandatory five days period after delivery of the decision appealed against. The Applicant was served with the verdict aforestated on the 20th November 2015.*
>
> *20. It is common cause that at the Disciplinary hearing, the 3rd Respondents were not party as only the Applicant that had been charged of contravening the Rules had been summoned. However, the 3rd*

respondent was also served with a copy of the verdict on the 21st November 2015.

[8] Applicant also asserted:

> "*21. Despite having been served with the verdict, which inter alia directed that the game played on the 1st November 2015 be replayed, the 3rd respondent did not file an appeal as envisaged by Regulation 49 (f) of the N. F.A.S. statutes, as read together with Article 8 (10) of the Swazi Trac Hhohho Regional Super League Rules and Regulations 2015/2016."*

[9] It is applicant's further contention that upon applicant's failure to file an appeal on the replay, fifth respondent arranged for a replay. It was on 2nd January 2016. Third respondent did arrive but late for this game. The result was that it was called off and third respondent lost three goals and three points to the applicant. Third respondent was also charged.

[10] On the 8th January 2016, third respondent lodge an appeal against the decision of sixth respondent of 19th November 2015 where a replay was ordered between the clubs. This, according to respondents, was way out of time, and ought not to have been entertained by first respondent. The applicant further attests to a number of irregularities which I will refer to later herein.

[11] On 28th January 2016, the first respondent found in favour of the third respondent and relegated the applicant, such that applicant who was position one could not play the game arranged by fourth respondent. Applicant was never invited to the hearing that led to its relegation. By this time, fifth respondent had already submitted the name of applicant to fourth respondent for purposes of taking part in fourth respondent's tournament of that season. The applicant was notified by fifth respondent of this.

[12] Applicant was substituted by sixth respondent in fourth respondent's tournament. Applicant protested the decision of first respondent. Fifth respondent joined applicant in the protest by correspondences.

[13] On the 2nd February 2016, fourth respondent conducted a draw excluding applicant from participating. It turned out that the applicant was not privy to the ruling of first respondent of 28th January 2016. Applicant only discovered of its relegation when it was attending the draw by fourth respondent.

[14] It was only on the 3rd of February 2016 after the draw had taken place that first respondent reduced its reasons for the ruling. Upon receiving the correspondences from applicant and fifth respondent, first respondent declined to entertain them, citing *functus officio*. By correspondence addressed to 5th respondent, first respondent advanced that applicant should approach the Court of Arbitration.

Urgency

[15] The matter came before me at 5:00 p.m. on 5th February 2016. The applicant had served respondents, according to respondent's Counsel, "*at 4:00 p.m. just an hour, and that there were no reasons for the urgency as applicant became aware of the first respondent's ruling on the 2nd February 2016, during the draw*". In brief, first respondent strenuously called for the matter to be dismissed on want of urgency alone.

[16] In response, applicant's attorney referred the court to paragraph 42 of its founding affidavit which reads:

> *"When the draws for the game were conducted, the Applicant was excluded from the list of teams to represent the Hhohho Super League in the Swazi Bank Tournament and in its place Tinyosi Football Club was wrongly irregularly and unconstitutionally submitted."*

[17] He then submitted from the bar that the draw was conducted on 2nd February 2016. When applicant's attention was drawn to the fact that the papers are silent on the date by this court, the applicant applied to supplement its founding affidavit and tendered costs for the same. The court granted the order as prayed for even though applicant's application was vigorously opposed. I mentioned that reasons shall follow in the main judgment.

[18] The court granted applicant's prayer to supplement its founding affidavit for the following reasons:

a) All the respondents, when the question of urgency was deliberated upon, had not filed their answers. In this regard, there was no prejudice to be suffered by the respondents. This was moreso as the applicant had tendered costs.

b) As correctly pointed out by applicant, what precipitated it to move the present application was its exclusion from the draw as contended at its paragraph 42 of the founding affidavit.

c) The applicant was asserting a right inherent *sui generis* of the *audi alterum partem*. The court could not shut the door against it.

d) There would be no alternative remedy for applicant as the games were scheduled for the following day, thus it would have suffered irreparable harm if the matter was dismissed. This would have meant that applicant had to redraft their application starting *de novo* and by the time it

appears in court, the game would have been played and its application rendered academic.

[19] In the totality of the above and guided by *locus classicus* case of **Shell Oil Swaziland v Motor World (Pty) Ltd t/a Sir Motors, Civil Appeal Case No.23/2006** where their Lordships citing **Goldstone J**[2] as follows:

> "*Where in an application the applicant does not state in his founding affidavit all the facts within his knowledge but seeks to do so in his replying affidavit the approach of the Court should nevertheless always be to attempt to consider substance rather than form in the absence of prejudice to the other party."*

[20] Also in **Shepherd v Tuckers Land and Development Corporation (Pty) Ltd 1978 (1) S.A. 173 (W)** at **177-178** it was held:

> *"This is not, however, an absolute rule. It is not a law of the Medes and Persians. The Court has a discretion to allow new matter to remain in replying affidavits, giving the respondent the opportunity to deal with it in a set of answering affidavits."*

[21] Their Lordships also cited as follows[3]:

> *"The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs."*

[22] I was further alive to the wise words of their Lordships at paragraph 40.

> *"The above considerations should also be applied in our courts in this Kingdom. This Court has observed a tendency among some Judges to uphold technical points in limine in order it seems, I would dare add, to avoid having to grapple with the real merits of a matter. It is an approach which this Court feels should be strongly discouraged.[4]"*

[2] Baeck and Co. (S.A.) (Pty) Ltd v Van Zummeren and Another 1982 (2) S.A. 12 (W) headnote
[3] As per Shreiner JA in Trans-African Insurance Co. Ltd. v Maluleka 1956 (2) S.A. 273 (A) at 278 G.
[4] Shell Oil Swaziland *supra*

[23] The second point raised was one of jurisdiction. It was contended that this court had no jurisdiction to entertain matters relating to football or such games. The court was referred to Articles 64 (4) and 67 of first respondent's statutes.

[24] The respondents contended that the only body applicant may appeal to is CAS (Court of Arbitration). Applicant laments respondents' position in this regard stating that CAS is inaccessible owing to the fact that it is located in Lausanne in Switzerland.

[25] Indeed when applicant addressed a correspondence to first respondent challenging its decision, first respondent authored as follows on the 3rd February 2016:

> *"3. The NFAS hereby informs HRFA with regard to paragraph 3 of your correspondence, that matters that have been brought through or decided by the Appeal Committee are appealable with the Court of Arbitration for Sport, as articulated in Article 64 (4) of the NFAS Statutes. Matters brought before Arbitration are all that do not fall under the jurisdiction of the NFAS's judicial bodies. The matter in question was already addressed under the jurisdiction of the NFAS's judicial bodies. Paragraph 2, therefore, may form part of the presentation at the Court of Arbitration for Sport."*

[26] Before I come to the finding of whether this court's jurisdiction is or not ousted by the States, it is apposite to interrogate the said statute.

The Statute

[27] Article 64 reads:

> *"APPEALS COMMITTEE*

1. *The Appeal Committee shall consist of a chairman and the number of members deemed necessary. The chairman shall have legal qualifications.*

2. *The function of the Appeal Committee shall be governed by the NFAS Disciplinary Code and the NFAS Code of Ethics. The Committee shall pass decisions only when at least three members are present. In certain cases, the chairman may rule alone.*

3. *The Appeal Committee is responsible for hearing appeals against decisions from the Disciplinary Committee and the Ethics Committee that are not declared final by the relevant NFAS regulations.*

4. *Decisions passed by the Appeal Committee shall be irrevocable and binding on all the parties concerned. This provision is subject to appeals lodged with the Court of Arbitration for Sport (CAS)."*

[28] The submission on behalf of respondents are *ex facie* correct when one reads sub (4) above. However, owing to the principle of our law that a piece of legislation ought to be read in its entirely in order to ascertain the true import of it, Article 67 and 68 shade some light on the exact meaning of sub (4) above.

[29] Article 67 reads:

"JURISDICTION

1. *The NFAS, its Members, Clubs, Players, Officials and match and players' agents shall not take any dispute to Ordinary Courts unless specifically provided for in these Statutes and FIFA regulations. Any disagreement shall be submitted to the jurisdiction of FIFA, CAF or the NFAS.*

2. *The NFAS shall have jurisdiction on internal national disputes, i.e. disputes belonging to parties belonging to the NFAS. FIFA shall have jurisdiction on international disputes, i.e. disputes between parties belonging to different Associations and/or Confederations."*

[30] Article 67 (2) defines with explicitly the jurisdiction of first respondent and FIFA[5]. According to sub (2), internal disputes arising from members of

[5] Federation International de Football Association

first respondent as an association are to be decided by none other than first respondent. However in the event there is an international dispute, then FIFA comes in to decide but of course with due regard to the sub regional body(COSAFA) and CAF.

International disputes

[31] The interpretation of Article 67 (2) is to be read in line with the FIFA regulations in order to understand as to who is entitled to approach FIFA in the event there is a dispute.

[32] Firstly, common sense suggests that only a member of an organization would be entitled to approach it for its mandate. The FIFA Statute under definitions point out that:

> *"member"* *an Association that has been admitted into membership of FIFA by the Congress. "*

[33] While Congress refers to:

> *"the supreme and legislative body of FIFA."*

[34] Association has been defined by FIFA Regulations as:

> "*a football association recognized by FIFA. It is a member of FIFA, unless a different meaning is evident from the context.*"

[35] Now Regulation 19 (4) of FIFA Statutes, puts the matter of the role of FIFA and first respondent beyond doubt as it provides:

> *"19 (4)* *Each members is responsible for deciding national issues, which may not be delegated to the leagues."*

[36] Leagues has been defined by the definition clause of FIFA Statute as:

> "*an organization that is subordinate to an Association."*

[37] In other words, an association in this case is first respondent while a league is sixth respondent. Regulation 19 (4) continues to read:

> *"Each confederation is responsible for deciding issues involving more than one Association concerning its own territory. FIFA is responsible for deciding international issues involving more than one confederation."*

[38] Confederation has been described by the FIFA Statute under definition title as "*a group of Associations recognized by FIFA that belong to the same continent (or assimilable geographic region).*"

[39] In brief, the likes of applicant do not feature in the list of members of FIFA. If anything, it is the first respondent who is a member of FIFA. In other words, it is respondent who may petition FIFA. Even then first respondent may not do so directly. First respondent as an Association must go via the regional confederation.

[40] As correctly pointed out by Counsel for first respondent, first respondent is an umbrella body of all football clubs in Swaziland. It is first respondent that must deal with disputes arising within its members and not FIFA which is an international body. Not even the confederation upon which first respondent belongs in the region can applicant approach for its dispute therefore. If there is doubt on the above position, I am inclined to demonstrate it further.

[41] Article 68 of first respondent statute reads:

"COURT OF ARBITRATION FOR SPORT

1. *In accordance with Articles 59 and 60 of the FIFA, any appeal against a final and binding FIFA decision shall be heard by the Court of Arbitration for Sport (CAS) in Luasanne, Switzerland. CAS shall not, however, hear appeals on violations on the Laws of the Game, suspensions of up to four matches or up to three months, or decisions passed by an independent and duly constituted Arbitration Tribunal of an Association or Confederation.*

2. *The NFAS shall ensure its full compliance and that of its Members, Clubs, Players, Officials and match players' agents with any final decision passed by a FIFA body or CAS."*

[42] For the sake of clarity, it is apposite to cite the Article 59 and 60 of the FIFA statute.

"59 <u>Disciplinary Committee</u>

1. *The Disciplinary Committee shall consist of a chairman, deputy chairman and the number of members deemed necessary. The chairman and the deputy chairman shall have legal qualifications.*

2. *The function of this body shall be governed by the FIFA Disciplinary Code. The committee shall pass decisions only when at least three members are present. In certain cases, the chairman may rule alone.*

3. *The committee may pronounce the sanctions described in these Statutes and the FIFA Disciplinary Code on Members, Clubs, Officials, Players and match players' agents.*

4. *These provisions are subject to the disciplinary powers of the Congress and Executive Committee with regard to the suspension and expulsion of Members.*

60 <u>Appeal Committee</u>

1. *The Appeal Committee shall consist of a chairman, deputy chairman and the number of members deemed necessary. The chairman and the deputy chairman shall have legal qualifications.*

2. *The function of this body shall be governed by the FIFA Disciplinary Code. The committee shall pass decisions only when at least three members are present. In certain cases, the chairman may rule alone.*

3. *The Appeal Committee is responsible <u>for hearing appeals against decisions from the Disciplinary Committee that are not declared final by the relevant FIFA regulations as well as decisions passed by the Players'</u>*

Status Committee concerning the eligibility of Players for representative teams.

4. *Decisions pronounced by the Appeals Committee shall be irrevocable and binding on all the parties concerned. This provision is subject to appeals lodged with the Court of Arbitration for Sport (CAS)."* (my emphasis)

[43] From the underlined words above, it is clear that it is not just any matters that are to be taken to CAS. It must be noted also that CAS is not part of the judicial bodies of FIFA[6]. It is to me a court of last resort after FIFA judicial bodies (which has its own hierarchical structures) has taken its decision. It is for all intent and purposes an independent body standing outside FIFA.

[44] Article 63 of FIFA Statutes reads on CAS jurisdiction:

"Jurisdiction of CAS

1. *Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.*

2. *Recourse may only be made to CAS after all other internal channels have been exhausted.*

3. *CAS, however, does not deal with appeals arising from:*

   a) *Violation of the Laws of the Game;*
   b) *Suspension of up to four matches or up to three months (with the exception of doping decisions)*
   c) *Decisions against which an appeal to an independent and duly constituted arbitration recognized under the rules of an Association or Confederation may be made."*

[45] CAS only entertains matters from the region submitted by FIFA. Even then, the internal structures of FIFA must have been exhausted or that the matter does not fall within the mandate of FIFA. Clause 3 (c) above oust

[6] Article 58 of FIFA Statutes refers to judicial bodies of FIFA as: the Disciplinary Committee; the Appeals Committee and the Ethics Committee.

applicant completely, besides that applicant is not a stand alone as a member of FIFA with regards to the issue at hand.

[46] In the final analysis, first respondent was totally ill advised when it authored the correspondence dated 3rd February 2016 directing the applicant to lodge its appeal with CAS.

[47] It would be remiss of me to end this enquiry without reverting to Article 64 (4) of first respondent's Statute as some may view it as contradictory to my analysis above. I must point out that there is no ambiguity or contradiction in Article 64 (4). I may reinstate it for purposes of clarity.

> *"64 (4)* ***Decisions*** *passed by the Appeal Committee shall be irrevocable and binding on all the parties concerned. This provision is subject to appeals lodged with the Court of Arbitration for Sport (CAS)."(my emphasis)*

[48] All that the sub article (4) envisages is that decision by the Appeals Committee (local Committee) should draw precedents (*ratio decidendi*) from CAS, or should I put it directly that in passing their (Appeals Committee) decisions, they should not be contrary to those passed by CAS. If they are, those decisions are not binding upon the party and may be revoked. This provision is meant to ensure certainty in the football fraternity in terms of decisions taken. At any rate, as FIFA Statutes demonstrates, CAS deals only with matters falling outside the jurisdiction of FIFA's judicial bodies.

Where then should an aggrieved member of first respondent go to in the event it intends to appeal outside first respondent's judicial bodies?

[49] I must start off by highlighting that the composition of first respondent's judicial bodies is similar to that of FIFA. Like FIFA, first respondent has

three structures, *viz*. the Disciplinary Committee; the Ethics Committee and the Appeals Board[7]. Article 62 deals with the composition and functions of the Disciplinary Committee while Article 63, with that of the Ethics Committee. Article 64 deals with that of the Appeals Board although the drafters decided to refer to it as a Committee under this section. That it was referred to it as a Committee instead of a Board, does not detract from that it refers to the same body.

[50] As demonstrated above, a member aggrieved by the Appeals Committee (FIFA) may, depending on certain conditions, approach CAS, the international independent body from FIFA. In Swaziland, the answer to the above question lies in Article 66 which reads:

> *"The NFAS shall create an Arbitration Tribunal, which shall deal with all internal national disputes between the NFAS, its Members, Players, Officials and match and players' agents that do not fall under the jurisdiction of its judicial bodies. The Executive Committee shall draw up special regulations regarding the composition, jurisdiction and procedural rules of this Arbitration Tribunal."*

[51] However just like CAS, the Arbitration Tribunal, to be established by first respondent is restricted to matters that "*do not fall under the jurisdiction*" of the disciplinary, ethics and appeals committees. Obviously, the matter at hand falls within the judicial bodies of first respondent. For instance, where two entities such as 5th respondent are competing to hosts each a tournament at the same time. This would be an appropriate matter before the tribunal under Article 66.

[52] Two cases have been cited on the jurisdiction of this court with regards to persons like applicant. These are the **Moneni Pirates Football Club and Another v Premier League of Swaziland, Civil Case No. 258/2003** and **Bakers Pride Arsenal Football Club v Manzini Regional Association,**

[7] See Article 61 of first respondent's Statutes

Civil Case No. 359/10 both unreported. In both cases, jurisdiction of this court was challenged on the basis that applicant had to exhaust internal remedies and that the first respondent statute oust this court's jurisdiction. **Masuku J** stated in **Bakers Pride** *supra:*

> "*[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 FNAS 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 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."*

[53] The learned Judge then held that the court's jurisdiction was not ousted. I see no reason why I should depart from this sound reasoning. Otherwise, where else would an aggrieved party go to following the analysis that the international bodies are also not available to it due to the nature of its dispute and the status of applicant. The *orbiter dictum* in **Delisile Simelane v The Teaching Service Commission and Another, Civil Appeal Case No. 22/2006** is very apposite:

> "*The judicial function power and independence of the courts is jealously guarded and any legislation limiting the jurisdiction of the courts will be strictly interpreted*."

[54] For the above reason, the *point in limine* on jurisdiction stands to fall.

Respondent's answer

[55] Although the matter was adjourned to 6:00 a.m. the following day as the tournament was to be played at 2:00 p.m. the matter had to be adjourned further at the instance of respondents. Respondents, however, undertook not to continue with the game pending finalization of the matter. I recommend them for this. At that stage, applicant applied for days wasted costs. I reserved the question of costs. I am inclined not to grant costs of 6th February 2016 to applicant for the reason that it did not suffer prejudice as respondents *mero motu* tendered not to continue with the games. At any rate their ground for the postponement was that their attempts to find the record of proceedings by the Appeals Board were unsuccessful. I think this was a reasonable ground.

Merits

[56] Although almost all the respondents filed answering affidavits, on the return date, only first respondent and fourth respondent indicated that they were proceeding with the opposition. Fifth respondent and the rest, indicated that they will only abide by the decision of the court.

[57] On the 5th February 2016 when the matter first appeared, the learned Counsel, Mr. Sabela K. Dlamini, indicated that he was representing the first respondent. However, on the hearing date *viz*. 15th February 2016, the learned Counsel submitted that he was no longer representing the first respondent but was then representing fourth respondent. The strange procedure about this turn of events was that fourth respondent had not filed an answering affidavit. It was filed by first respondent. When Counsel on

behalf of applicant pointed this out, Mr. Sabela K. Dlamini stood up to apply that the answering affidavit filed by first respondent should be read as if filed by fourth respondent. Again Mr. Mkhwanazi, on behalf of applicant, pointed out that the deponent of the answering affidavit is the Chief Executive Officer of first respondent who had no inclination of fourth respondent's internal affairs. Mr. Sabela K. Dlamini, however insisted without, this time, advancing any grounds. Mr. Mkhwanazi took the matter further by pointing out that now that first respondent was no longer opposing the application, certain prayers against first respondent should be granted. Again Mr. Sabela K. Dlamini stood up to object again without advancing any reasons as to the objection.

[58] That as it may, in the interest of justice, I proceed to deal with the matter as if fully opposed by namely, first and fourth respondents. I will, however refer to first respondent as if fully represented in this matter for the reason that the impugned decision was made by it and not fourth respondent. Fourth respondent merely followed instructions given to it by first respondent not to include applicant in the draw.

First respondent's answer

[59] On the issue of third respondent filing its appeal out of time, first respondent deposed[8]:

[8] Paragraph 24 pages 54-55

"*24.1 I admit that on 3 December 2015, the 3rd Respondent wrote to the NFAS seeking review of the DC decision to reply the same with the Applicant. This was followed up with a letter to the NFAS dated 30 December 2015, a copy of which is annexed hereto marked "NFAS 7"*

24.2 I also wish to bring to the attention of this Honourable Court that the NFAS offices were closed from 15 December 2015 and re-opened on 5 January 2016 hence annexure "NFAS 7" was received on 5 January 2016.

24.3 As a mother body, we could not shut the door to the 3rd Respondent when it complained about a decision of the DC that was prejudicial to it.

24.4 We therefore took the view that the appropriate body to deal with the review was the Appeals Committee which, in terms of article 64 (3), was responsible for scrutinizing decisions of the DC.

24.5 We therefore facilitated accordingly, leaving the merits of the matter to the appropriate judicial body.

24.6 This function of the NFAS which is set out under article 36 of its constitution."

[60] Further, first respondent's response to paragraph 30 of applicant's founding affidavit that the first respondent acted with gross irregularity when it entertained an appeal out of time was a bare denial. In fact most of the averments by applicant were answered by bare denials. The principle of the law on bare denials was held as follows:

> *"...bare denial of applicant's material averment cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the court to conduct a preliminary examination and ascertain whether the denials are not fictitious intended merely to delay the hearing.[9]"*

[61] First respondent proceeded to raise jurisdictional issues even in the body of its answering affidavit despite that it had indicated so earlier.

[9] Room Hire Co. (Pty) Ltd v Jeep Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 at 1165

Determination

[62] The gravamen of applicant's complaint is:[10]

> "*39. It is further stated that the irregularities set out above are compounded the fact that the decision taken on 28th January 2016, which adversely affects the Applicant's rights to participate in the Swazi Bank Cup, was taken without affording the Applicant a right to be heard in accordance with the audi alteram partem rule and Section 33 of the Constitution of Swaziland. For this reason again the decision is flawed and ought to be reviewed or set aside."*

[63] The first respondent answered:[11]

> "*34. I can only say that my view of the review before the Appeals Committee was that it involved two parties who were the protagonists in the tribunal below, the DC. The aforesaid two parties were the 3rd and 5th Respondents who were both notified of the hearing before the Appeals Committee."*

[64] From the above, it is common cause that the applicant was never afforded a hearing when the appeal by third respondent was heard on 28th January 2016. First respondent does not explain any further how fifth respondent was the opponent in the appeal. What is worse is that even fifth respondent was not present during the appeal as the record of proceedings (record) bear the same. In fact, the record reflects that fifth respondent arrived late and indicated that the matter should be postponed in order to invite the applicant who would be affected by the decision. This plea obviously fell on deaf ears. First respondent proceeded with the hearing and found against the applicant. What was worse is that fifth respondent had already submitted the name of applicant to fourth respondent and applicant was aware of this when fourth respondent ruled that the name of applicant

[10] Page 17 paragraph 39 of the Book of Pleadings
[11] Page 58 paragraph 34of the Book of Pleadings

should be substituted. Again first respondent's position is exacerbated by the fact that no reasons were advanced for the ruling. The reasons came after the ruling was executed, that is, after fourth respondent conducted the draw and excluded applicant. Applicant was advised of the appeal not by first respondent but fifth respondent after the hearing had taken place.

[65] On the maxim, "*audi alteram partem*", the case of **President of Bophuthatswana and Another v Segulard 1994 (4) S.A. 96** at 98 reflects:

> ***"The "audi alteram partem", rule is a principle of natural justice which promotes fairness by requiring persons exercising statutory powers which affect the rights or property of others to be afforded a hearing before the exercise of such powers. It has existed from antiquity and is today the cornerstone of the administrative laws of all civilized countries."***

[66] The learned Judge proceeds:

> ***"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such occasion, that even God Himself did not pass sentence upon Adam before he was called upon to make his defence."***

[67] This "*very learned man"* sat in the celebrated case of **Cooper v The Board of Works for the Inland worth District (1863) 143 ER 414**[12] as he eloquently stated of the right to be heard:

> *"Even God did not pass a sentence upon Adam, before he was called upon to make his defence; "Adam" says God, "Where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?"*

[68] **M.C.B. Maphalala J**, as he then was, cited **Uma Nath Pandey v State of U. P. Air 2009 SC 2375** as follows:

[12] See also Rudd v Rex 26/12 [2012] SZSC 44 (30 November 2012)

"6. Natural justice is another name for common sense justice. Rules of Natural justice are not codified cannons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

7. The expression "natural justice and legal justice do not present a water-tight classification. It is the substance of justice which is to be secured by both and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatically pedantry or logical prevarication. It supplies the omission of a formulated law as Lord Buckmaster said; no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.

8. .... These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "magna carta"."

[69] The learned Judge in the case of **Bophuthatswana** stated further**:** [13]

"the maxim, "audi alteram partem", is deeply embedded in the administrative and judicial procedures and is always presumed to be implied."

[70] **Attorney General – Eastern Cape v Blom and Others 1988 (4) S.A. 645 at 669 (H),** their Lordships authored:

[13] *supra*

> *"Audi rule comprises not only the right to place ones version before the authority has to make the decision, but also the opportunity to persuade that authority to exercise its discretion in a particular manner."*

[71] **Byles J** stated:

> *"Although there are no positive words in a statute requiring that he party shall be heard, yet the justice common law will supply the omission of the legislature."*[14]

[72] In view of the import of the principle of the *audi alteram partem* (let the other party be heard), and the circumstances of the applicant as alluded at paragraph 62 herein, it is clear that the conduct of first respondent violated the principle.

[73] I am alive to the procedural aspect that the breach of the *audi alteram partem* rule on its own cannot be a ground to order the prayers by applicant. The enquiry therefore, is whether applicant did show on a preponderance of probabilities that it had prospect of success.

Prospects of success

[74] The applicant contended that third respondent filed its appeal out of time. It further pointed out that:

- Third respondent was prepared to comply with the order of replay but for its late arrival at the sports grounds where replay

[14] Cooper *supra*

was scheduled. Even on the said date, third respondent did not indicate that they intended to challenge the ruling on replay. Third respondent came prepared to play but for the match officials who found that they were out of time and therefore could not play.

- The appeal against the decision for a reply was therefore lodged as an afterthought. First respondent ought therefore not to have entertained the appeal as it was out of time. Further, first respondent in hearing the appeal was also out of time as it had to entertain the appeal within ten days of it being served with it. First respondent heard the appeal after seventeen days instead of ten days.

[75] In answer, first respondent stated:

> *"24.1 I admit that on 3 December 2015, the 3rd Respondent wrote to the NFAS seeking review of the DC decision to replay the same with the Applicant. This was followed up with a letter to the NFAS dated 30th December 2015, a copy of which is annexed hereto marked "NFAS7"*
>
> *24.2 I also wish to bring to the attention of this Honourable Court that the NFAS offices were closed from 15 December 2015 and reopened on 5 January 2016 hence annexure "NFAS7" was received on 5 January 2016.*
>
> *24.3 As a mother body, we could not shut the door to the 3rd Respondent when it complained about a decision of the DC that was prejudicial to it.*
>
> *24.4 We therefore took the view that the appropriate body to deal with the review was the Appeals Committee which, in terms of article 64 (3), was responsible for scrutinizing decisions of the DC.*
>
> *24.5 We therefore facilitated accordingly, leaving the merits of the matter to the appropriate judicial body.*

24.6 This is the function of the NFAS which is set out under article 36 of its constitution."

[76] Applicant cited section 49 (c) of first respondent statue as reading:

"(i) The Board shall regulate its procedure.

(ii) An Appeal or application for review shall be lodged with the General Secretary of the FA within five days of the decision being upheld against or the order sought to be reviewed having been notified to the parties in writing and shall be accompanied by a non-refundable fee of E2 000-00 (Two Thousand Emalangeni)."

[77] Although the first respondent did attempt to address this matter, it failed to attach the correspondence dated 3rd December 2015 as evidence of the date when the appeal was lodged. It however attached one dated 30 December 2015.

[78] Glaringly from this correspondence, it does not refer to any appeal lodged on 2nd December 2015. The total reading of this correspondence creates the impression that it is an appeal lodged at the date indicated on it. For this reason, I find that the applicant's averment that first respondent ought not to have entertained the appeal to be correct. This is fortified by the evidence on the recording of proceedings of the appeal itself. It does not indicate that the point of third respondent filing the appeal out of time was deliberated upon and decided in favour of third respondent.

[79] I need not canvass the other points raised as grounds for review on prospect of success as it would burden this judgment. It suffices that the appeal was out of time and therefore first respondent's decision ought to be reviewed and set aside.

[80] The above are therefore reasons for having granted applicant the orders on 16th February 2016 namely:

1. The normal requirements set out in the Rules of the Court relating to service of documents and time limits are hereby dispensed with and the matter is allowed to be heard on urgency basis;

2. The verdict issued by first respondent dated 28th January 2016 concerning the applicant is hereby reviewed and set aside;

3. The first and fourth respondents or any other respondent's decision to have applicant excluded and substituting applicant with second respondent as representative of Hhohho Regional Super League in the Swazi Bank Cup Competition is hereby reviewed and set aside;

4. First and fourth respondents are each ordered to pay costs of suit, each paying the other to be absolved.

_____

M. DLAMINI
JUDGE

For Applicant : M. Mkhwanazi of Mkhwanazi Attorneys
For Respondent : S. K. Dlamini of Magagula & Hlophe Attorneys