IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CASE NO: 1446 /17

In the matter between:

DARREN CHRISTIE	**APPLICANT**

And

CHAIRPERSON PLAYERS' STATUS COMMITTEE	**1ST RESPONDENT**
MANZINI SUNDOWNS FOOTBALL CLUB	**2ND RESPONDENT**
MBABANE SWALLOWS FOOTBALL CLUB	**3RD RESPONDENT**
THE SECRETARIAT OF THE NATIONAL FOOTBALL ASSOCIATION	**4TH RESPONDENT**
THE NATIONAL FOOTBALL ASSOCIATION OF SWAZILAND	**5TH RESPONDENT**

Neutral Citation:	*Darren Christie vs. Chairperson Player's Status Committee and 4 others Case No. (1446/17) [2017] SZHC 241*
Coram:	**MLANGENI J.**
Heard:	**25/10/17, 26/10/17**
Order Made:	**26/10/17**

Delivered: **17/11/17**

Summary: *Administrative law – judicial review of a decision of Players' Status Committee of the National Football Association.*

Players' Status Committee said to be an administrative rather than quasi – judicial body, hence its decision not reviewable – court holding that its powers are of a quasi-judicial nature, hence reviewable on common law grounds.

Duty to exhaust domestic remedies, whether applicable in the present case, on the facts no meaningful domestic remedies available.

Where it is apparent that applicant will not get justice before the tribunal being reviewed, court may substitute its own decision

Decision of Players' Status Committee set aside with costs.

JUDGMENT

[1] On the 26th October 2017 I heard legal arguments in this application for review. At the conclusion of arguments I made an order setting aside the decision of the First Respondent and directed the Fifth Respondent to appoint a special Players' Status Committee to determine the status of the Applicant. I also granted legal costs against the Fifth Respondent at the ordinary scale. What follows is an analysis of the matter and the reasons upon which I made the orders that I made.

[2] In his papers the Applicant describes himself as an adult Swazi male of Sidvwashini area in Mbabane. He is a professional soccer player who earns a living as such.

BACKGROUND

[3] Applicant was once registered in the books of Mbabane Swallows Football Club and played for the said club. To avoid prolixity I will henceforth refer to Mbabane Swallows Football Club as **'Swallows'**. In 2014 the Applicant entered into a contract to play for Manzini Sundowns Football Club during 2014/2015 season. I will refer to Manzini Sundowns Football Club as **'Sundowns'.** The contract with Sundowns was renewed or extended to the 2015/2016 season and again to the 2016/2017 season. He played for Sundowns for three successive seasons.

[4] At the end of the third season (2016/2017) he approached his employer, Sundowns to request a clearance so that he could register with a football club of his choice. He states that to his **"surprise and dismay**[1] the director of Sundowns, one Carmichael, told him that there was an agreement with Swallows to the effect that when he was done with Sundowns he was to be cleared to Swallows, and the latter was the one to handle his intended transfer to wherever he wanted to go. The effect of this alleged arrangement is that the Applicant was to again become a Swallows player, *willy nilly,* three seasons after he had last played for Swallows.

[1] Para16, page 26 of the Book.

[5] The Applicant disagrees with this, and on or about the 5th September 2017 he moved an application before the Players' Status Committee of the National Football Association of Swaziland (NFAS) with the following prayers:-

(i) Declaring him as not being contracted to Sundowns or Swallows, thus **"free to join a team of his choice without any form of compensation being paid to the Respondents".**

ii) Directing Sundowns to forthwith issue the Applicant with a clearance certificate and any other documents necessary to effect his registration with a team of his choice.

There are alternative prayers, but they are of no relevance to this judgment.

[6] The Players' Status Committee is a sub-committee of the National Football Association of Swaziland (NFAS). It exists in terms of Article 54 of the Statutes of the NFAS. Its duties include to **"set up, monitor and ensure compliance with transfer regulations in accordance with the FIFA regulations for the status and transfer of players and settle any disputes related to the player status and transfers".**

[7] Simply put, the task of the Players' Status Committee was to determine whether the Applicant was a Swallows player or, as it is colloquially put in football circles, a free agent. A free agent is a player who is not contractually attached and who is in a position to engage with any team where there is mutual interest.

[8] Before the Committee the hearing of the application was postponed on a number of occasions and for different reasons. Before the Status Committee the two Respondents cited therein were Sundowns and Swallows Football Clubs. Sundowns never participated in the hearing and it was recorded that there was no appearance by it or on its behalf[2]. On the 18th September 2017 the Applicant's representative submitted as follows:-

> **"This application is against 1st Respondent on the basis that we want an order against them being Manzini Sundowns F.C. on the ground that the player has been playing for them from 2014. We are seeking 1st Respondent failed to issue a clearance to Applicant. The 1st prayer is a declaratory order and 2nd prayer is dealing with the issue that if declaratory order is granted 1st Respondent should release the registration documents to the player.**
>
> **We have not received any documents opposing the application. Without such the application is unopposed[3]."**

[9] On the same date, the 18th September 2017, the Committee ruled that the application before it was to proceed as an unopposed one. The following quote is relevant.

> **"The committee has considered the application by applicants. The committee issued an order to file opposing papers before 12:00 hours on 14.09.2017 and 2nd Respondent failed to file their papers. You have also**

[2] Page 6, para 3 of the Record of Proceedings.
[3] Page 6, para 3 of the Record of Proceedings.

not raised any point of law, ……..We will therefore hear submissions by the Applicant only[4].”

[10] I emphasise, needlessly, that the committee made a ruling that the matter was to proceed as an unopposed matter. It is during this hearing that the Committee, through its chair, produced two sets of documents whose source was said to be the 2nd Respondent.

Committee: Are you familiar with these documents?

Applicant’s Rep: It is my first time to see this.

[11] The hearing adjourned to enable Applicant’s representative to take instructions on the documents. At resumption Applicant’s representative asked to be furnished with originals of the documents. The originals were not furnished. Ultimately, the Applicant objected to the introduction of these documents by the Committee not only because originals were not furnished but also because the documents had not been filed by the Respondents. In any event, the Applicant disputed the authenticity of the documents.

Applicant’s Rep: If a judge issued an order that the Applicant is not opposing and thereafter same judge produces papers….

Committee: We cannot decide your application in isolation because there is the player’s file from NFAS which also has to be considered.

[4] Page 7 of Record of Proceedings, under “Ruling”

[12] The ruling of the Committee is at page 29 of the book of pleadings and it comprises four (4) paragraphs, only. I quote the operative paragraph, which is the fourth and last:-

> **"The player therefore rightfully belongs to Mbabane Swallows Football Club".**

[13] I again note, needlessly, that Mbabane Swallows had not made any representation in the matter, and the order that was sought was against Sundowns, not in favour of Swallows or against it.

[14] The present application for review is a sequel to the ruling that I have referred to at paragraph 11 above, and it seeks to have the said ruling set aside and that a special Players' Status Committee be convened by the NFAS to determine the status of the Applicant. The grounds that are advanced for the review are captured at pages 14-15 of the book of pleadings and I summarise them herein.

i) First Respondent (the Committee) had actual bias in favour of the 3rd Respondent (Swallows). According to the Applicant the Committee **"did not keep a mind open to persuasion throughout the proceedings and they seemed to have made up their minds to decide in a particular way despite the uncontroverted evidence and submissions made by my attorney to them."**

ii) It was improper for the Committee to go out of its way to secure and produce evidence on behalf of Swallows despite that the latter opted not to oppose the application.

iii) The Committee failed to address issues that were raised by the Applicant in respect of article 10 (1) of FIFA Regulations on the Status and Transfer of Players.

iv) The Committee erred in not treating the application before them as unopposed "**despite being satisfied that service has been done appropriately."**

v) It was improper for the Committee to refuse to give the Applicant copies of the documents that were introduced and to give Applicant time to address such documents including, if necessary, time to file further papers in response thereto.

[15] The Applicant could have added another ground – the failure by the Committee to give reasons for its ruling.

[16] At common law the grounds of review are well settled, but the list is by no means closed. In the case of **NHLANHLA PHAKATHI v SWAZILAND TELEVISION AUTHORITY AND OTHERS**[5] I mention the following grounds:-

i) Irregularity/gross irregularity.

ii) Unreasonableness/gross unreasonableness.

iii) Irrelevant considerations.

[5] (745/15[2017] SZHC 205.

iv) Failure by decision-maker to apply his mind to the facts.

v) *Mala fides*, capriciousness or arbitrariness.

vi) *Ultra vires*.

[17] In the same case I mentioned what appears to me to be an even broader ground of review – failure of justice[6]. Under this ground my understanding is that anything in the form of procedure that occasions failure of justice on the given facts is a basis for review. This would clearly be the case where the chair or committee descends onto the arena of conflict, to the extent of procuring and admitting documentary evidence that becomes the basis for the decision, with an outcome that is adverse to the interests of the Applicant.

[18] The Committee ruled that the application was unopposed, and it is therefore difficult to understand how it came to the conclusion that it came to. It is interesting to note that when certain issues were raised by the Applicant the committee tersely stated that **"this is not a court of law[7]."** Whilst this is factually correct, it does not mean that basic principles of justice, especially natural justice, have no relevance merely on the basis that the Committee is not a court of law.

[19] Before the Players' Status Committee the matter was heard on the 13th, 15th and 18th September 2017. During these hearings issues that were raised include the status of the application as an unopposed one, the admissibility of documents that were procured by the Committee and whose originals were not furnished to the Applicant despite express request, the applicability and effect of some aspects of FIFA

[6] See MUSA GWEBU v MANZINI CITY COUNCIL, Civil Appeal No. 20/03 at page 6, per Tebbutt JA
[7] Page 6, last paragraph.

rules, etc. For all this, the ruling of the Committee is only six (6) lines. Conclusions that inevitably flow from this ineptitude include the following: either the issue was pre-judged and the hearing was nothing but a farce, or the Committee never paid attention to relevant considerations or it simply did not apply its mind to the matter. The failure by the Committee to give reasons for the ruling amply demonstrates that there was no reasonable basis upon which they came to the decision. This aspect, alone, is sufficient to make the ruling reviewable.

[20] One unmistakable feature of the matter is that although the ruling by the Committee is in favour of Mbabane Swallows Football Club, who were served with the application on the 22nd September 2017, the said club has not made any appearance or filed any papers in the matter. It is equally curious that Sundowns, against whom the order of the Committee was sought, has not lifted a finger in this matter. So, who benefits from the ruling of the Committee? If no one benefits from it, it must be construed as a measure calculated only to frustrate the Applicant and keep him away from earning a living for as long as possible. It appears to me that if this argument had been urged upon me in the hearing I might have issued an order substituting that of the Committee, for there is enough evidence to suggest that the Applicant is not likely to get justice before a Committee that is accountable to the Fifth Respondent. A quote from Comrie J. is instructive:-

> **"With rare exception Judges do not substitute their own opinion or decision for the opinion or decision of the functionary board ……But we do insist that the repository of the power, which may be a far - reaching power**

affecting life, liberty or property, goes about his task in the right manner[8]".

[21] On the basis of the above I came to the conclusion that the ruling of the Committee dated 21st September 2017 was liable to be set aside and I so ordered.

[22] Preliminary points of law had earlier on been raised on behalf of the 4th and 5th Respondents. The 4th Respondent is a functionary of the 5th Respondent and has no *locus standi in judicio*, hence I am addressing only the 5th Respondent.

[23] The first point of law raised is that the interim order that was issued by this court on the 22nd September 2017 was **"obtained by stealth"** and was irregular. At the hearing the point was not pursued and I can only commend the Respondent's counsel for that. The second point of law, which was pursued doggedly, was that the Applicant failed to exhaust domestic remedies before approaching this court, and for that reason the application was to be dismissed. Upon hearing arguments on this point I dismissed it prior to embarking upon the merits. My reasons for dismissing the point follow below.

[24] Paragraph 13.2 of the First Respondent's affidavit is in this manner:-

"The domestic remedies that have been created in the fifth Respondent's statutes are designed to provide immediate, cost effective competent remedies. The

[8] Mokgoko and Others v Acting Registrar, Setlogelo Technickon and Others 1944(4) SA 104 at page 112.

intention is to accord football administrators an opportunity to employ their own mechanisms, specialised knowledge of the sport, to rectify any irregularity before the matters are referred to external forum. To bypass the domestic remedies has the effect of undermining the framework of sport dispute resolution".

[25] During the hearing it came to light that the domestic remedies refer to a Court of Arbitration for Sports (CAS) and FIFA, both of which have a seat overseas. CAS, which sits in Switzerland, has jurisdiction to hear matters which have been decided upon, with finality, by FIFA[9] and, it appears, FIFA' s jurisdiction is in respect of international associations and or confederations as opposed to individuals within specific territorial areas. The Appeals Committee, per Article 64 of the NFA Statutes, deals with decisions from the Disciplinary Committee and the Ethics Committee only. The Players' Status Committee is excluded by non-mention.

[26] It appears that the avenues mentioned above are not available to the Applicant, but even if they were, their effectiveness is subject to doubt[10]. But the real question is whether the existence of domestic remedies within the SNFA structures bars the Applicant from approaching this court on review. The powers of review by the High Court have Constitutional recognition, per s152 of the Constitution, in respect of all subordinate courts, tribunals and **"any lower adjudicating authority."** For one thing, there is no qualification in respect of exhausting domestic remedies. So clearly, so long as there

[9] Article 68 of National Football Association Statutes.
[10] Mashumi Shongwe v Swaziland National Football Association Appeal Board and Another, (643/17) [2017] SZHC.

are common law grounds for review the Applicant was at liberty to approach this court, as he did. It is also significant that none of the provisions that are claimed to create domestic remedies make mention, even scantily, of the common law right to review.

[27] Respondents make the argument that the Players' Status Committee exercises administrative rather than quasi-judicial authority, hence the Applicant should not have approached this court without first exhausting domestic remedies. In this regard the respondent relies on judgments that include **MAXWELL DLAMINI AND OTHERS v UNIVERSITY OF SWAZILAND**[11] and **MBUSO DLAMINI AND OTHERS v THE UNIVERSITY OF SWAZILAND**[12]**.** First, I point out that s152of the Constitution does not make any distinction between quasi-judicial function and administrative function. Secondly, to me it appears indubitably clear that the Players' Status Committee exercises quasi-judicial powers in settling **"disputes related to the player status and transfers**[13]**."** And in the event that it violates principles of natural justice and other rules of procedure, there is nothing that stops a person in the Applicant's position from approaching this court. To hold otherwise would have enormously adverse consequences upon the rights of individuals to justice and fair treatment.

[28] Let me conclude with a brief analysis of the cases that the Respondent relies upon. In the case of MBUSO DLAMINI AND OTHERS v THE UNIVERSITY OF SWAZILAND the Applicants were seeking an interdict. The application was dismissed on the basis that they had not succeeded in demonstrating that there was no other satisfactory

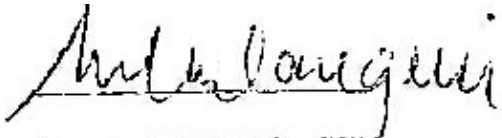
[11] (1819) 2013 [2013] SZHCH 255.
[12] Civil Case No. 3977/2017.
[13] Article 54 of the Swaziland National Football Association Statutes.

remedy, the Respondent having argued that the Senate should have been engaged in terms of established channels of communication. To this I add the fact that the University is a statutory body with administrative organs that are created by statutory provisions. It is peremptory to approach the organs created therein.

[29] I respectfully agree that this decision was correct on the facts but those facts are distinguishable from the present ones. The later case of MAXWELL DLAMINI AND OTHERS v UNIVERSITY OF SWAZILAND was decided on the same basis that the earlier one was, namely that Senate had not been engaged to deal with the matter. At paragraph [36] of the judgment Her Lordship Dlamini J. states:-

> **"In brief the matter before court is prematurely as Senate did not deliberate on it. The submission on behalf of applicants that there was no need to go back to Senate after they were dismissed is ill advised in Law".**

[30] While I respectfully agree with the first sentence, I have reservations about the second one in that once the students were dismissed the ordinary procedure for approaching Senate may have become illusory. But the bottom line is simply that I think the decisions are distinguishable on the basis of the different factual situations, especially the presence of the statutory obligation to approach Senate.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For Applicant: **Attorney Z. Dlamini**

For 5th Respondent: **Attorney M. Dlamini**