



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 1253/16

In the matter between:

**SHISELWENI REGIONAL FOOTBALL
ASSOCIATION (S.R.F.A.)**

1st Applicant

MASHUMI SHONGWE

2nd Applicant

RUDOLPH SAULOS

3rd Applicant

ZANELE HLOPHE

4th Applicant

NKOSINATHI KUNENE AND THREE OTHERS

5th Applicant

And

THE NATIONAL FOOTBALL ASSOCIATION

OF SWAZILAND (N.F.A.S.)

1st Respondent

MLIMI MAMBA

2nd Respondent

JABULANI DLAMINI

3rd Respondent

AARON MHLANGA AND TWO OTHERS

4th Respondent

Neutral citation: *Shiselweni Regional football Association (S.R.F.A) and Seven Others vs The National Football Association of Swaziland (N.F.A.S) (1253/16) 2016 [SZHC 153] (19th August 2016)*

Coram: MAPHALALA PJ

Heard: 28th July, 2016

Delivered: 19th August, 2016

For Applicants: Mr. M. Mkhwanazi
(of Mkhwanazi Attorneys)

For Respondents: Mr.N. Mabuza
(of S.V. Mdladla & Associates)

Summary: *Civil Procedure – whether the High Court has jurisdiction – to hear a review Application on the actions of the National Football Association – the Respondents contend that the High Court lacks jurisdiction in term of section 152 of the Constitution of Swaziland – the Respondent relies on the **dictum** of the Supreme Court in the case of **Eagles Nest (Pty) Ltd and Five Others vs Swaziland Competition Commission and Another Civil Appeal case no. 1/2014** – this court is of the considered view that the objection **in limine** of jurisdiction ought to succeed – the 1st Respondent does not fall in the classes of entities in which the High Court has jurisdiction according to section 152 of the Constitution of Swaziland – therefore, the Application is dismissed on the jurisdictional threshold.*

JUDGMENT

The Application

[1] The Applicant Shiselweni Regional Football Association (S.R.F.A.) with 7 (Seven) Others has filed an Urgent Application for review against the

Respondents' being The National Football Association of Swaziland (N.F.A.S.) and 5 (Five) Others on the 21st July, 2016 for orders in the following terms:

- 1. Dispensing with the normal requirements set out in the Rules of the above Honourable Court relating to service of documents and time limits and that this matter be heard as one of urgency.**
- 2. That a Rule Nisi do hereby issue, calling upon the Respondents to show cause, on a date to be determined by the above Honourable court, why an order in the following terms should not be made final;**
 - 2.1 Reviewing and or setting aside the 1st Respondent's decision purporting to suspend the 2nd to 8th Applicants from executing the duties and functions and exercising the powers set out in Article 36 of the S.R.F.A Statutes after being elected executive members of the 1st Applicant.**
 - 2.2 Restraining and interdicting the 2nd to 6th Respondent from executing the duties function of the Executive Committee of the 1st Applicant as set out in Article 35 of the S.R.F.A. Statutes.**
 - 2.3 A declaration that the 1st Respondent decision purporting to suspend the 2nd to 8th Applicants from office as elected Executive Committee members of the 1st Applicant is unconstitutional and ultra vires the statutes of the 1st Respondent and the 1st Applicant.**
- 3. That prayer 2.2 above operates with immediate interim effect pending final determination of this application**
- 4. Costs of application.**
- 5. Further and / or alternative relief.**

[2] The Application is founded on the affidavit of one Mr. Mashumi Shongwe who is the elected Chairman of the 1st Applicant outlining the background of the

matter. Pertinent annexures are also filed in support thereto. These being correspondence between the parties.

The Opposition

- [3] The 1st Respondent opposes the granting of the prayers in paragraph [1] **supra** in the Answering Affidavit of one Mlimi Mamba who states their in view of the voluminous and vexed Application served on him in the evening of 19th July, 2016 he could not find an attorney to assist him in responding to the Application. Various annexures are filed in support thereto. Three points **in limine** are raised in the said affidavit being firstly, that of jurisdiction of this court. Secondly of urgency of the Application and thirdly, that Applicant has not exhausted internal remedies.
- [4] The Applicant then filed and Replying Affidavit in accordance with the Rules of this court.

A brief background

- [5] The facts of the matter are outlined in paragraphs 4 to 10.1 of the Respondent's Answering Affidavit and I will outlined them **in extenso** as follows:

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The 1st Respondent is an association charged with duty to regulate, administer and control the game of football within Swaziland. Article 3 (c) of the 1st Respondent's Constitution also called the Statutes provides that 'The objection of the NFAS are to draw up regulations and provision on any aspect of football under its auspices or territory and ensure their enforcement'.

At (e) the same Constitution provides that it is 1st Respondent's objective to respect and prevent any infringement of the statutes, regulations, directives and decisions of FIFA, COSAFA and NFAS as well as the Laws of the Game and ensure that these are also respected by its Members and to prevent being abused or brought into disrepute" (sic)

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The 1st Respondent as the Administrator of Football in Swaziland has Members or Affiliates (defined in the definitions clause as a legal association or league that has been admitted into membership by the General Assembly) provided for in Article 11 who affiliates with it. In terms of Article 11 (3) "Members shall subordinate to the NFAS and must comply with these statutes, the Regulation, decisions and any directive issued by the NFAS' (own underlying)

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Members or Affiliates apply to join membership of the 1st Respondent. When making such application to the Respondent, Members / Affiliates are enjoined and obligated to furnish a declaration that such applicant member "will always comply with the statutes, regulation and decisions of NFAS, FIFA, CAF and COSAFA and ensure that these are also respected y its own Members, clubs, Officials, Players", as per Article 12 92) (b) of the Constitution.

In terms of Article 15 (1), "Members of NFAS have following obligations:

- (a) to comply fully with the statues, regulations, directives and decisions of FIFA, CAF COSAFA and of the NFAS at all times and to ensure that these are also complied with b its members".**

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All members of the 1st Respondent when making application to affiliate with the 1st Respondent are enjoined to have legally valid statutes

(Constitution) and regulations. The 1st Applicant is no exception and has its own.

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In terms of Article 3 (e) of the 1st Applicant's Constitution, the objective of the 1st Applicant are, *inter alia*, to “respect and prevent any infringement of the statutes, directives and decisions of FIFA, CAF, COSAFA and NFAS..... and ensure that these are also respected by its Members and to prevent from being abused or brought into disrepute”.

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According to Article 3 (l) the 1st Applicant's other objective is “to ensure that all bodies and officials must observe the statutes, regulations, decisions and Code of Ethics of Ethics of SRFA and NFAS in their activities....”.

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10.1 At Article 3 (m) 1st Applicant is obligated “to carry out decisions and directives of the NFAS”.

The Arguments

[6] The attorneys of the parties appeared before this court on the 28th July, 2016 to advance arguments of their clients and both filed comprehensive of arguments for which I am grateful. The attorney for the Respondents commenced the arguments on account of the three points **in limine** mentioned above in paragraph 3 (**supra**).

[7] However, the main focus of Mr Mabuza for the Respondents was on the jurisdictional point relying on the provisions of section 152 of the Constitution of the Kingdom of Swaziland.

[8] The attorney for the Applicant Mr. Mkhwanazi concentrated on the merits of the dispute and relied on the judgment of this court of the case of **Vovovo Football Club vs the National Football Association and Five Others Civil Case no. 255/2016**. That the jurisdiction of this court is established by this case.

[9] I shall in brief outline the pertinent arguments of the attorneys of the parties for one to understand the issues for decision by this court in the following paragraphs.

(i) The Respondent's arguments

[10] The attorney for the Respondents contended on the jurisdictional question that this court does not have such to hear and determine the matter under section 152 of the Constitution of Swaziland. That the Applicants state in their papers that this court has jurisdiction by virtue of section 152 of the Constitution. However, primarily the Applicants are seeking to review the decision of the 1st Respondent to suspend them.

[11] It is contended for the Respondents that in terms of the Constitution of Swaziland, the powers of this court on review are explicitly laid out in section 152 which reads as follows:

“The High Court shall and exercise review and supervisory jurisdiction over all subordinate Courts and Tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction issues orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers”.

[12] That in view of the above the 1st Respondent is not a subordinate court, nor is it a tribunal or lower adjudicating authority. Therefore, this court cannot exercise its review powers over the 1st Respondent. That 1st Respondent does not possess or exercise judicial or quasi, judicial powers but exercises purely administrative powers.

[13] In this regard this court was referred to the Supreme Court case of **Eagles Nest (Pty) Ltd and Five Others vs Swaziland Competition Commission and Another, Civil Appeal 1/2014** to the following **dictum**:

“Furthermore, Section 4 of the High Court Act (No. 20/1954) provides that the High Court

1.4 Shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Swaziland, and if necessary to set aside or correct the same. This shows that the review jurisdiction of the High Court is not inherent as the English Kings Bench Division had, over inferior courts. This jurisdiction, like all the others stated in Section 151 and 152 of the Constitution, are statutory powers.”

[14] The attorney for the 1st Respondent further cited the English case of **R vs Inland Revenue Commissioners exp Preston (1985) AC 835 at 852** where **Lord Templeman** stated that **“Judicial review should not be granted where an alternative remedy is available”**. That **in casu** it is clear from the facts herein that a **plethora** of alternative remedies are available to the Applicants.

[15] The attorney for the Respondent then dealt with the merits of the case in paragraphs 2, 2.1, 2.2, 2.3, 2.4, 2.5 **suspension** of the **1st Applicant** in paragraphs 3.1 and 3.2; the SFRA Constitution at paragraphs 4.1, 4.2 and 4.3;

Article 34 (10) of NFAS in paragraphs 5.1 to 5.2 and in the last paragraph 6 concluded his arguments with the following submissions:

It is submitted that Section 33 of the Swaziland Constitution has no application in casu. It is trite that a matter will not be decided on a constitutional point if it can be disposed of on another issue.

6.1 It is further submitted that the Applicants' rights have been violated in casu since they are still to be tried by the DC. They have placed the cart before the horse by approaching the Honourable Court without having exhausted local remedies. In fact, the allegation of the applicability of section 33 fortifies the lack of jurisdiction since the 1st Respondent was exercising administrative powers and not those contemplated by section 152 of the Constitution.

6.2 The Executive Committee met, as is stated in the letter, on the 13th July, and wielded the power vested in it. This meeting is also acknowledged by Applicants in paragraphs 24, 25, 26 and 34 of their founding Affidavit.

6.3 It is submitted that in the Eagles Nest decision (op cit), the Supreme Court, quoting the imminent Lord Denning, said the rules of natural justice should not be stretched too far, at paragraph 55.

(ii) The Applicant's arguments

[16] The attorney for the Applicant first dealt with the merits of the case relying on section 33 of the Constitution of Swaziland. In the main Heads of Arguments with the Registrar's stamp of the 27th July, 2016 canvassed various arguments at paragraph 5 thereof. The kernel of the Applicant's argument is canvassed to

the argument that the suspension of the Applicants for an offence they did not commit before being heard is unjust and unfair and is a contravention of section 33 of the Constitution.

[17] On the first ground for review set out in paragraph 30 of the Founding Affidavit the following is averred:

“In reaching the decision to suspend the Applicants, the 1st Respondent took into consideration and ignored relevant ones and hence failed to apply its mind to the issues.”

[18] That a closely related ground is the one that states that the 1st Respondent misconstrued the important and meaning of Article 34 (10) of the 1st Respondent Statute. In this regard the court was referred to the legal authority of **Black’s Law Dictionary** which defines an **incumbent** and a **nominee** as follows:

“Nominee” “a person who is proposed for an office, membership award or like title or status”.

“An individual seeking nomination, election or appointment is a candidate. A candidate for election becomes a nominee after being formally nominated”

An incumbent is defined as;

“One who holds an official post, especially a political one”.

[19] In paragraph 15, 16, 17, 18, 19, 20, 21, 23, 24, 25 to 32 dealt with the issue of **ultra vires**.

[20] In paragraph 32 thereof that the Applicants contended that they have made out a case for a review of 1st Respondent's decision and a declaratory order and that such suspension is unconstitutional and in contravention of 1st Respondent's own statutes as read together with 1st Applicant's statutes.

[21] On the jurisdictional point raised by the Respondent the attorney for the Applicant relied on the **dictum** in the High Court case of **Vovovo Football (supra)** cited in paragraph [9] of this judgment. On the 3rd August, 2016 the attorney for the Applicant filed Supplementary Heads of Arguments on the point raised in the Supreme Court case of **Eagles Nest (supra)**.

The Court's analysis and conclusions thereon

[22] Having considered the papers filed of record and the arguments of the attorneys of the parties the first port of call is a determination of the points of law raised by the 1st Respondent that of jurisdiction of this court. Secondly, that point of urgency which was not argued by the parties and thirdly the point on the exhaustion of local remedies.

[23] Therefore I shall first address the point on jurisdiction of the court. If I find that they have jurisdiction to address the merits. However, If I find otherwise to dismiss the Application without any further ado. I thus proceed in the following paragraphs.

The jurisdictional threshold

[24] The Respondents contend that the High Court does not have jurisdiction to hear and determine the matter under section 152 of the Constitution of Swaziland. The Applicants state in their papers that the High Court has jurisdiction by

virtue of section 152 of the Constitution. Further, Applicants in the Heads of Arguments of their attorney contends that this court has jurisdiction as provided by section 33 of the Constitution of Swaziland. In the written submissions the Applicants contend that the 1st Respondent falls under the category of lower adjudicating authority. In view of this position of the Applicant I directed that the Respondents also file arguments on this point of whether the 1st Respondent falls under the said category stated by the Applicant being a lower adjudicating authority.

- [25] It is specifically contended for the 1st Respondent by Mr. Mabuza in his Supplementary Arguments that his client does not possess and / on quasi judicial powers. Further, that the 1st Respondent is not a lower adjudicating authority.
- [26] That the Constitution provides for this court to exercise review and supervisory powers over **Subordinate Courts, lower adjudicating authorities and tribunals**, in terms of section 152. That 1st Respondent is neither of the listed entities. 1st Respondent is not a Subordinate Court. It is not a lower adjudicating authority and is not a tribunal.
- [27] The attorney for the 1st Respondent contends that Subordinate Courts are the Magistrates Court, and 1st Respondent is clearly not one of them. Further, lower adjudicating authorities are entities with power to enact, subordinate legislation, like Municipal Councils on local government authorities. These entities have powers to enact legislation and to adjudicate, using that legislation. The 1st Respondent does not have such powers. 1st Respondent has a Constitution only and that Constitution creates certain committees, **inter alia**, the Disciplinary Committee which is an autonomous body that has disciplinary power, not the 1st Respondent. That the Applicant **in casu** has failed to

distinguish between 1st Respondent and the Disciplinary Committee, which can be sued in its own name.

[28] The attorney for the 1st Respondent went on at great length in paragraphs 1.4, 1.5, 1.6, 1.7, 1.8 to explain in detail the effect of adjudicating authority. I shall revert to pertinent paragraphs of these arguments when I deal with my analysis and conclusions later on.

[29] Having considered the above arguments of the parties on this point it would appear to me that the arguments of the 1st Respondent are correct on all fronts for the following reasons.

[30] Firstly, I agree in **toto** with the 1st Respondent's contentions that the Applicant's fatal flaw is their failure to distinguish between administrative power viz a viz quasi judicial power. These two concepts are not autonomous. **Black's Law Dictionary** defines "**quasi judicial**" as **or relating to or involving an Executive or Administrator of Acts Adjudicative**. I agree with the 1st Respondent contention on this point that clearly the act must be **adjudicative**, not administrative, to be reviewable under section 152. There must be a finding of guilt or innocence and the 1st Respondent does not have such power and did not exercise it.

[31] According to the attorney for the 1st Respondent the term "**Adjudication**" is defined by **Black's Law Dictionary** as "**the legal process of resolving the dispute**". It is clear that the 1st Respondent does not have such power. The process of adjudicating was to be carried only by the Disciplinary Committee which the Applicants are avoiding.

[32] Secondly, in my assessment of the facts and the arguments of the parties discipline is the purview of the Disciplinary Committee, whose decisions are subjects to review by this court such a body exercises **quasi** judicial powers not the 1st Respondent. The Disciplinary Committee has its own existence. It is correct what the 1st Respondent's attorney has stated that if the Applicants were reviewing a decision of the Disciplinary Committee, then it would fall within the orbit of section 152 since it is a tribunal exercising **quasi** judicial power. The 1st Respondent clearly on these argument does not fit the provisions of section152.

[33] Coming to the reliance by the Applicants on the dictum of **Vovovo Football Club vs National Football Association (supra)** I find the **dictum** in **Eagles Nest (supra)** would be binding to this court. And this court ought to follow that decision which take precedence, moreso where a Constitutional point has been made by the Appeal Court.

[34] In the totality of all the above it would appear to me that the Applicant ought to have launched their complain before the Disciplinary Committee as stated above. The attorney for the Applicants in arguments conceded the point but insisted that the court proceed to determine the matter.

[35] I wish to comment **en passant** that in this case the constitutional imperatives of section 152 of the Constitution are to be observed. It may well be that an injustice has been caused on the Applicants but this court ought to be clothed with proper jurisdiction to address it. To do otherwise, would be running roughshod of the Constitution of Swaziland.

[36] On the issue of costs the 1st Respondent has sought costs at a punitive scale on the facts of the matter. I have considered the arguments to and fro and in exercise of my discretion I would award costs at the normal scale.

[37] In the result, for the foregoing reasons the point **in limine** on jurisdiction is upheld with costs at the ordinary scale. The Application is accordingly dismissed.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE