IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Reportable

CASE NUMBER JS 1298/09

In the matter between:

SOUL MMETHI **Applicant**

And

DNM INVESTMENT CC T/A

BLOEMFONTEIN CELTICS

FOOTBALL CLUB **RESPONDENT**

JUDGMENT

Molahlehi J

Introduction

[1] The applicant who is a professional football player seeks an order declaring that his contract of employment with the respondent having been a fixed term contract was incapable of cancelation for any other reason other than for material breach. The applicant further seeks an order to have the respondent compensate him in the amount of R1410 000,00 (one million four hundred and ten thousand rand) being remuneration and sign on fees for the remainder of his contract which he contends had been prematurely terminated by the respondent. The applicant brought his claim in terms of s77 of the Basic Conditions of Employment Act 77 of

1997 (the BCEA). The respondent is a football club established in terms of the rules governing football clubs in the Republic of South Africa.

[2] At the beginning of the trial the respondent raised a point in limine concerning the jurisdiction of the court to entertain the claim. The respondent contended that the court did not have jurisdiction to entertain the matter because the contract of employment read with the Employee Hand Book (the handbook) and the Constitution of the National Soccer League (the NSL) require that disputes that arises between the club and the players should be referred to private arbitration.

Background facts

[3] The facts of this case are generally common cause. The applicant who was prior to his dismissal for operational reason was employed as a professional football player by the respondent in terms of a written contract. The letter of appointment of the applicant incorporates into the contract of employment the respondent's Employee Handbook (the handbook), rules and the constitutions of the NSL.

[4] The handbook provides that in a case of dismissal an employee can challenge such a dismissal in terms of the dispute resolution procedure under the football rules.

[5] On the 2nd September 2009, the respondent sent a notice in terms of s189 of the Labour Relations Act 66 of 1995 (the LRA). The notice informed the applicant that he had become redundant.

[6] On the 30th October 2009, the applicant was issued with a letter informing him that his services were terminated for operational reasons.

The jurisdictional point in *limine*

[7] Mr Murphy, for the respondent, argued that this court does not have jurisdiction to entertain the claim of the applicant because the contract of employment requires the matter to be referred to private arbitration. He relied in this regard in the decision in ***Augustine v Ajax Football Club (2002) 23 ILJ 405 (CCMA),*** wherein the learned commissioner at arbitration concluded that the strong view was in favour of enforcing the private contract between the parties. In that matter the commissioner found that the applicant would suffer no prejudice if the matter was to be heard by a private arbitrator rather than the CCMA. Although not relevant for the purpose of the present decision that approach seems to be in line with the recent decision of ***Carlbank Mining Contractors (Pty) Ltd v John Moshoe and others, soon to be reported judgement case number JR1592/07,*** where it was held that the bargaining council including the CCMA being creatures of statutes do not have discretion to prevent or call a halt to any private arbitration and tackle the dispute itself. In essence Mr Murphy's argument was that the provisions in the contract requiring disputes to be referred to arbitration oust the jurisdiction of the court.

[8] Mr Moshoana, for the applicant on the other hand argued that the provisions of the constitution of the professional soccer league could not by providing for arbitration of disputes overrule the LRA and the BCEA. It was further argued that even if it was to be found that the constitution of the soccer league in relation to arbitration provisions was binding, it could not oust the jurisdiction of the court. In this regard Mr Moshoana relied on the decisions of ***Coetzee v Comitis [2001] 1 All SA 538 (C), Fabian McCarthy v Sundowns Football Club and others [2000] JOL 10381 (LC) and Santos Professional Football v(Pty) v Igesund and another 2002 (5) Sa 697 (C).***

[9] In the ***Coetzee's*** matter the court held that the NSL's arbitration clause did not axiomatically serve to oust the jurisdiction of the court. The court held that if a party seeks to rely on an arbitration clause in an agreement, it has discretion as to whether it should itself determine the matter or stay the proceedings pending the outcome of the arbitration proceedings. The court in that case exercised its discretion of determining the matter because it found that the dispute involved difficult and complex constitutional issues as well as matters of public policy. The issues that arose in that case were found to be those that could not be determined by an arbitrator.

[10] The approach in ***Coetzee*** was endorsed in the ***Fabian McCarthy,*** where the court exercised its discretion in favour of entertaining the matter because it found that:

> *"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."*

[11] In dealing with the argument of the respondent that the court should not entertain the dispute because the parties have an effective internal dispute resolution mechanism, in ***Fabian McCarthy,*** Waglay J, as he then was, had the following to say:

> *"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."

[12] ***In PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA),*** the Supreme Court of Appeal, quoted with approval what was said in ***Parakh v Shah Cinemas (Pty) Ltd and others 1980 (1) 301 (D)***, at page 305, by Diddcot J when he said:

"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. And the award of the arbitrator cannot be enforced without the Court's imprimatur, which may be granted or withheld. But that is by no means all. 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."

[13] It is trite that private arbitrations in labour disputes are governed by the Arbitration Act 42 of 1965 (the Act). Section 6 of the Act provides as follows:

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

[14] It is clear from the reading of s 6 of the Act that even the legislature did not envisage the court being deprived its jurisdiction on the basis of an arbitration agreement. It is clear that the court is not deprived of its ordinary jurisdiction even when the stay of the proceedings is granted in terms of that section. It has been held that the court will be there when needed to give direction and exercise due supervision. The powers of the court may be evoked at any time. See ***GK breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk 1984 (2)SA 66(O).***

[15] The same approach has been followed by the Zimbabwen Courts, in the cases, ***Thornton v Mckenzie & others [2006] JOL 18561 (ZH) and Shell Zimbabwe (Pty) Ltd v Zimsa (Pvt) Ltd [2008] JOL 21589 (ZH).*** In dealing with the issue of an arbitration clause ousting the jurisdiction of the court in ***Thornton***, held that:

"Generally speaking the courts and society at large are averse to someone suffering harm without a legal remedy. For that reason I

take the view that although the parties expressly agreed that any dispute arising from their contract be finally determined by arbitration, they were not by so doing ousting the inherent unlimited jurisdiction of the High Court."

[16] The court went further quoting from the unreported decision in *Cargill Zimbabwe v Culvenham Trading (Pvt) Ltd HH-42-2006 at 3* to say the following:

"With respect the defendant is always subject to the jurisdiction of the court. It is only the proceedings that are stayed pending referral of the dispute to arbitration. An arbitration clause does not have the effect of ousting the jurisdiction of the court. It merely seeks to compliment the court process in resolving disputes by engaging in an alternative dispute resolution process but remains under the control of the courts"

[17] In short the principle of our law is that a clause in an agreement, as is the case in the present matter, which provides for a dispute to be referred to arbitration does not preclude a party from initiating court proceedings to have the dispute adjudicated by the court. What an arbitration clause however does is that it obliges the parties in the first instance to refer the dispute to arbitration. As stated earlier a party seeking to invoke and rely on the arbitration clause in the agreement must request a stay of such

proceedings, pending the determination of the matter by an arbitrator. The court retains discretion whether or not to entertain the matter or hold the parties to their agreement and order them to resolve their dispute in terms of their agreement but retain the supervisory power over the arbitration process.

[18] It is clear from the authorities cited above that the court will entertain the matter in the face of an objection by the other party to the arbitration agreement where special circumstances exist to do so. In the absence of the special circumstance the court will decline to exercise its discretion in favour of entertaining the dispute. The examples of special circumstances are those referred to in the case of ***Coetzee's*** and ***Fabian McCarthy.*** The other example would be where the arbitration clause provides for a treatment of an employee less than what is provided for in the collective agreement. See ***SACTWU obo Stinise v Dakbor Clothing (Pty) Ltd & others [2007] BLLR 659 (LC),*** where the approach is summarized in the head note as follows:

> *"The Court noted that section 199 of the LRA prohibits contracts of employment which permit an employee to be treated in a manner less favourable than that prescribed by a collective agreement. It was apparent from the award that the commissioner had not applied his mind to the question whether the arbitration clause had this effect. The employer was bound by the council's main*

agreement, which provides for a dispute resolution procedure for non-parties. Had the arbitrator applied his mind to the Act, he would have concluded that the private arbitration provision in the contract conflicted with the main agreement and that it deprived the employee of the free dispute-resolution procedure provided by the council in terms of the main agreement. This was also contrary to public policy."

[19] In my view, because private arbitration agreements are consensual the court should be very slow in exercising its discretion to entertain a dispute where parties have agreed that such disputes should be referred to arbitration. The importance of respecting an agreement to refer disputes to arbitration by the parties was emphasised by the Constitutional Court in the case of ***Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another 2009 (6) BCLR 527 (CC).*** In this respect the court at paragraph [219] of its judgment had the following to say:

"[219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in

the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters."

[20] It is also important to note that the dispute resolution mechanism in the LRA allows for parties to enter into an agreement to resolve their disputes through private arbitration. The LRA encourages private arbitration for matters that otherwise would be dealt with under it. In the present matter it is common cause from the background facts set out above that the parties have an agreement to refer their disputes to arbitration whenever they arise. The question to consider now is whether or not this court should exercise its discretion in favour of entertaining the dispute in the face of an agreement to refer disputes to arbitration. In other words the question is whether, whilst retain is jurisdiction, the court should hold the parties to their agreement.

[21] The issues in dispute are set out in the pre-trial minute in the following terms:

"4.2 In particular the Respondent contends that-

4.2.1 The fixed term contract of employment was terminated for operational reasons;

4.2.2 a fair procedure was followed;

4.2.3 it was entitled, in law, to terminate the fixed term contract of employment as it did.

4.3 In particular Applicant contends that-

4.3.1 on or about the 30th October 2009, the Respondent unlawfully and without just cause terminated the fixed term contract of employment;

4.3.2 as a result of the pre-mature termination the Applicant suffered damages, being the amount the Applicant would have received in respect of the remaining period of the fixed term contract of employment (being one year and six months).”

[22] At the end of the trial in this matter after both parties had led their respective witnesses, Mr Moshoana relying on the decision of ***Buthelezi v Municipal Demarcation [2005] 2BLLR 115 (LAC),*** argued that the respondent was prevented from terminating the fixed term contract of the applicant for operational reasons. He argued that the principle enunciated in that case extends to even instances where the parties have in the employment contract made provision for the termination of the employment contract for reasons related to operational requirements. I do not wish to express any view about that argument as I belief it should be left for determination by an arbitrator appointed in terms of the agreement between the parties.

[23] In my view, there are no special circumstances or unlawfulness that would warrant the court continuing with the matter in the face of an agreement between the parties to have their disputes arbitrated by an independent arbitration tribunal. In my view the facts and circumstances of this case require that a high premium should be placed on consensual arrangement made between the parties to have their affairs regulated by private arbitration. Put differently, I see not reason why the applicant could not exhaust the internal remedy before approaching this court. The court will whilst the applicant is exhausting the internal remedy in the form of arbitration retain its supervisory role over the dispute and may therefore be approached on the same matter by any party at any time should the need arise.

[24] In the light of the above discussion, I am of the view that the respondent point *in limine* is sustainable and accordingly the claim brought before this court by the applicant should be stayed pending the determination of the dispute by the arbitrator. I do not however belief that it would be fair to require the applicant to pay the costs of this litigation.

[25] In the premises the following order is made:

25.1. The applicant's claim is stayed pending the referral to arbitartion and determination of the dispute by the Dispute Resolution Chamber as contemplated in the National Soccer League's constitution.

25.2. There is no order as to costs.

MOLAHLEHI J

Date of hearing: 27th July 2010

Date of Judgment: 1st October 2010

APPEARANCES

For the Applicant: Mr G N Moshoana of Mohlaba and Moshoana Inc.

For the Respondent: Mr M Murphy of Edward Nathan Sonnenberg