

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**

Respondents

JUDGMENT: LEAVE TO APPEAL

WAGLAY J:

[1] The first respondent (Sundowns) seeks leave to appeal against the judgment handed down by this Court on 30 October 2002. The grounds upon which it seeks such leave are the following:

That this Court erred in finding that:

- (a) the application was urgent;**
- (b) there was no contract in existence between the parties; and**
- (c) the Court had jurisdiction to hear the matter notwithstanding the fact that the second respondent also enjoyed jurisdiction in respect of the dispute.**

[2] With regard to the issue of urgency the attack on the judgment is two-fold:

- (a) that Sundowns did not have a proper opportunity to put its case before the Court; and**
- (b) the urgency was designedly an abuse since Applicant knew as from 11 October 2002 the position adopted by Sundowns.**

[3] The argument that entertaining the matter on an urgent basis denied Sundowns the opportunity to properly place its case before this Court lacks any merit. The issue before the Court was a simple one: did the parties conclude an agreement as contemplated by the NSL, or put differently did the applicant and Sundowns enter into an agreement in terms of which the applicant could take the field and play for Sundowns? The finding of this Court was that there was no agreement as contemplated by the NSL in that such agreement had to be in writing and signed by both parties. From the papers filed by Sundowns it was abundantly clear that there was no such written agreement. In the circumstances any other evidence that Sundowns may have sought to place before this Court would not have taken their case any further.

In any event Sundowns never asked this Court for an opportunity, by way of requesting a postponement, to file more papers. There was simply an allegation that an absent witness may be able to deal with how Sundowns exercised the option given to it in terms of the written agreement signed by the parties in September 2000. As recorded in the judgment, Sundowns admitted that there

was no written agreement and therefore evidence as to how Sundowns exercised its option was irrelevant, more especially in the light of their evidence that the Applicant refused to sign the written agreement prepared by it.

[4] The issue relating to the Applicant having created its own urgency is dealt with in the judgment. I am satisfied that it was in the interest of justice that the matter be entertained as one of urgency.

[5] Furthermore the matter has been dealt with and there is no further evidence that can have any bearing on the matter. In the circumstances they exist no good grounds for this Court to grant leave to appeal in respect of the issue of urgency.

[6] Sundowns argument in respect of the agreement between it and the Applicant is as follows: since April 2002 it entered into negotiations with the Applicant to conclude an agreement thus exercising its rights in terms of the option provision in the written agreement of September 2000. On 2 May 2002 it confirmed exercising its right to renew its contract with the Applicant for a further period

of two years. This was done by letter to the Applicant. Negotiation thereafter continued until, according to Sundowns, an oral agreement was concluded in September 2002. The terms of the said oral agreement were then reduced to writing at which time the Applicant refused to sign such agreement.

[7] For purposes of this matter Applicant conceded the above as representing the agreed facts. On these facts taken together with Sundowns admission that it is bound to the NSL rules, it is clear that an agreement as contemplated by the NSL which requires that an agreement between a professional footballer and a club has to be in writing to be valid was not met.

[8] In the circumstances Sundowns argument that oral agreements are valid and not prohibited by law is quite meaningless. This Court did not find that oral contracts are not binding or invalid in law, simply that in terms of the NSL constitution (to which Sundowns is bound and is required to comply with) in regard to the relationship between professional clubs and professional footballers oral agreements are of no force and effect in terms of a

professional player playing for a professional club.

[9] Sundowns in the argument now presented argues that it could have and can still compel the Applicant to sign a written agreement embodying the agreed oral terms and conditions. This argument was never presented at the hearing nor is it addressed in its papers. I do not consider this a relevant consideration in deciding whether or not to grant leave to appeal. It is inappropriate when an argument is not presented in Court and at the hearing one party concedes to argue on the other party's facts, to come at the appeal stage and raise the possible actions open to a party based on a concession made for purposes of argument by the other.

[10] Finally Sundowns argues that this Court erred in entertaining the dispute when the NSL makes provision for this dispute to be resolved by arbitration. In this regard I agree with what was said in the matter of Coetzee v Comitis 2001 (1) SA 1254 (C) at 1266 D-J that the arbitration clause does not oust the jurisdiction of this Court. The Court always has the discretion to refuse to entertain a matter which by agreement between the

parties can be referred to arbitration. In this matter because of the fact that this Court found the matter to be urgent; that the letter exercising the option did not constitute a written agreement; the value of oral agreements vis-à-vis the rules and regulations that govern the relationship between clubs and the professional players within the NSL; and having regard to the rules of the NSL relating to arbitration it was satisfied that this was a matter in which it should exercise its discretion in favor of deciding the issue. This I am satisfied is not an issue which will be interfered with by another Court.

[11] In the circumstances I am satisfied that no purpose will be served in granting Sundowns leave to appeal against the judgment handed down, accordingly leave to appeal is refused with costs.

WAGLAY J

Date of judgment: 4 November 2002

For the Applicant: N. Arendse SC instructed by Ntsoane

attorneys

**For the Respondent: N. Cassiem SC instructed by Jose
Ferreira attorneys**