

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D993/09

Not Reportable

In the matter between:

MIPHY LUPINI

1st Applicant

SOUTH AFRICAN FOOTBALL PLAYERS UNION

2nd Applicant

And

LAMONTVILLE GOLDEN ARROWS

FOOTBAAL CLUB AND ARBITRATION

Respondent

J U D G M E N T

GUSH, J:

1. The applicants in this matter seek an order:

1. Declaring that clause 19 of the employment contract entered into between first applicant and respondent on or about 23 July 2007 is contra *bonis mores* and/or contravened public policy and as a result void and/or unenforceable.
2. Declaring that clause 19 of the employment contract entered into between first applicant and respondent on or about 23 July 2007 infringes on the first applicant's right to access to courts in terms of section 34 of Chapter 2 of the Constitution of the

Republic of South Africa of 1996;

- 3 Declaring that the Labour Court has jurisdiction to adjudicate over the first applicant's claim for damages suffered by him as a result of the termination of his employment contract by the respondent

2. The first applicant in this matter is a professional football player who had entered into a contract of employment with the respondent. The second applicant is the South African football players union of which the first applicant is a member.
3. The respondent is a professional football club which participates in the national soccer league (NSL) which operates under the control of the South African football Association (SAFA) and is subject to the rules and control of both the NSL and SAFA.
4. Prior to filing this application, and as a consequence of the termination of the first applicant's contract by the respondent, the applicants launched the application for damages referred to in prayer 3 of the notice of motion.
5. The applicants aver in the statement of claim that the 1st applicant's contract was unlawfully cancelled and by virtue of the provisions of s 77 (3) of the Basic Conditions of Employment Act (BCEA),¹ this Court has jurisdiction to determine the first applicant's claim.
6. The respondent in its statement of opposition to the applicants claim, *in limine*, pleaded that the 1st applicant's claim against the respondent arose from the employment contract entered into between first applicant and the respondent in terms of which all disputes arising from the employment contract are to be referred to the "Dispute Resolution Chamber in

¹ Act 97 of 1995.

accordance with the NSL rules from time to time".²

7. Appropriately, in matters of this nature, the respondent's statement of claim in opposition included a prayer that the determination of the 1st applicant's claim be stayed pending the referral of the dispute between the parties to the dispute resolution chamber as contemplated in the contract.
8. The parties then concluded a pre-trial minutes on the 20th August 2009 in which minutes, it was recorded that the court was required to decide inter-alia: the exact terms of the contract; whether the contract contained an arbitration clause and if so whether the clause was binding on the parties and **whether the court had jurisdiction to entertain the claim** (my emphasis). The pre-trial minute inexplicably makes no mention of the respondent prayer that the applicants claim be stayed pending a referral to the dispute resolution procedure.
9. During September 2009, a directive was issued that the matter should be enrolled for trial. In October however, the parties requested that the matter be transferred to the Durban Labour Court. The matter was transferred, was allocated a Durban case number and was enrolled trial in Durban on the 22nd and 23rd November 2010.
10. For reasons which were neither explained nor appear from the pleadings, the matter did not proceed for a determination by the court as to whether the applicants' application should be stayed pending the referral of the dispute to arbitration but the applicants elected to file a substantive application under the same case number for the relief set out in para 1 above.
11. In the this application seeks three separate but linked declarators:

² Clause 19 of the applicant's contract.

- 11.1. Firstly: declaring that clause 19 of the applicant's employment contract is *Contra bonis mores* and/or contravened public policy;
 - 11.2. Secondly: declaring that clause 19 of the contract infringes on the 1st applicant's right of access to the courts in terms of section 34 of Chapter 2 of the Constitution; and
 - 11.3. Thirdly: declaring that the Labour Court has **jurisdiction** to adjudicate the first applicant's claim for damages (my emphasis)
12. This application was filed on the 3rd November 2010 and the respondent filed a notice of opposition and answering affidavit on the 16th November 2010.
13. Contemporaneously with the notice of opposition and answering affidavit the parties filed a document headed "Applicants' Practice Note: Set Down 22 and 23 November 2010 which records:
- Nature of matter:**
1. *Jurisdiction – the respondent disputes the jurisdiction of the above Honourable Court. Kindly see bundle 2.*
 2. *Statement of Claim – unlawful termination of fixed term contract of employment. Kindly see bundle 1.*
- The parties have agreed that the application for a declaratory order in respect of the jurisdiction of the Labour court should be heard prior to the carrying of the statement of claim. Depending on whether the court reserves judgement will not on the application for a declaratory order the matter may or may not proceed on the other issues listed above*

14. At the outset however the applicants however sought more than simply a declarator as to the court's jurisdiction. It is apparent from their application that the applicants were relying on prayers 1 and 2 of the notice of motion as a means to establish jurisdiction and in addition as a means to exclude any reliance the respondent may wish to place on the said clause 19 in persuading the court not to determine the dispute.
15. It must be emphasised that the applicants' prayers 1 and 2 of the notice of motion only seek orders declaring the dispute resolution clause (clause 19) to be *contra bonis mores* and unconstitutional, neither of which are prerequisites to determining jurisdiction.
16. In opposition to the declaratory orders sought by the applicants in prayers 1 and 2 of their notice of motion, the respondent argued that the applicants' application was defective as they had failed to join both the NSL and SAFA, who are the bodies under whose jurisdiction the dispute resolution process falls.
17. As a consequence, but without conceding the need to join the NSL and SAFA, the applicants asked that the application in respect of prayers 1 and 2 be adjourned (to the trial roll to be considered at the same time as the claim for damages), irrespective of the outcome of application for the declarator sought in prayer 3. Not only did the applicants wish to consider a possible joinder but argued that a finding that the court did not have jurisdiction to hear the contractual damages claim did not preclude the court from considering prayers 1 and 2 albeit at a later stage.
18. Whilst correctly pointing out that this was not the basis of the applicants' original application and emphasising that if the applicants wish to pursue prayers 1 and 2 it would require a significantly different case, Mr Murphy, on behalf of the respondent, did not oppose the applicants' application for the

adjournment of prayers 1 and 2.

19. Although the parties agreed that I was not required to deal with prayers 1 and 2, and that they are to be adjourned, I am of the view that in order for the court to consider the relief sought in prayers 1 and 2, the applicants would be required to join both the NSL and SAFA.
20. Having elected not to pursue prayers 1 and 2 at this time, the only relief that the applicants now seek is a declarator that the “Labour court has jurisdiction to adjudicate over the first applicant's claim for damages suffered by him as a result of the termination of his employment contract with the respondent”.
21. There is no doubt that the 1st applicant's claim for damages is a dispute which arises from the contract of employment and that the contract includes an agreement to refer such dispute to a dispute resolution “in accordance with the NSL rules and in the Dispute Resolution Tribunal's of the NSL rather than before any court or other tribunal insofar as it is a requirement of FIFA and other footballing rules that the internal dispute resolution mechanisms available in football should be utilised by participants in the game save where the football rules do not provide an appropriate tribunal to determine the dispute”.
22. Clause 19 of the applicants contract of employment in its entirety records under the heading “Dispute Resolution”:

19.1 all disputes arising out of or relating to this contract, including disputes as to the meaning or interpretation of any provision of this contract or as to the carrying into effect of any such provision or as to the termination or consequences of termination shall be referred to dispute resolution in accordance with the NSL rules from time to time.

19.2 *The parties warrant that, in accordance with the football rules, any and all disputes whatsoever shall be determined in accordance with the NSL rules and in the Dispute Resolution Tribunal's of the NSL rather than before any court or other tribunal insofar as it is a requirement of FIFA and other footballing rules that the internal dispute resolution mechanisms available in football should be utilised by participants in the game save where the football rules do not provide an appropriate tribunal to determine the dispute.*

23. The contract provides further that:

1.1 *The employer employs the footballer a professional footballer ... subject to the NSL rules ... as amended from time to time;*

1.2 *This document (including annexures documents, policies and rules incorporated by reference) constitutes the contract of employment between the club and the footballer;*

1.3 *The club and the footballer have perused and considered the terms of this contract of employment and each warrants to the other that it is a true reflection of the full meetings of their minds at the time of execution thereof;*

...

2.2.8 *'Football rules' shall mean the Constitution, Statutes and Rules and Regulations of the NSL; SAFA; CAF and/or FIFA as amended from time to time;*

2.2.9 *'NSL rules' shall mean the Constitution and Rules and Regulations of the National Soccer League as amended from time to time;*

...

3.3 *It shall be the responsibility of the footballer to understand and comply with the provisions of the football rules in general and the NSL rules in particular as issued and/or amended from time to time including those relating to agents in respect of contracts*

and transfer fees, training and development, compensation, prohibited substances and dispute resolution.

24. The applicants' original statement of claim is for a claim for damages arising from an alleged breach of the 1st applicant's contract of employment with the respondent.
25. When opposing the applicants original claim the respondent raised, *in limine*, the provisions of clause 19 of the contract and sought to have the applicants claim stayed pending the referral of the dispute to the dispute resolution processes stipulated in the contract. This is not a matter of jurisdiction. What the court is required to determine in these circumstances is whether it will exercise its discretion to stay the proceedings or "tackle the dispute itself".
26. Inexplicably this is not the issue the parties have placed before the court.
27. The effect of an arbitration clause on the court's jurisdiction is dealt with in the Arbitration Act³ in section 6:

Stay of legal proceedings where there is an arbitration agreement

- (1) *If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.*
- (2) *If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court*

³ Act 42 of 1965

may make an order staying such proceedings subject to such terms and conditions as it may consider just.

28. The issue of the court's jurisdiction was considered in the matter of *Parekh V Shah Jehan Cinemas (Pty) Ltd and Others*⁴ where the court held:

*An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision... Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitrable disputes straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the disputes itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other. Throughout, its jurisdiction, though sometimes latent, thus remains intact.*⁵

29. Given that the matter before the court is not whether the referral of the applicant's claim for damages should be stayed pending the outcome of the arbitration or whether there are special circumstances which would justify the court exercising its discretion "*to tackle the dispute[s] itself*" but that the applicants have seen fit to file a substantive application for a declarator that the court has jurisdiction, the question must be asked if it is necessary for the court to take matter any further than to consider only the relief which the applicants

⁴ 1980 (1) SA 301 (D).

⁵ At page 305 E-H.

seek.

30. Neither party has offered any explanation why the applicants have elected to proceed with this application or why the respondent has actively participated, albeit in opposition, in this application for the declarators and has not raised the issue of its application for the applicants' claim for damages to be stayed pending the referral thereof to arbitration.
31. The specific nature of the applicants' application for the declarators cannot by any stretch of the imagination be deemed to be an application for the stay of the proceedings by the respondent particularly in the light of the agreement between the parties recorded in the "practice note". The respondent did not challenge the court's jurisdiction in its statement of claim in opposition. The first reference to jurisdiction is set out in the pre-trial minute.
32. The fact that the applicants elected to file a separate and substantive application for the declarators and that the relief sought in prayer 3 appears at least at the outset to have been relief consequential upon prayers 1 and 2 being granted, it is abundantly clear that the parties were not engaged in an application to stay the process as originally and correctly pleaded by the respondent.
33. Given the circumstances of this matter and the parties agreement to approach the court on the question of jurisdiction it would be inappropriate to make an order of costs.
34. In the circumstances I make the following order:
 - 34.1. The applicants' application for the relief set out in prayers 1 and 2 of the notice of motion is postponed *sine die*;
 - 34.2. The relief sought in prayer 3 of the applicants' notice is granted;
 - 34.3. There is no order as to costs.

GUSH J

Date of Hearing : 22 November 2010

Date of Judgment : 11 May 2011⁶

Appearances

For the Applicant : Adv C Goosen

Instructed by : Van Gaalen Attorneys

For the Respondent: M Murphy: Edward Nathan Sonnenberg Inc

⁶ The record of the hearing was requested soon after the hearing but for technical reasons due in part to the noise caused by the construction work being undertaken in the court building was only transcribed on the 6th March 2011