

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO: J4373/02

In the matter between

FABIAN MCCARTHY

Applicant

And

SUNDOWNS FOOTBALL CLUB,

NSL

SAFA Respondents

J U D G M E N T

WAGLAY, J:

Football worldwide is arranged in a pyramid structure under FIFA. Seen from a South African perspective FIFA is on top of the pyramid with CAF, SAFA and then the NSL. The NSL controls and regulates professional football in South Africa and is itself subject to the rules and regulations of SAFA, CAF and FIFA. Any club or footballer wishing to play professional football in South Africa must therefore be registered with the NSL.

All professional clubs are affiliated to the NSL and play football in the leagues it regulates, including the Premier Division of the NSL. The Premier Division is the highest level of football in South Africa. The policy function of the NSL is vested in its Board of Governors. This Board is made up of chairpersons or the duly authorised representatives of the professional clubs and other elected regional representatives who must be club chairpersons or officials. The NSL is thus entirely controlled by the owners and/or senior management of professional clubs. Professional footballers are not represented on the Board, nor any persons independent of the professional clubs are on the Board. The Board has the power to make and amend rules and regulations. The rules and regulations which are promulgated by the Board

ensure *inter alia* the proper functioning of the game of football, the proper approach to the rights of the clubs *inter se* including the requirement that there be certainty as to when clubs can contract with players who leave one club for another

. Any footballer, therefore, wishing to pursue football as an occupation in South Africa and/or internationally must play under the FIFA umbrella. In the South African context that means any professional player playing for a club is playing under the auspices of SAFA. A professional footballer must for these reasons play for clubs affiliated to the NSL which is the professional association of clubs affiliated to SAFA. Footballers have no choice. They must join clubs affiliated to the NSL if they want to pursue football as an occupation or career and once they do so they are subjected to the rules of the NSL.

If a player wants to leave a club, even after his contract has expired and join another club, he must obtain a clearance from the club he is leaving as his new club will not be able to register him with the NSL and he will not be able to play unless and until his club is able to lodge a clearance certificate with the NSL. The requirement of the clearance certificate prior to registration is found in the NSL regulations which require that the only players eligible to play will be players who are properly registered with the NSL, who will register the player on submission of the relevant documents including a clearance certificate or club transfer certificate as defined in the Rules.

If a player is under contract with a club, a clearance certificate will not be provided as players must remain with and play for their clubs while the contract subsists. Players are signed on fixed term contracts, and this is a requirement of the NSL, and may not leave their clubs and join other clubs while they are in contract save in special circumstances. What these special circumstances are, are not relevant for present purposes.

Regulation 17.14 of the current NSL Regulations provide:

"A contracted player who has reached the age of 23 and whose contract has expired, is entitled to a clearance certificate without a transfer fee or compensation being payable."

the reference to a transfer fee is a reference to the fact that a

player who is in contract can only be transferred to another club

by agreement between the clubs, including if that is part of the agreement, the payment of a transfer fee. The issue of compensation is only relevant in relation to players who are under the age of 23 where in terms of the FIFA and NSL regulations training and compensation fees may be payable to clubs who contributed to the training of a player prior to the age of 23. Players who have reached the age of 23 and whose contracts are terminated are free agents in terms of the NSL regulations. In other words, they are free to conclude contracts with new clubs and to further their occupation as professional footballers with new clubs, free of any restraint by clubs that they had been contracted to. The term "free agent" is defined in the NSL regulations to mean:

"A player who is registered with a national soccer league and whose contract has expired and who has reached 23 years of age or a player whose contract has been terminated by mutual agreement or for just cause or sporting just cause as contemplated in Regulation 20".

Other definitions in the NSL regulations which are relevant include the definition of a contract and an agreement which provides that these :

"mean an agreement recorded in writing and signed by or on behalf of the relevant parties thereto and any agreement which is not reduced to writing and signed as aforesaid, will have neither force nor effect in law."

Further it is said that:

"contracted players means a professional (not amateur) footballer who is under contract to a club affiliated to the NSL and 'out of contract' player means a player who is not under contract to a club affiliated to the NSL or

whose contract with any such club has terminated."

expired or

The employment contract of professional footballers differ substantially from the contracts which one finds with other employees. In particular, a professional footballer cannot resign during the period of his contract of employment and take up employment with another club without agreement of his old club. If a professional footballer leaves a club after the period of his contract of employment, he cannot simply begin playing for another club unless and until he is provided with a clearance certificate by the club that he leaves as the NSL would not register the player without a clearance certificate.

A professional footballer is required to sign a standard NSL Players Contract and also a Registration Form requiring him to bind himself, like his club, to the NSL Constitution and Regulations. The NSL Contract clearly is intended to be for a predetermined fixed term period. It is in fact a fixed term contract and therefore has to specifically set out the period for which that agreement will subsist. Clause 26 of the said contract provides:

"Where the player and club have entered into and executed a new player contract, then and in such event the provisions as contained in Rule 17 of the Rules and Regulations of the National Soccer League will apply."

When the footballing rules and regulations are read in their entirety, it is clear that the predetermined fixed term contracts of employment would terminate unless new agreements have been entered into, signed and the player is registered afresh. It needs emphasising that the NSL Registration Form also provides that the club and player require registration for a set specified period.

Against this background I have before me an applicant who is a 25 year old professional footballer. He entered into the standard NSL contract referred to above to play for Sundowns Football Club (Sundowns), a very successful professional club. The contract was to endure for two years commencing on 26 September 2000 and terminating on 30 September 2002. The standard contract referred to above has space for contracting parties, that is the professional football club and the professional footballer, to agree to further terms. In the space there provided Sundowns and the applicant by agreement recorded the following:

"Sundowns has the irrevocable option to renew this contract for a further period of two years."

The applicant and Sundowns have since April this year attempted to finalise an agreement in terms of which the applicant would remain in Sundowns employ for a further period of two years. According to the applicant the negotiations have failed to result in an agreement and since his contract with Sundowns has come to an end by effluxion of time, he is a free agent and is entitled to enter into a contract with another professional club. His complaint is that notwithstanding his status as a free agent, Sundowns has refused to provide him with a clearance certificate. Without a clearance certificate he cannot be registered as a player for any professional football club. Applicant thus seeks for this Court to confirm that his contract with Sundowns has in fact terminated and that this court will declare him to be a free agent and order Sundowns to issue him with a clearance certificate.

Applicant has come to this Court as a matter of urgency because he has secured a professional club who is prepared to enter into a contract with him and in terms of NSL regulations to which professional clubs and players are bound, the period for registration of players closes tomorrow, 31 October 2002. According to the applicant if he is not registered by tomorrow, he will not be able to play professional football for the rest of this season and this would seriously prejudice his career.

The application is opposed by Sundowns. They do so on three grounds. Firstly, they contend that the matter is not urgent; secondly, that the relief should be refused because a valid contract is in existence between it and the applicant and, finally contend that there are internal processes within the NSL for the

resolution of the perceived dispute as seen by the applicant and the internal dispute resolution mechanisms should have been invoked to resolve this dispute.

With regard to urgency, there are a number of levels on which Sundowns contend that this matter is not urgent. Firstly, that applicant on his own version was aware by no later than 16 October 2002 that Sundowns did not intend issuing him with a clearance certificate. He none the less waited until 25 October 2002 to lodge this application. No reasons have been given for failing to lodge this application earlier. This submission of Sundowns is not without merit. An applicant who comes to this court as a matter of urgency must satisfy this court that he himself has acted with due urgency. When an applicant takes his time and then comes to court alleging urgency, the court will be reluctant to come to his assistance, if it does come to his assistance at all. In this case the applicant has failed to provide any explanation as to why it took him nearly ten days to launch this application. Ten days does not, however, itself display conduct on the part of the applicant to be such that this court should refuse to entertain this matter.

The court also needs to consider prejudice such urgent application causes to Sundowns. Sundowns only had the weekend and Monday to prepare its opposing papers and one of its chairpersons who has intimate knowledge of the negotiations and the fact of the conclusion of an oral agreement between Sundowns and the applicant, is not available to depose to an affidavit setting out the above and perhaps additional facts relating thereto. Entertaining this matter would thus cause it prejudice. This submission would have been of merit, however, the applicant for purposes of this application is prepared to concede that an oral agreement had in fact been concluded between Sundowns and him. This concession from the applicant disposes of the respondent's complaint in relation to prejudice because that is the only issue that is of relevance and on which issue this court is told that the unavailable chairperson could depose to an affidavit.

Sundowns' further argument that the matter is in any event not urgent is that since the relationship between the applicant, Sundowns and the NSL is regulated in terms of a collective agreement, the fact that registration of players must be done by 31 October 2002 should not be seen as a bar from registering after that date because this court has an inherent power to override such a term of the agreement i.e. notwithstanding the

restriction to registration of players after 31 October 2002, this court could compel the NSL to register the applicant if it finds in favour of the applicant and this the Court could do so at any time. This argument I refuse to accept. While it is true that this court may compel those under its jurisdiction to carry out the terms of its order, it is not the role of this court to willy-nilly flex its muscle to override the terms of contractual arrangements freely and voluntarily entered into between the parties such as Sundowns and other NSL clubs.

Finally, the respondent argued that this matter is not urgent because notwithstanding the rule restricting registration to a period prior to 31 October 2002, FIFA has recently taken a decision (which decision I accept to be binding on SAFA and therefore NSL) which is that professional players who are not bound by contract to any club may be registered outside the restricted registration period. This being so, applicant's reliance on the closure of the registration on 31 October for founding urgency is without merit. Applicant's argument that the provision only applies to professional players who are not contracted to a club AND have not been able to secure an alternative club to sign them during the registration period is also without merit. I do not accept that simply because an out of contract player has a club agreeable to sign him, such registration must take place within a prescribed period. I believe the decision of FIFA applies to all players who do not have a contract irrespective of whether or not a professional club is interested in signing him on because the rationale for FIFA's decision no doubt has to be to ensure that such players are not left in a precarious situation where they are free agents yet are unable to sign for a club because of the restrictive periods relating to registration. This decision by FIFA would have proved fatal to the applicant because it removes this application out of the sphere of urgency.

This Court must, however, be mindful of the fact that, unlike any other employees, professional footballers only have a relatively short period within which to practise their profession, a profession which is inherently risky as they may suffer injuries which may ruin their careers; they are subjected to the vagaries of selection not faced by other employees; they are required to earn sufficient to sustain themselves and their families in a relatively short period and cannot simply, like any other employee, decide to move from one employer to another. Here we have a class of employees who face restrictions in carrying out the trade which restrictions can have an effect on their earnings that cannot be calculated with any degree of certainty.

The fact that Sundowns continue to pay the applicant his salary is not what this Court in the present matter considers to be adequate because as a professional footballer what the applicant should be allowed to do is to play and for this reason I am prepared to entertain this matter as being an urgent one. The fact that I am entertaining the matter, however, does not mean that I am satisfied that the applicant himself acted with due diligence and this court's displeasure will reflect in the cost order that I shall make.

Being satisfied that this matter should be entertained, I then turn to the principal issue and that is whether or not a contract has been concluded between the parties. When one speaks of a contract between a professional footballer and a professional club like the applicant and Sundowns in this matter, affiliated to NSL, SAFA and FIFA, one speaks of a contract that has the effect that it can be acted upon i.e. the contract that a professional player enters into with a professional club, to have a binding effect has to be in writing and signed by both parties. An oral agreement might have some value between the parties but is of no value vis-a-vis the playing of football at a professional level.

As stated earlier, no player may take the field in a professional game unless he is registered with the NSL. The NSL will not register a player unless there is a written contract between the player and the club. In the result, in so far as Sundowns may allege that there was an oral agreement between it and the applicant, such oral agreement does not give it the right to even field the applicant as part of its team in a match.

I do not make any comment on whether or not the oral agreement, if indeed concluded, created any rights and obligations between Sundowns and the applicant. What I am satisfied with is that there is in fact no contract between Sundowns and the applicant that is binding in so far as the applicant playing for Sundowns as a professional soccer player or footballer is concerned. The contract that it did have ended on 30 September 2002 and as applicant is over the age of 23 he is a free agent entitled to seek employment elsewhere.

In so far as Sundowns seeks to rely on the option clause, this clause does no more than give Sundowns the right to negotiate a contract with the applicant. This irrevocable option therefore

means nothing more than the right to negotiate and, if possible, conclude an agreement.

The above does not, however, dispose of this matter. Sundowns further argued that I should not entertain this matter because the NSL provides adequate dispute resolution processes to deal with matters such as the present. The fact that internal remedies are available in the form of arbitration hearings does not oust this Court's jurisdiction to deal with such matters. While this Court will always be reluctant to entertain matters where processes are in place to address the disputes between parties, where the processes do not provide for matters to be heard on an urgent basis and the matter is in fact urgent, I believe it is not improper for the court to deal with such a matter. This is such a matter.

In the result and for reasons mentioned above, I make the following order:

1. That there is no binding contract as envisaged by the NSL between the applicant and the first respondent.
2. Applicant is a free agent and therefore free to join the professional club of his choice.
3. That the first respondent must issue to the applicant a clearance certificate for purposes of applicant being registered with the NSL. This certificate must be issued by no later than 16:00 today, 30 October 2002.
4. There is no order as to costs.

WAGLAY J

DATE OF JUDGMENT: 30 October 2002

APPLICANT: Adv. N. Arendse SC assisted by Adv A. Katz instructed by NTSOANE ATTORNEYS

RESPONDENT: Adv N. Cassiem SC assisted by Adv A. Sniders instructed by JOSE FERREIRA ATTORNEYS

SECOND AND

RESPONDENTS: No appearances.