
SOUTH AFRICA / JUDGMENT

Ajax Cape Town Football Club and Another v Mokhari N.O and Others (18413/18) [2018] ZAGPJHC 404 (18 May 2018) [2018] ZAGPJHC 404

COURT

South Gauteng High Court, Johannesburg

BEFORE

R M Keightley

CASE / FILE NUMBER

18413/18

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

(1)

NOT

REPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES

(3)

REVISED

CASE

NO.18413/18

18/5/2018

In

the matter between:

AJAX
CAPE TOWN FOOTBALL CLUB
FIRST APPLICANT
TENDAI
PASSION
NDORO
SECOND APPLICANT
And
MOKHARI
WILLIAM N.O
FIRST RESPONDENT
NATIONAL
SOCCER LEAGUE
SECOND RESPONDENT
THE
SOUTH AFRICAN FOOTBALL
THIRD RESPONDENT
ASSOCIATION
JOMO
COSMOS FOOTBALL CLUB
FOURTH RESPONDENT
BLACK
LEOPARDS FOOTBALL CLUB
FIFTH RESPONDENT
AMAZULU
FOOTBALL CLUB
SIXTH RESPONDENT
BAROKA
FOOTBALL CLUB
SEVENTH RESPONDENT
BIDVEST
WITS FOOTBALL CLUB
EIGHTH RESPONDENT
BLOEMFONTEIN
CELTIC FOOTBALL CLUB
NINTH RESPONDENT
CAPE
TOWN CITY FOOTBALL CLUB
TENTH RESPONDENT
CHIPPA
UNITED FOOTBALL CLUB
ELEVENTH RESPONDENT
FREE
STATE STARS FOOTBALL CLUB
TWELFTH RESPONDENT
LAMONTVILLE
GOLDEN ARROWS FOOTBALL
CLUB
THIRTEENTH RESPONDENT
KAIZER
CHIEFS FOOTBALL CLUB

FOURTEENTH RESPONDENT
MAMELODI
SUNDOWNS FOOTBALL CLUB
FIFTEENTH RESPONDENT
MARITZBURG
UNITED FOOTBALL CLUB
SIXTEENTH RESPONDENT
ORLANDO
PIRATES FOOTBALL CLUB
SEVENTEENTH RESPONDENT
PLATINUM
STARS FOOTBALL CLUB
EIGHTEENTH RESPONDENT
POLOKWANE
CITY FOOTBALL CLUB
NINETEENTH RESPONDENT
SUPERSPORT
UNITED FOOTBALL CLUB
TWENTIETH RESPONDENT

JUDGMENT

KEIGHTLEY, J

1. In football, anything is possible until the final whistle blows. This urgent application is testament to that truism.
2. The applicants are Ajax Cape Town Football Club (“Ajax”) and Tendai Passion Ndoro (“Ndoro”). Ndoro is contracted as a player with Ajax. The main respondent in the urgent application is the National Soccer League (“the NSL”), and the third respondent is the South African Football Association (“SAFA”). The NSL is a special member of SAFA. In turn, SAFA is a member of the international football governing body, FIFA. Save for the first respondent, the remainder of the respondents are all professional football clubs and members of the NSL. The fourth to eighteenth respondents play in the Premier Soccer League (“the Premier League”), while the nineteenth and twentieth respondents play in the second tier of the professional league, being the National First Division (“the First Division”).
3. At the heart of the urgent application is the fate of the Promotional Play-off mini-league (“the Play-Off”) that commenced on Wednesday, 16 May 2018. In terms of article 7 of the NSL Handbook (which is the body of rules immediately governing the NSL and its members):
 - a. The club ending the season in the bottom position (at present, 16th) on the Premier Division table is relegated to the First Division.
 - b. The club ending the season in the top position of the First Division is automatically promoted to the Premier Division.

- c. The club finishing in 15th position of the Premier Division, and the clubs finishing 2nd and 3rd respectively in the First Division take part in the Promotion Play-off. The winner participates in the Premier Division in the

following season and the other two clubs take part in the First Division.

4. The Play-off for this season comprises a home and away format, with each team playing the others once at home, and once away. The mini-league is scheduled to run for a period of three weeks, and is set to end on 2 June 2018.
5. There is a substantial difference in terms of the financial rewards offered for participation in the Premier Division compared to those offered for participation in the First Division. It stands to reason, then, that a club would have much to gain by being placed 15th on the Premier Division table at the end of the season rather than 16th. The latter position involves automatic relegation to the less lucrative First Division. The position of 15th at least leaves a club with the prospect of playing in the promotion Play-Off and, if victorious, retaining a spot in the Premier League.
6. The final ordinary games of the current NSL season (excluding the Play-Off) took place over the weekend commencing Friday 11 May 2018. After the conclusion of these matches, Ajax placed 15th on the Premier League table. Had that been the end of the matter, it would have been entitled to participate in the Play-Off commencing on Wednesday, 16 May (which was the day on which the urgent application was heard).
7. However, on Monday 14 May 2018, disciplinary proceedings were conducted by the NSL against Ajax and Ndoro in the form of an arbitration. The first respondent, Mokhari SC, was appointed as the arbitrator under article 63.1 of the NSL Handbook. It provides that:

“If the Chief Executive Officer is of the opinion that the prosecution of a complaint, protest, disciplinary matter or appeal according to the prescribed time lines will prejudice the League, he may escalate the relevant issue directly to arbitration as provided for in terms of the SARA Statutes.”

8. The arbitrator handed down his award on Tuesday, 15 May 2018. He found Ajax and Ndoro to be guilty on various counts of misconduct. Included in the sanctions imposed were the following:
 - a. That Ajax forfeit the match played against the club, Platinum Stars, and that it be declared that the match was won by Platinum Stars 3-0.
 - b. A similar penalty as regards a match played between Ajax and Polokwane City.
 - c. A similar penalty as regards a match played between Ajax and Supersport United.
9. These penalties resulted in a reconfiguration of the end of season league table positions. As a result of the points consequently lost by Ajax, it dropped to 16th on the Premier League table. It thus became subject to automatic relegation and lost its place in the Play-off.

10. The urgent application was filed at the High Court on the morning of Wednesday, 16 May. The applicants asserted that it was extremely urgent as the Play-Off was to commence with the first match kicking off at 3pm that afternoon. The application was in the form of a Part A and a Part B. Under Part B the applicants seek an order expediting a review and setting aside of the arbitration award made by Mokhari SC. Under Part A, which is the application before me, the applicants seek, by way of urgency and pending the review under Part B:
 - a. An order interdicting the NSL from commencing the Play-Off.
 - b. In the alternative, and in the event that the Play-Off may have commenced prior to the determination of Part A, an order interdicting the NSL from continuing with the Play-Off mini-league.
11. As matters transpired, the clock ran down before the scheduled kick-off of the first Play-Off match at 3pm on the day of the

hearing. Consequently, what the applicants seek is their alternative relief. The next scheduled Play-Off match is on Sunday 20 May 2018.

12. As far as Part B is concerned, all of the parties who were represented before me are agreed that the review should be heard on an expedited basis. I agree that it (Part B) should be resolved as a matter of urgency and my order makes provision for this. It provides time-lines for the parties for the filing of affidavits and heads of argument in order that they may approach the Deputy Judge President for a special allocation for the hearing as soon as reasonably possible.
13. The relief sought before me under Part A follows an eventful year of litigation between the parties. This was prompted by Ndoro's

taking up employment as a registered football player with Ajax by way of a transfer in January 2018. He was transferred from a Saudi Arabian club, Al Faisaly. At the commencement of the 2017-18 season, he was a registered player contracted to Orlando Pirates. He played one match for that club, before taking up his contract with Al Faisaly. From September 2017 to December 2018 he played in matches for Al Faisaly. After his transfer to Ajax, he played a number of games for them during the course of the season.

14. There is no dispute that Ndoro was registered to three clubs in one season (the 2017-18) season, and that he played in matches for all three clubs during the season. Article 5(3) of the FIFA Regulations on the Status and Transfer of Players provides that:

"Players may be registered with a maximum of three clubs during one season. During this period, the player is only eligible to play official matches for two clubs. ..."

The FIFA Regulations bind club members of the NSL and players registered by them.

15. The first action that led to litigation between the parties was taken by Ajax and Nodoro. They brought urgent proceedings before the Dispute Resolution Chamber (“the DRC”) of the NSL on 26 January 2018, seeking a declarator to the effect that Nodoro was eligible to play for Ajax during the remainder of the season. It is important to note that at that stage, Ajax and Nodoro took the view that the DRC had jurisdiction to determine the relief it sought, while the NSL disputed the DRC’s jurisdiction to do so. The NSL took the view that only FIFA’s Players’ Status Committee (“PSC”) had jurisdiction to do so. The DRC was persuaded by the applicants’ view, and made an order declaring Nodoro eligible to play.
16. The next phase commenced when the NSL appealed the DRC’s ruling to Cassim SC, sitting as arbitrator in a SAFA Arbitration Tribunal appointed under Article 23.9 of the NSL constitution and the SAFA statutes. Cassim SC ruled that the DRC did not have jurisdiction, and that the matter should be determined by the PSC of FIFA. Cassim SC’s award was rendered on 28 March 2018.
17. This prompted the first foray by the parties to the High Court. Ajax and Nodoro sought to review Cassim SC’s award on an urgent basis, and to remit the matter back to the Arbitration Tribunal for fresh consideration. At the same time, they sought an urgent order interdicting the NSL from preventing Nodoro from playing pending the finalisation of that review.
18. The urgent interdict application came before Sutherland J, who dismissed the application. The urgent review of the Cassim SC award came before Unterhalter J, who delivered his judgment (“the Unterhalter J judgment”) on 28 April 2018. I will have more to say about the Unterhalter J judgment later. At this stage, it should be noted that the applicants (Ajax and Nodoro) asserted, as one of their grounds of review, that Cassim SC had committed an error of law in finding that the DRC did not have jurisdiction to determine the dispute referred to it by Ajax and Nodoro. In other words, the applicants maintained that the DRC, and not the FIFA PSC had jurisdiction.
19. Unterhalter J found, albeit for different reasons than those relied on by Cassim SC, that the DRC did not have jurisdiction to determine the dispute referred to it by Ajax and Nodoro. Rather, in terms of the NSL and SAFA statutes, read with those of FIFA, the question of whether Nodoro could be declared eligible to play was a status-related matter in respect of which only the PSC had jurisdiction, due to the international element introduced by Nodoro’s transfer from Al Faisaly (being a foreign club) to Ajax during the season.
20. It is common cause that in line with the determination by Cassim SC that FIFA’s PSC, and not the DRC, had jurisdiction to determine the dispute initially referred by Ajax and Nodoro, the NSL made two attempts to refer the matter to the PSC. FIFA however took the view that it was not competent to deal with the NSL’s petition to it, as the matter could not be referred by a non-member. The NSL asserts that the applicants opposed its petitions to FIFA. As matters stand at present, that assertion is not contradicted by the applicants. In fact, in the letter I refer to shortly from the applicants’ attorney to the NSL dated 9 May, they record that: “Ajax on 10 April 2018 wrote to FIFA, PSC, SAFA and the PSL (NSL) saying that the FIFA PSC does

not have jurisdiction.” (my emphasis)

21. As I have indicated, the Unterhalter J judgment was handed down on 28 April 2018. On 3 May 2018, the NSL preferred the disciplinary charges referred to earlier against Ajax and Ndoro. On the same date, the NSL notified all parties, including Ajax and Ndoro, that the disciplinary matters would be referred to arbitration on an urgent basis. The NSL substantiated the urgency of the matter by pointing out that the matters were extremely urgent in that the season was about to end and the Play-Off fixtures had already been set. The outcome of the disciplinary proceedings had the potential to affect the final standings, including the Play-Off. The NSL asked the parties and the arbitrator to be appointed to assist in ensuring that the matters were dealt with urgently at one consolidated hearing and resolved.
22. On 7 May 2018, the applicants wrote to the NSL demanding an immediate withdrawal of the referral to arbitration of the disciplinary

matters. They did so on the basis that the DRC declaration of eligibility was valid and effective at the times that Ajax was alleged to have fielded Ndoro in contravention of the applicable rules. They asserted that for this reason, there was no basis for the allegations of misconduct forming the substance of the disciplinary charges.

23. It should be noted that at this stage the applicants did not contest that the Arbitration Tribunal, due to be convened for purposes of the disciplinary charges, lacked jurisdiction to adjudicate the matter.
24. On 8 May 2018, SAFA wrote to all parties requesting their urgent co-operation in nominating an arbitrator from a list of three

possibilities. On the same date, counsel for the applicants emailed SAFA directly indicating that he was not available for the remainder of that week and would only be available on Thursday 17 May for the proposed arbitration. On 9 May the applicants’ attorney wrote a long letter to the NSL. The following aspects of the letter are relevant for present purposes:

- a. The applicants took issue with, and rejected the assertion that the arbitration was urgent. They expressed the view that the urgency was self-created.
- b. They referred to the Unterhalter J judgment, and the finding in it that the PSC had jurisdiction to consider the matter referred by the applicants.
- c. They referred to the PSC’s refusal to consider the matter.
- d. Importantly, and flowing from the previous point, they asserted that: “Ajax has been correct in its argument that the FIFA PSC has no jurisdiction and only the ... DRC has jurisdiction.” (My emphasis)

- e. The applicants disputed that the Play-Offs could be affected by the pending disciplinary proceedings on the basis that: "... the points obtained by Ajax as a result of the PSL DRC eligibility ruling cannot be taken away." This was a reference apparently to an understanding that prevailed at the time of the urgent hearing before Sutherland J, prior to the institution of the disciplinary proceedings against the applicants.
25. At this point there appears to have been a flurry of exchanges of correspondence. It is not necessary to traverse the details of these letters. However, it must be recorded that the NSL insisted on its position that the matter was extremely urgent. As I have indicated, the applicants contended otherwise. They also took issue with the chosen arbitrator, and nominated another one. That is not of much moment for purposes of this application. On 9 May the applicants sent a letter to SAFA in which they asserted that:

"The request for an urgent arbitration is an abuse of power and is irrational; it is not urgent; the Ndoro issue is moot and no basis

for misconduct (or charge) is set to the PSL request for arbitration (sic)".

26. When SAFA wrote a further letter to the parties regarding the urgency of the matter, the applicants proposed that:

"We attempt to agree on the terms of reference over the weekend and commence with the Arbitration on Monday and/or Wednesday/Thursday/Friday (preferably not Wednesday as a potential playoff match is scheduled for such date)." (my emphasis)

27. SAFA initially set the arbitration for Friday 11 May. For various reasons, it became necessary to re-schedule for Monday, 14 May 2018, when the proceedings took place before Mokhari SC. This meant that the final, ordinary league matches were played as scheduled over the weekend preceding the arbitration hearing.
28. On Sunday, 13 May, the NSL received an email from applicants' attorneys indicating that they had drafted papers in anticipation of having the matter set down on a most urgent basis. At the arbitration hearing on the morning of Monday 14 May, the NSL was given a copy of a letter from the applicants' senior counsel, Arendse SC, to the Deputy Judge President of this division. The letter requested that its purpose was to secure an urgent allocation of an urgent application to be launched during the course of that day (14 May). The letter went on to say that:
- "... we have drafted papers in anticipation to have the matter set down on a most urgent basis to have both the appointment of the arbitrator set aside, and for a declaratory order that the matter relating to the interpretation of Regulation 5 of the FIFA Status and Transfer Regulations is not arbitrable in a SAFA Arbitration Tribunal, save where an appeal arises from a PSL DRC ruling." (my emphasis)*
29. Despite this stated intention, the applicants only launched their urgent application two days later, on Wednesday 16 May. What should be noted from the underlined portion of the above extract is that the applicants appeared to have adopted an entirely different stance on

jurisdiction to that maintained by them previously. Whereas previously they were adamant that the DRC and not the FIFA PSC had jurisdiction, their stated intention from the letter to the Deputy Judge President was to argue before the High Court that a domestic arbitration tribunal did not have jurisdiction, and that only the PSC had jurisdiction to determine the issue.

30. It was this stance that formed the backbone of the applicants' submissions before me in this urgent application. In summary, the applicants' case rested on the following contentions:
 - a. The disciplinary charges turn on the eligibility of Ndoro to have played for Ajax in the impugned matches.
 - b. This is a question upon which Unterhalter J has ruled. As the applicants and the NSL were parties to the proceedings before Unterhalter J, his findings are binding on them.
 - c. The Unterhalter J judgment makes a clear finding that in a dispute about the eligibility of a player in the position of Ndoro, only the FIFA PSC has jurisdiction. A domestic arbitration tribunal under SAFA and/or the NSL statutes has no jurisdiction.
 - d. In the circumstances, the arbitration under Mokhari SC was conducted on the legally erroneous basis that it had jurisdiction to consider and make an award in the disciplinary proceedings against them, when it did not have jurisdiction.
 - e. The applicants accordingly have a very strong case, and in effect a clear right, to have the Mokhari SC award reviewed and set aside under Part B.
 - f. The effect of the award and the penalties imposed was to deprive the applicants of their right to participate in the Play-Off, as the points deducted caused them to drop from 15th to 16th place, and hence to automatic relegation status, in the league.
 - g. Should the Play-Off go ahead, Ajax would suffer irreparable harm in that it would be deprived of the right to fight to retain its place in the Premier League.
 - h. The balance of convenience favoured the applicants because the interim interdict suspending the Play-Off would result in only a brief suspension of the mini-league.
 - i. The integrity of the NSL, the leagues and the Play-Off was vital to all parties and to the public. It would be extremely detrimental if an obviously flawed arbitration award was permitted to take effect and to determine which clubs participated in the Play-Off.
 - j. The matter was extremely urgent, as the Play-Off was about to commence. The urgency was triggered by the unpredictable outcome of the final matches played over the weekend proceeding the arbitration before Mokhari SC, and the award that was handed down only on Tuesday, 15 May.

31. The first issue that requires consideration is the urgency of the application for relief under Part A. While the NSL and the other parties represented all saw the merit in proceeding with an expedited review of the Mokhari SC award, they contended that the urgency in seeking an order to suspend the Play-Offs pending that review was self created on the part of the applicants.
32. I have set out in some detail already the events leading to the urgent application. The events are important not least in relation to the question of whether this court should determine that the matter ought properly to be dealt with with the degree of urgency contended for by the applicants.
33. The question of urgency is particularly important in this case. The NSL administers and regulates matters which are of enormous public interest to the football-loving public of South Africa. The league is a long-standing sporting institution, and plays an important role in the social and cultural life of South Africa. Members of the public dip into their oftentimes meagre pockets to purchase tickets to attend matches, or they congregate to watch on television. The broadcast arrangements and rights are critical to the public's enjoyment of, and continued interest in the professional football played under the auspices of the NSL. There can be no question that the Play-Off mini-league engenders particular interest, determining as it does the critical question of which club may be elevated from First Division, and which club may be relegated from the Premier League.
34. In these circumstances, it seems to me that there must be a convincing need for a court to consider it appropriate to suspend the Play-Off at the stage that, quite literally, the players are donning their kit and warming up for kick-off.
35. This is what the applicants asked this court to do. Not only did they proceed at the eleventh hour to launch their urgent application, but they did so on the most restricted time frames. The applicants delivered their unsigned papers electronically to the NSL close to midnight on the 15 May. It set the matter down for 10h00 the following morning. The notice of motion required the NSL to deliver

any answering papers at that time too. This proved to be an impossible task for the NSL. It managed to provide the court with an

answering affidavit (stated to have been prepared in great haste) during the course of the hearing, and after the applicants'

counsel had commenced addressing the court. Given the circumstances, no blame can be laid at the NSL's door in this regard.

36. The applicants further expected that the court should make its determination before the kick-off of the first mini-league game. This too proved to be impossible. I note these points because they give an indication of the extreme pressure the applicants placed on the court and on the respondents to deal with their urgent application.

37. In my view there are a number of factors pertinent to the question of whether this degree of urgency was warranted. First, the applicants have known about the Unterhalter J judgment since it was handed down on 28 April 2018. The jurisdiction point they now assert is a magic bullet to deal with the validity Mokhari SC's arbitration award must have been patently clear to them from the first. Despite this, at no stage until the letter sent by counsel to the Deputy Judge President on 14 May, did the applicants purport to rely on the jurisdiction point they now say is an unassailable impediment to the validity of the Mokhari SC award. On the contrary, as I have recorded earlier, as late as 9 May, in their letter to the NSL, the applicants asserted that they had been correct in their assertion that the FIFA PSC had no jurisdiction, and that the DRC had jurisdiction. The late reliance by the applicants on the alleged clear and determinative finding by Unterhalter J is not explained by them.
38. Second, until the morning of the arbitration, the applicants' clear position as communicated to the NSL was that the resolution of the issues raised in the disciplinary proceedings was not urgent. I have recorded their communications in this regard. They expressly denied that it was extremely urgent that the disciplinary arbitration take place before the Play-Off. In fact they proposed that the arbitration could even take place after the first Play-Off match. Their stated view was that the Play-Off would not be affected. In doing so, they worked on the assumption that the points obtained by Ajax could not be taken away. This was after the NSL had warned all parties that the outcome of the disciplinary arbitration had the potential to affect the final standings and the Play-Off.
39. In these circumstances, the applicants' submission to the court that it was the unforeseen effect of the arbitration award on the standings and the Play-Off that triggered the extreme urgency of its application is unconvincing.
40. Third, the applicants have known about the questionable eligibility of Ndoro since January 2018. This is what prompted its urgent

application to the DRC. Having obtained a favourable ruling from the DRC, they strenuously acted to protect that ruling. This entailed

steadfastly maintaining the stance, until this week, that the DRC had jurisdiction. They opposed the attempt by the NSL to refer the matter to the PSC on the basis that it did not have jurisdiction. There is merit in the NSL's submission to the court that it has been open all along to Ajax to approach FIFA for a ruling on Ndoro's status or to support the NSL in its referral, and that they have refrained from doing so because they fear that the outcome will be obvious, and that Ndoro will be declared ineligible to play. This calls into question the bona fides of the applicants recently adopted stance that it is in fact the PSC that has exclusive jurisdiction and that for this reason Part A requires the extremely urgent attention of the court.

41. When I questioned counsel for the applicants as to why his clients had not acted earlier to raise the jurisdiction issue they now rely upon, he submitted that his clients were obliged, under the NSL statute, to first exhaust their internal remedies. In other words, the applicants were required to raise the issue with the arbitrator first, before they could

approach the courts. When viewed against the applicants' conduct in the run-up to the urgent application, that submission simply does not hold water. There is no indication that the applicants acted with a view to first exhausting their internal remedies. Had this been the case, the jurisdiction point would have been apparent much earlier in their communications with the NSL. In addition, they would have welcomed, rather than opposed, the urgency of the disciplinary arbitration, as this would have given them the earliest opportunity to deal with the jurisdiction issue and the best chance of the arbitration negatively affecting their standing and Play-Off status. It seems to me that this submission was made without a proper appreciation of the underlying facts of the matter.

42. Counsel for the applicants sought to persuade me that the jurisdiction point arising from the Unterhalter J judgment was so

strong that the applicants should not be non-suited for urgency. This, it was submitted, would impact negatively not only on Ajax and its standing in the league, but on the very integrity of the league itself. A failure to suspend the Play-Off would be tantamount to lending false credibility to an obviously invalidly determined and thus constituted pool of mini-league participants. It was submitted that so obvious was the arbitrator's error in not upholding the jurisdiction point, that the applicants' right to have the award reviewed and set aside on that basis amounted not merely to a *prima facie*, but indeed to a clear right.

43. I do not wish to traverse the merits of the jurisdiction point in any depth at this stage of the proceedings. That is a matter that will be argued fully before the review court in due course. I consider this issue only to the extent that it is relevant to the urgency issue. In this regard, my view is that the jurisdiction issue is not as patently clear and unassailable as the applicants portray. This is because Unterhalter J's judgment arose out of a referral of a particular dispute by the applicants to the DRC. The judgment and its pronouncements on jurisdiction were directed at the dispute resolution mechanisms provided for under the NSL and FIFA statutes in circumstances where a player and his club sought a determination on his eligibility. The findings were made in the context that the DRC's powers were engaged from the outset. The question of disciplinary procedures (which are dealt with under different provisions) under those same statutes was never an issue before Unterhalter J. Thus, his findings and pronouncements on jurisdictional issues as between the NSL and FIFA must be read in the context within which they were made. The jurisdiction of the DRC under the NSL rules expressly excludes disciplinary disputes. Unlike the dispute resolution provisions under both the NSL and FIFA statutes, the FIFA statute does not give it jurisdiction in disciplinary matters.
44. As I have already indicated, I make these observations without any intention of trying to prejudge the matter. These are all issues that require ventilation. My point at this stage is simply to state that I am not persuaded that any urgency-related problems for the applicant can be overlooked, or given less weight because of an alleged clear and obvious case for review under Part B.

45. It is trite that a party seeking urgent relief must persuade a court that the urgency is warranted. A matter should not be dealt with by way of urgency in circumstances where this would visit injustice on the other parties involved. It is in this context that courts refrain from coming to the aid of litigants who are the authors of their own urgency, or who would unfairly benefit, at the expense of other parties, by their delay. Obviously, this depends on the facts of each case. The degree of urgency asserted by the applicant is something that must be factored into the inquiry.
46. In this case, the applicants proceeded on the basis of an extreme degree of urgency. So much so that the hearing commenced without any affidavits having been filed by any of the respondent parties. In my view, this urgency was not justified on the basis that the league matches and the arbitration award acted as unforeseen events that, together, triggered the urgency, as contended for by the applicants. The history of the matter demonstrates that the applicants were well aware of the risks of playing Ndoro from the start of this year. They must have been aware of the risks of relying on the impugned DRC ruling after Cassim SC's award. By the time that the Unterhalter J judgment was handed down, and shortly thereafter the disciplinary proceedings were instituted, the applicants ought to have been fully aware that the NSL intended to deal with the issues urgently. It was expressly notified that the reason for the urgency of the disciplinary arbitration was precisely because it could affect the Play-Off standings. It must have been aware of the risks involved to it in this regard. Despite this, the applicants questioned, and in fact denied, the urgency of the situation. They also took no steps to raise, and ventilate the jurisdiction point that they now rely upon until 14 May.
47. In these circumstances, it is difficult to accept as reasonable the applicants' stance that they were justified in proceeding with the extreme urgency adopted by them to protect their position. The other parties involved were prejudiced by the urgency of the applicants' actions. The NSL prepared papers under obviously extreme pressure. At least one other respondent, Platinum Stars Football Club, indicated that it was unable to prepare papers, and relied simply on submissions from the Bar on urgency. The prejudice to the NSL is particularly significant. It acts in the interests of all members and, to an extent, too, in the public interest. It is important that it not be obstructed in putting its full case before the court. The other members of the NSL who may be affected by the outcome of the application deserve the same courtesy. The NSL indicated in its answering affidavit that it had been hamstrung in this regard as a result of the degree of urgency adopted by the applicants.
48. The applicants' dilatory conduct in only proceeding with urgency at the last minute placed the Play-Off in jeopardy at a time when the full schedule was determined, and broadcasting, ticketing, venues, safety and a myriad of other matters had been arranged. This is contrary to the interests of not only the NSL and its members, but also the public in general. It became clear at the hearing that if the applicants succeeded in their Part A relief, there was a realistic probability that the Play-Off would not be finalised before the commencement of the 2018-19 season. This is because the Play-Off was scheduled to run for three weeks until 2

June. From the 14 June to 15 July, FIFA has decreed that not professional football matches are to be played worldwide because of the World Cup. There is no guarantee that a review under Part B, even if expedited, could be finalised in time for the Play-Off to be completed before the 14 June, and from July until August, all players and clubs are in the off-season. For this reason, the interests of the NSL, all members of the league, and the interests of the general public in the Play-Off and the fate of next seasons' league determinations are pertinent for purposes of considering whether the urgency adopted by the applicants could be justified.

49. On the other hand, the applicants sought to benefit both ways by adopting at first a non-urgent stance, and only at the eleventh hour an urgent stance. For so long as the arbitration had not been finalised, their position in the league was not affected. There was thus no urgency on the part of Ajax to finalise the arbitration. However, once the award was made, and their position affected, they sought by way of extreme urgency to freeze the post-arbitration award standings in the league by delaying the Play-Off pending the review. In my view, the resort to extreme urgency in this situation is unacceptable.
50. Having considered the particular facts at hand in this case, I am not satisfied that the applicants have established that they were justified in proceeding to seek to interdict the Play-Off with the degree of urgency they have adopted. To proceed to consider their application in these circumstances would not be in the general interests of all parties represented by the NSL. Should the

applicants succeed in their review, the NSL has indicated it will deal with the consequences, and make whatever arrangements become

necessary. The position of the applicants will not necessarily be determined finally by the outcome of the Play-Off as presently

scheduled. On the other hand, to proceed with urgency to suspend the Play-Off now, when the matter has been so hastily brought to court at the eleventh hour, would not be in the general interests of the NSL, its members and the public it in part serves.

51. Before making my order, I record that this morning I received an email via my registrar that had been sent to her after close of business yesterday by applicants' counsel. I am not sure whether this email was sent with the knowledge of, and consent from, the respondents. I did not have any forewarning that they intended doing this, nor was the question of further submissions canvassed in court on the day of the hearing. I only had sight of the email this morning, but which time my judgment was substantially complete. I do not consider that it was proper for the applicants to make further submissions to me in this manner, and I have disregarded the email for purposes of my judgment.
52. For all of these reasons I make the following order:
1. The application under Part A is struck for want of urgency.

2. The applicants are directed, jointly and severally, to pay the costs in respect of Part A of the second and eighteenth respondents, including the costs of two counsel where so employed.
3. The parties are directed to comply with the following timelines as regards Part B:
 - a. The applicants to supplement their papers by no later than 22 May 2018;
 - b. The respondents to file their answering papers by no later than Friday, 25 May 2018;
 - c. The applicants to file their reply, by no later than Tuesday, 29 May 2018;
 - d. Parties to file heads of argument by 1 June 2018.
4. Parties are directed to approach the DJP for an expedited date of hearing for the review.

R M KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE HEARD

: 16 MAY 2018

DATE OF JUDGMENT

: 18 MAY 2018

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Prepared on 13 October 2026 · Esheria