‘‘‘‘‘‘‘‘‘‘‘‘‘‘**IN THE LABOUR COURT OF SOUTH AFRICA**
HELD AT JOHANNESBURG **CASE NO: J4909/00**

In the matter between:

SOUTH AFRICAN FOOTBALL

First Applicant

Second Applicant

and

Respondent

–

JUDGMENT

–

LANDMAN J:

The South African Football Players Union and Edward Motale, a professional football player of 12 years’ standing (who has played locally and has also represented the National side Bafana Bafana) launched an application on 23 October 2000 against the Ria Stars Football Club (“Stars”). The applicants sought an order:

1 Declaring the respondent’s conduct in giving the second applicant (i.e., Mr Motale) a clearance certificate, constitutes a repudiation of the fixed term contract of employment concluded by the second applicant and the respondent.

2 Directing the respondent to pay the applicant's outstanding salaries in the amount of R 113 333,40, calculated from the date of breach of the contract to the last day of the fixed term contract.

3 Interest at the prescribed legal rate from the date of demand to the date of payment.

4 Costs of the suit.

Stars opposed the application and filed an answering affidavit by Mr Malombo Lechaba, its coach. A confirmatory affidavit was filed by Mr Junior Ramusi, Stars general manager. Ms Ria Ledwaba, the managing director of Stars, signed a resolution of the board which, significantly, authorised Mr Lechaba to oppose the application.

THE CASE ON AFFIDAVIT

Mr Motale contends in his founding affidavit that:

" On or about August 2000 the respondent, duly authorised and represented by Sello Chiko Twala ("Twala"), and myself, entered into a fixed term contract of employment.

6 The material terms of the contract were that-

6.1 I will make my talent and services as a football player available to respondent for a period of 12 months;

6.2 respondent would pay me an amount of R 11 333, 34 per month as

remuneration.

7 I duly tendered my service in accordance with my fixed term contract of employment, and at no stage was I informed that my performance was not up to standard.

8 I further earned my salaries for the next two months I had been with the respondent. I annex a copy of my salary advice as annexure EM1 for the month of September 2000.

9 On or about 3 October 2000, and in breach of the contract, I was called by an official of the respondent, a certain Mr Junior Ramusi, who advised me that my services with the respondent were being summarily terminated.

10 I enquired from Junior the reason for my dismissal, and he informed me that the respondent had appointed a new coach, Lechaba, and that I did not feature in his plans.

11 In consequence the respondent is in breach of the fixed contract of employment, and I have since accepted the repudiation of the contract.

12 On 4 October 2000 I instructed my attorneys of record to address a letter to the respondent relating to the breach of my fixed term contract, and further that I have accepted the repudiation. A copy of the letter is attached hereto marked EM2.

13 As a result of the respondent's conduct I have suffered loss of earnings in the amount of R113 333,40, being the total outstanding contract fee."

In its answering affidavit Stars sets out its version of events. Mr

Lechaba says:

"1 On 30 July 2000 in Pietersburg the second applicant and the respondent concluded the agreement annexed hereto marked LS2. To avoid prolixity I do not set out the contents of the aforesaid agreement but pray that the contents thereof may be incorporated herein *mutatis mutandis*.

1.1_ The agreed rate of the second applicant's remuneration was

R 7 000 basic salary per month, as evidentially shown in the schedule to the aforesaid agreement in terms of clause 24 of the aforesaid agreement.

1.2 SECOND APPLICANT DISHONESTY

(a) The respondent's head office is in Pietersburg, where the salaries and other incentives of players are paid.

(2) The respondent's branch office is in Johannesburg, where players' original contracts are signed and kept.

(c) In the pay month the players of the respondent claim their salaries from the general manager (Junior Ramusi) of the respondent at its said head office in Pietersburg.

(d) In August 2000 the second applicant unlawfully and intentionally informed the general manager of the respondent (whose

confirmatory affidavit is annexed hereto marked L3) that his salary for August 2000 was R11 333, 24. On the strength of this the general manager paid the second applicant R11 333, 24.

(a) (e) However the second applicant unlawfully and intentionally and/or knowingly failed to disclose to the general manager that the agreed rate of his remuneration was R7 000 per month in terms of the agreement concluded prior to August 2000. This allegation is repeated in regard to the month

of September 2000.

(f) In August 2000 the second applicant knowingly received R 4 333,24 salary (i.e., R 11 333,24 less R7000 equals

R 4 333, 24) to which he was not entitled.

(g) The same allegation is made in regard to September.

(h) As a result of this false representation the respondent has suffered R8 666, 48 actual prejudice, hence the respondent hereby makes a counterclaim for R8 666, 48 against the second applicant.

2 Between August 2000 and September 2000 the second applicant committed persistent and serious misconduct and was in persistent and serious breach of the rules of the respondent and of the terms and conditions contained in the aforesaid agreement.

Some of those examples are:

(a) The applicant publicly and falsely accused me of not wanting to use him when he started on the bench, and later came on as a substitute in the first ten minutes of the fifth game between Bloemfontein Celtic and the respondent.

(a) (b) Persistently and deliberately disobeyed or challenged my authority falsely and publicly, saying that I was just the assistant coach who was taking over the club and doing things that Mr Jacob Sekala of the respondent did not like, and that I wanted 'to rule everything at Ria Stars and act like their head coach'.

(g) That the applicant persistently under- performed whenever he played for the respondent, and when I gave him appropriate guidance and counseling he angrily responded by saying that I expected him to be 'the Nomvete or Mkhelele of Ria Stars. That is not possible'."

3 Between August and September 2000 the second applicant was given appropriate

evaluation, instructions, training, guidance and counseling, but repeatedly refused to improve saying that I had favourites and that I wanted to ruin his life. Meetings were held with him to try to assist him to improve his conduct and performance but he refused to improve his conduct and performance.

4 On 3 October 2000 the respondent finally discovered that in August 2000 and September 2000 the applicant had received R8 666, 48 in excess of his normal monthly wages that was not due. Immediately thereafter the second applicant was called to a meeting to reply to a question requiring him to explain why in August 2000 and 8 September 2000 he had knowingly received R8 666, 48 wages that were not due.

5 In the aforesaid meeting the applicant was further required to explain his persistent and serious misconduct, and his persistent and serious breach of the rules of the respondent and of the terms and conditions contained in the agreement concluded on 30 July 2000. In reply the second applicant emphasised that the continued working relationship was intolerable for him and that he should be deregistered with the league and be given a free clearance in terms of clause 15 (b) of the agreement, annexed hereto, in order for him to go and look for greener pastures with other clubs. In response the respondent asked the second applicant to sign a form of deregistration and cancellation of contract of employment, annexed hereto marked L4. After reading it the second applicant said that he did not understand English and that he was going to ask his accountant to read it for him, and that thereafter he would fax the same copy to the respondent.

5.1 He simply left with a copy of the aforesaid form without even acknowledging receipt thereof in writing. He later came back with the signed form of deregistration and cancellation of the contract, saying 'I have still got it back there are certain clauses that I don't agree with'. Immediately thereafter the second

applicant demanded that the respondent should sever the relations with him on the basis (i.e. by paying him the remuneration of R110 000 for the remaining period of his contract) he found acceptable, failing which he will take legal action against the respondent and go to the press and the media to expose the respondent. In answer the respondent told the second applicant that, that way was not open, the second applicant would not take no, for an answer. He thought that the respondent would eventually capitulate.

5.2 Despite the second applicant's aforesaid confrontations and threats on 3 October 2000 the respondent requested the second applicant to specify certain clauses that he did not agree with in order for the parties to attempt to come to some sort of agreement regarding such certain clauses he did not agree with.

5.3 In response the second applicant requested that he should be given an opportunity until the following day (i.e. 4 October 2000) to take advice and to come up with specific clauses that he did not agree with.

5.4 Instead of sending the specific clauses that he did not agree with on 4 October 2000 the applicant carried out his threat, i.e. to take legal action on 3 October 2000, in that on 4 October 2000 the second applicant sent the letter of demand, annexed hereto marked L5, to the respondent, demanding payment of R110 000 for the remaining period of his contract, failing which a law suit will be instituted."

Mr Lechaba goes on to set out the provision of clause 18 of the agreement. This provides that:

"If a club is guilty of serious or persistent breach of the terms and condition of this agreement, the player may cancel the agreement after giving 14 days' written

notice to remedy the beach. Failing which the player may cancel the agreement within 3 days after the club has been found guilty by the relevant authority of such breach or default. The player shall then forward a copy of such notice to the SAFA and the National Soccer League."

He continues:

"1 In breach of clause 18 of the agreement the second applicant did not give the respondent 14 day's written registered notice to remedy such alleged breach.

2 The second applicant cancelled the agreement before and without the respondent having been found guilty by the relevant authority of such alleged breach or default.

3 The second applicant cancelled the agreement before and without having given 3 days after the respondent had been found guilty by the relevant authority of such alleged breach or default."

"5.5 Due to the fact that the respondent could not be expected to put up indefinitely with the second applicant's ongoing confrontations, dishonesty, persistent and serious misconduct, and persistent and serious breach of the rules of the respondent, and the terms and conditions contained in the agreement of 5 October 2000, the respondent decided to end the game too. On 5 October 2000, the respondent then, in terms of clause 17 of the agreement between the parties, sent 14 days' written notice of termination of the agreement to the second applicant for having been guilty of persistent and serious misconduct, and being in persistent and serious breach of the rules of the respondent and the terms and conditions contained in the aforesaid agreement, and having knowingly received R8 666, 48 wages that were not due.

On 5 October 2000 the aforesaid written notice of termination of the agreement was sent to the applicant by post to the second applicant's last known address, i.e.,

898 Section C Mamelodi West, Pretoria.

6 The termination of the applicant's services was both lawful and fair on the ground that:

6.1 the applicant committed persistent and serious misconduct and persistent and serious breach of the contract and knowingly received R8 666, 48 wages that were not due;

6.2 clause 17 of the agreement between the parties allowed the respondent to terminate the applicant's services for persistent breach and serious misconduct and for persistent and serious breach of the agreement."

That was Stars case in so far as it was set out in the answering affidavit.

THE CASE ON TRIAL

The applicant came before Francis J on 5 May 2001. By agreement he made an order that the matter be set down for trial. At least this is the note which appears on the file. The parties apparently decided to rely on the papers before court which set out the conflicting issues. They, however, held a pre-trial conference. The parties agreed that the following facts were common cause: Applicant was a professional soccer player. Applicant entered into a written contract of employment with respondent. The contract was valid until 30 August 2001. Applicant received remuneration for two months, i.e. August and September 2000. On 3 October 2000 applicant was called to a meeting with Mr Ramusi. On 3 October 2000 applicant was issued with a document entitled 'deregistration and cancellation of a contract of employment'. He was further issued with a clearance certificate dated 3 October 2000 and signed by Mr Ramusi. On 4 October 2000 applicant, through his attorneys, addressed a letter to respondent accepting repudiation of the contract of employment. A fixed term contract of employment was entered into by the parties at Johannesburg.

The parties agreed that the following facts were in dispute:

1 Whether the contract of employment was entered into between respondent and applicant, duly represented by Chiko Twala.

2 Applicant's salary.

3 Whether applicant unlawfully and intentionally informed the general manager in August and September 2000 that his salary was R11 333, 24.

4 Whether applicant has committed persistent and serious misconduct and/or breached the rules and terms of conditions contained in his fixed term contract of employment.

5 Whether applicant was given appropriate evaluation, training, guidance and counseling.

6 Discussions of the meeting on 3 October 2000.

7 Whether applicant did receive the respondent's letter dated 5 October 2000.

8 Whether the contract of employment has been lawfully terminated.

Stars, by agreement, commenced leading evidence. Two witnesses were called. They were Ms Ria Ledwaba and Mr Sello Chiko Twala. These witnesses, who are both directors of Stars, presented a completely different defence to that set out in the answering affidavit. Stars case was now that the contract of employment between it and Mr Motale was terminated by mutual consent. Therefore Mr Motale was not entitled to any damages.

Ms Ledwaba testified that Mr Lechaba and Mr Ramusi did not have knowledge of the affairs of Stars. Stars did not rely on any breach of the contract by Mr Motale. These two gentlemen, the coach and the general manager, were no longer employed by Stars. I may add that they did not testify at the hearing. In short, the directors simply suggested that the affidavits and the case set out in those

affidavits should simply be disregarded.

Ms Ledwaba testified about the events leading up to the mutual termination of the contract on 3 October 2000. Before setting out her evidence I should record that, at a certain stage, she commenced telling this court what the coach Mr Lechaba would say. Ms Mababolo, who appeared on behalf of the applicants, objected to this on the ground that it was hearsay evidence. On the assurance by Mr Seneke, who appeared on behalf of Stars, that the coach would be called, I provisionally allowed the evidence in.

Ms Ledwaba said that Mr Motale played not more than four games, although she could not remember much about this. After the last game the directors met with management on the Monday. They did not specifically meet to talk about Mr Motale but about the players generally. The coach discussed the performance of the players and suggested that Mr Motale was under-performing. The directors instructed him to talk to Mr Motale.

Ms Ledwaba says that in September 2000 they met with Mr Motale. He was told the coach said that he was not satisfied with him. She said that the Premier Soccer League allowed him two options. She said, as the coach was not satisfied, the club or the team could place him on a transfer list or he could get a clearance certificate to play for a team of his choice. Mr Motale chose to be given a clearance. She said that: “On the 3 October we met Mr Motale at our offices and we finalised the September discussion, and on that day a clearance certificate was issued to him”. She says the issuing of the clearance certificate amounted to the termination of the contract.

Ms Ledwaba went on to say that when clearance certificate was issued, she also signed the document headed “deregistration and cancellation of a contract of employment”. She gave this document to Mr Motale. This is a document which

she had drawn up. Its essential terms are that the signatory (normally the player) would agree to his deregistration with the league and the subsequent cancellation of the contract between the club and himself. It goes on to provide:

"Whereas the club waives its right to claim compensation in the event I join another club, I will also forfeit any claim of whatever nature against my former club, being Stars Football Club, once my contract has been terminated by an act of deregistration and I have been issued with a clearance certificate, which must be without prejudice."

She says Mr Motale did not sign this. It is indeed common cause that he did not. She says she cannot remember whether he gave a reason for not wishing to sign it. Mr Twala was not present on this occasion.

Mr Motale's evidence regarding the events of 3 October 2000 is briefly the following: He said that on 3 October 2000 after morning training he was called into office by Mr Ramusi, the manager. When he came in, he was welcomed. Mr Ramusi was alone. He told him that the board senior members had agreed that he should leave. Mr Motale asked why this should be. He was stunned and shocked. The general manager had before him the clearance certificate and the deregistration document. He showed them to Mr Motale. Mr Motale asked him to send him a letter saying that they were terminating the contract. When Mr Motale had a look at the document he saw that it was the termination of his contract. Mr Ramusi said to him that this was the parting of their ways. Mr Motale refused to sign the deregistration document, but he did take it away with him. He was also given the clearance certificate. He concluded that he had been dismissed. He resolved to go and talk to Mr Twala, but he was not able to find him, although he made several attempts to do so.

Mr Motale then went to tell the head coach and the other players that he no longer belonged to the club and that they should not be shocked when they no longer saw

him.

EVALUATION

It is common cause that the parties entered into a written contract of employment. This contract is the standard contract which is drawn up by the National Soccer League and is used by the Premier Soccer League. It was duly signed by both parties. It was for a fixed period of twelve months, commencing on 1 August 2000.

There is some dispute as to whether Mr Motale's remuneration was to be a gross amount of R7 000 or a nett amount of R7 000 i.e. after tax has been deducted. I will return to this issue later.

Mr Seneke submitted that the applicants, rely on the contract referred to in Mr Motale's affidavit. This is not the contract signed with Stars and set out in the bundle of documents. This of course is true. In his affidavit Mr Motale relies on a contract signed in August with Mr Twala and not in July by Ms Ledwaba. But there is no doubt about the correct contract.

The parties have referred the dispute to trial in this court in a highly unconventional and undesirable manner. The best that I can do in these circumstances is to use the common cause pre-trial minute as the basis for deciding the issues between the parties.

I find that parties signed a written fixed term contract attached to the papers. This brings me to the issue of the alleged mutual termination of the contract. The onus of establishing that the contract of employment was terminated by mutual consent, rests upon Stars. In *Cotler v Variety Travel Goods (Pty) Ltd* 1974 (3) SA 621 (A),

at 627 and 629 A - F, Wessels JA said the following:

"Variety's case is that plaintiff by his oral agreement waived his contractual right to require 3 months' notice of termination of his employment. Proof of the conclusion of the oral agreement relied upon would have been the complete answer to the plaintiff's claim against Variety. This company was in no way concerned with plaintiff's alleged subsequent employment by Leatherite. The averment that plaintiff had contracted out of his right to 3 months' notice of termination of his employment forms an essential part of Variety's case that plaintiff's employment was lawfully terminated. No other form of lawful termination is relied upon. In my opinion therefore the incidence of the onus in relation to the defence pleaded by Variety is governed by the second principle referred to by Davis AJA in *Pillay v Krishna and Another* 1946 A.D. at 951. The oral agreement relied upon is in effect the special plea, and the onus of proof *quoad* would rest on Variety. The third rule referred to Davis AJA at page 952 of the judgement also lends support to this conclusion. If the onus in regard to the oral agreement were to rest on plaintiff, he would be required to prove a negative, namely that he did not conclude the oral agreement in question. This test is of course, not an absolute one but in the circumstances of this case it would seem to be appropriate. It was not essential to plaintiff's case to prove that he did not enter into any agreement affecting his rights in terms of the written agreement with Variety. On the contrary, the alleged oral agreement is an essential part of Variety's case. See, in this regard, *Kriegler v Minitzer and Another* 1949 (4) SA 821 (AD) at 828*, Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd.* 1972 (3) SA 583 (W) at 585 A- D. In my opinion Harcourt J in *Desai v Inman & Co* 1971 (1) SA 423 (N) also supports the submissions on plaintiff's behalf, that the burden of proof rested on the defendants in regard to the alleged oral agreement."

In this matter Stars, in its oral defence to the claim, relies on a contract of mutual termination. It is unnecessary for Mr Motale to rely on such agreement, or the absence of such an agreement, to prove his case. I am therefore satisfied that Stars has the burden of showing, on a balance of probabilities, that it concluded a mutual agreement with Mr Motale to end their contractual relationship.

Has Stars discharge this onus on a balance of probabilities? Although there is a parallel between the versions of Mr Ledwaba and Mr Ramusi on the one hand and Ms Ledwaba on the other hand, regarding the insistence of Mr Motale on the issuing of a clearance certificate, that appears to be where the similarity ends. A clearance certificate by a player's club is a PSL requirement for a player to seek employment with other clubs in the league.

The differences between the versions on other aspects are overwhelming. First, according to Mr Lechaba's affidavit the reason for him and Mr Ramusi calling Mr Motale in, and for entering into this contract with him, was his persistent and serious misconduct. This related *inter alia* to him having made a representation in August and September that he was to be paid R11 333,34 per month. It is said that this was paid to him. The result is the counterclaim to which I referred earlier. However, the pay slip itself shows that Mr Motale was only paid R7 000 in August 2000. The counterclaim for recovery of the alleged overpayment for the month of August and for the month of September was simply abandoned. There was no merit in it when these allegations were made by Mr Lechaba and Mr Ramusi. The extra payment which was made to Mr Motale in September was for another cause.

The coach and Mr Ramusi do not mention the possibility of putting Mr Motale on the transfer list. This meant that he would remain on Stars' payroll until the end of his contract unless he was bought by another club.

The affidavits of the coach and the general manager stand. Their serious allegations against Mr Motale cannot be brushed aside. Their contention that the written contract between Stars and Mr Motale was cancelled on the grounds of his misconduct and under-performance cannot simply be explained away without good and sufficient evidence. Mr Lechaba and Mr Ramusi may have explained this. But they were not called as witnesses. Even though, as I recorded earlier, I was informed that, at least, Mr Lechaba would be called.

Stars has presented two reasons for the termination of the contract. I have referred to the first one relating to its termination on the grounds of misconduct and under-performance. The other is that the parties agreed to terminate the contract. These two are in conflict. This make it virtually impossible for Stars to discharge the burden which rests upon them. The evidence by Mr Motale, in regard to the issues surrounding the clearance certificate and the deregistration certificate, does not assist them.

The agreement to terminate the contract was to be a written agreement. This is evident from the deregistration document itself which Stars wanted Mr Motale to sign. When it was handed to Mr Motale, it had already been signed by Ms Ledwaba. Mr Motale was not prepared to contract on those terms. I also find that he did not orally agree to terminate his relationship with Stars.

I am of the firm opinion that Stars has not proven that there was such an agreement, oral or in writing. The conclusion is therefore inescapable that the contract of employment between Mr Motale and Stars was unlawfully terminated by Stars.

DAMAGES

This brings me to the claim for damages. Mr Motale does not claim the amount set out in his founding affidavit. He claims ten times his remuneration of R7 000, i.e., the outstanding balance of his contract. He says that the R7 000 was to be after tax. It is common cause that the written agreement provides in its schedule that Mr Motale's basic salary was to be R7 000. The contract does not stipulate that this is to be the after-tax amount.

In the circumstances the normal incidence of tax would *ipso iure* be applicable and would be deducted from the amount of R7 000 as per payslip. However, the September payslip contains a running total of the taxable earnings payable to Mr Motale for the period of his employment, namely August and September. It also contains a running total of the tax which has been deducted from his salary. A comparison of the running total with the earnings (and the tax which relates to the September earnings), and a simple calculation, shows that Mr. Motale was paid R7 000 at the end of August. In addition, during August, Stars deducted R1 6000,00. This corresponds roughly with the rate of income tax payable for someone in his tax bracket, namely 18 %. This rate was applicable in the tax year in question. See the Income Tax Act 58 of 1960, read with section 12 of the Taxation Laws Amendment Act, 30 of 2000. This provides some support for Mr Motale's assertion that the R7 000 was to be his nett remuneration. Had he applied for the rectification of the contract then this may well have succeeded. But no such application has been made. The parole evidence rule does not permit him to rely on an alleged oral agreement. Indeed, clause 27 of the written contract provides:

"All previous agreements, whether be oral or in writing, between the club and the player are hereby cancelled and of no further force or effect."

Does this prevent Mr Motale from relying on the oral agreement ? The answer

must be: Yes it does. On the other hand, remuneration in the case of an individual, included in the contract of employment, can be unilaterally increased from time to time by his or her employer. In law, where the employer pays more, the employer makes an offer. If accepted by the employee, it gives rise to a variation of the contract. This is not precluded by the parole evidence rule. There is some faint support for this in *Durban Corporation v Cowely* 1930 AD 54.

After concluding the written contract with Mr Motale, Stars paid him R7 000 nett at the end of August, and again this amount at the end of September. There was also another amount, being an unspecified part-payment of the signing-on fee negotiated between Mr Motale and Mr Twala.

I am therefore satisfied that Mr Motale is entitled to base his claim for damages on a nett remuneration of R7 000. Mr Motale sought other employment with other clubs. He therefore attempted to mitigate his damages. He earned R 4 200,00 for that period. This must be set off against the R70 000 which would be payable to him as damages.

ORDER

1. In the premises the respondent, Ria Stars Football Club, is ordered to pay damages to the second applicant, Mr Edward Motale, in the sum of R65 800,00, together with interest from today's date, at the prescribed rate, until the date of payment.
2. The respondent is ordered to pay the second applicant's costs.
3. No relief and no costs are granted to the first applicant.

A A LANDMAN

JUDGE OF THE LABOUR COURT

20 May 2002

24 May 2002

PLICANT: Ms MAMABOLO OF MASERUMULE INCORPORATED

SPONDENT: ADVOCATE SENEKE INSTRUCTED BY S J ZULU ATTORNEYS