

# OUR FOOTBALL IS **BROKEN**

How to Fix South African Football's Dispute Resolution System

*Sneak Preview*



**Dennis A. Mumble**

## ***About Our Football is Broken***

Many football players, administrators, and sports legal practitioners have at some stage found themselves wondering how to defend themselves or their clients against abuse of power or unjust disciplinary charges in football! "OUR FOOTBALL IS BROKEN", the groundbreaking book by Dennis A. Mumble, former CEO of the South African Football Association, attempts to provide answers to these vexing questions.

In "OUR FOOTBALL IS BROKEN," Mumble takes a critical look at the dysfunctional dispute resolution system of the South African Football Association, providing six insightful case studies to illustrate the importance of the application of the global sports law, or the *lex sportiva* in South African sport. Through this lens, Mumble sheds light on common terms like "suspension, dismissal, expulsion, and ban," promoting a deeper understanding of the meaning and application of these concepts in a football context.

Mumble also encourages legal practitioners to take a closer look at the rapidly developing global sports law, championed by the Court of Arbitration for Sport (CAS) and FIFA and lends his expert view on the CAS jurisprudence and its application in South African sport.

In clear and concise language, he guides readers through the concept of constitutionalism as the basis for a well-governed football association, emphasising the importance of the principles of natural justice and procedural fairness.

In addition to examining the structure of a constitution and the nature of the relationship between parent bodies and affiliates, Mumble provides a comprehensive view of a typical football association's dispute resolution system, based on the FIFA Standard Statutes for Member Associations. He boldly debunks some of the myths around whether any SAFA structure can place another structure "under administration", and provides conclusive evidence to back up his assertions.

But Mumble goes beyond theory and offers practical guidance by providing some useful tools to those confronted with the abuse of power, demonstrating the real-world application of global sports law principles in South Africa. He emphasises the importance of transparency, accountability, leadership, and integrity as part of a good governance system for the football association, while also debunking some long-standing myths perpetuated by some football administrators.

Don't miss this opportunity to gain deeper insight into the dispute resolution system of a football association and learn how the application of the global sports law can promote better governance in the world of football. Get your hands on "OUR FOOTBALL IS BROKEN" today!

# Table of Contents

## ABOUT THE AUTHOR

### Preface

## PART ONE

### INSIGHTS INTO THE DISPUTE RESOLUTION SYSTEM

Maintaining Competitive Balance Through Rules

#### 1. The Constitution Is the Bedrock

#### 2. Revisions to the 2022 SAFA Statutes

Do the 2022 Revisions Match FIFA's Initiatives?

The Merits of the Revised 2022 Statutes

The Relationship with the National Soccer League

On Procedural Fairness - 2022 SAFA Statutes

On the Principle of Accountability and Integrity

The Separation of Powers and the 2022 SAFA Statutes

FIFA May Not Accept This Omission

#### 3. The Democratisation of World Football

#### 4. The Separation of Powers Doctrine

#### 5. SAFA's Relationship with its Members

#### 6. SAFA's Regulatory Framework

SAFA's Regulatory Framework

#### 7. The Different Types of Sanctions

#### 8. The Exco's Disciplinary Powers

Expulsions ; Suspensions ; Dismissals ; Bans ; Removal of Elected Officials ; 'Inquiring into the Affairs' of Members

#### 9. Unreasonable Delays and *Blocking*

"Blocking" is Denial of Justice

Arbitrariness: What is its Meaning in Sports Law?

#### 10. Role of the SAFA Judicial Bodies

Structural Deficiencies in the SAFA Judiciary

#### 11. What are Unforeseen Contingencies?

#### 12. What is Force Majeure?

#### 13. What is the Meaning of Disrepute?

#### 14. Proportionality in CAS Jurisprudence

**15. Abuse of *Ad Hoc* Committees**

**16. The Applicability of PAJA**

Turning a Constitutional Principle into Law:

**17. Constitutional Protections for Accused Persons**

**18. How to Challenge Disciplinary Sanctions**

Must Appeals go to CAS or to the Local Courts?

**19. A Toolkit for Disciplinary Hearings**

**PART TWO – RESTORING THE BALANCE OF POWER**

**20. Free and Fair Elections are Key to Democracy**

SAFA's Electoral Framework Explained

What is the Legislative Authority for Elections in SAFA?

Principles Governing the Electoral Process

Who is Currently in Charge of SAFA's Elections?

Contradictions and Abuse of Office

The Nomination Timelines and Process

**21 – 26. Case Abstract from Eastern Cape, North West, Free State, Western Cape, Kwazulu-Natal, Western Cape**

**27. Redesigning the Dispute Resolution System**

Changing the Punitive Dispute Resolution System

More Training In Sports Jurisprudence Is Required

Procedural Rules are Vital for the Delivery of Justice

The Judicial Bodies Are Not Sufficiently Independent

SAFA's Judicial Framework Must Be Modernised

**28. EPILOGUE – THE VALUE OF RULES**

Monty Python's - International Philosophy - Return Match

## PART ONE

### INSIGHT INTO THE DISPUTE RESOLUTION SYSTEM

#### *Maintaining Competitive Balance Through Rules*

The sport of football finds its roots in China during the 3<sup>rd</sup> – 2<sup>nd</sup> century BC. *Cuju* (pronounced Ts'u-chu and literally translated as "kick ball") was played by the Chinese military during the Han Dynasty and is recognised by FIFA as the earliest form of football for which there is evidence<sup>1</sup>. The two versions of *Cuju* (*Zhuqiu* and *Baida*) placed great emphasis on skill, with the *Baida* version rendering the scoring of goals obsolete, rewarding completed passes, deducting points for kicking the ball too far out of touch or kicking the ball too low or turning at the wrong moment. The game was decided in favour of the team with the most points.

Mob football was the predominant version of the game during the 7<sup>th</sup> and 9<sup>th</sup> centuries. Murder and manslaughter were the only prohibitions in a game with no clear rules, using the entire town as its field and involved whole communities. Brutality was par for the course. It later became known as "Shrovetide football" or "folk football", and is still played in some parts of the United Kingdom.

Over the millennia, the game evolved across the world and saw many versions, be it Gaelic football, American football, rugby league, rugby union and many other versions with rules as diverse as the geographic locations in which it was played.

In the 19<sup>th</sup> century, games would sometimes start with a particular set of rules and end with a different set of rules in force. This century proved no different from previous centuries when the game's rules were not always clear. The confusion that resulted as the sport entered the 20<sup>th</sup> century, led to numerous attempts to establish a uniform set of rules. Even the English FA, formed on 26 October 1863, could not stabilise the game under one set of rules, playing second fiddle to rugby football for the first couple of decades of its existence.<sup>2</sup>

In their infinite wisdom, the founders of FIFA in 1904 chose stability and innovation as two of the cornerstones in its effort to control the game of association football as we know it today and to make it accessible to the masses. This stability was to be achieved through a rational-legalistic organisational method that articulated the terms of engagement very clearly.

The rational-legalistic method gave birth to the Laws of the Game, the FIFA Statutes and a host of other rules that ensured the game was played to a uniform set of rules. The rules, laws and behaviours intended to promote efficiency and stable relations among the various stakeholders in the sport created the perfect competitive balance.

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<sup>1</sup> "History of Football – The Origins" (<https://www.fifa.com/about-fifa/who-we-are/the-game/index.html>) - retrieved 2019

<sup>2</sup> Tony Collins, "How Football Began – A Global History of How the World's Football Codes Were Born"

Five hundred years ago, this system would not have been acceptable since feudal lords presided over the early versions of the sport and decided the rules of engagement, preferring the subjective over the objective. The village chief, the headman or the King decided the outcome of the game.

With many competing interests vying for supremacy in the world's most popular sport, clearly defined rules were required to balance those interests to ensure a measure of fairness for players, officials, sponsors, spectators, suppliers and other interested parties alike. These rules form the glue that bind the competing parts together in an environment geared to the continued growth of the sport around the world.



FIFA sets the governance standards to ensure a degree of uniformity in the rules of the sport. It developed a set of standard rules intended to facilitate a common understanding across cultures.

In response to FIFA's standardisation effort, the South African Football Association (SAFA) adopted an aligned constitution on 1 October 2011, based on the FIFA Standard Statutes first adopted in 2001. These Statutes set the tone for the harmonisation of football governance throughout the world. The *Standard Statutes* represent the collective experience of FIFA in its governance of the global game and provides some degree of predictability to the rules of the sport worldwide.

The *FIFA Standard Statutes*, as well as the *FIFA Standard Electoral Code* (2007) and *FIFA National Dispute Resolution Chamber Standard Regulations* (2008), set the tone for better governance. The goal was to maintain a healthy competitive balance amongst the many role-players while also promoting stability for the sake of the game. Standardisation also aided the development of a more predictable football jurisprudence based on widely acknowledged procedures and infused with international public policy principles, particularly the principles of natural justice.

The FIFA Standard Statutes include the essential elements of a modern constitution – a basic structure, if you will – that include a few immutable elements like a clearly defined separation of powers, clear aims and objectives, democratically elected structures, the creation of specialised committees, and extensive dispute resolution mechanisms, all built on a foundation of procedural fairness. In international sports organisations, these fundamental rights have been entrenched in the arbitration of disputes.

The foundations of the standard statutes are firmly rooted in the concepts of a constantly growing sports law (the *lex sportiva*), as derived from the Court of Arbitration for Sport (CAS) and FIFA jurisprudence. The International Olympic Committee (IOC) formed CAS and initially sponsored it, but it was later spun off after the Swiss Federal Tribunal (essentially the Swiss Supreme Court) declared that CAS was not sufficiently independent from the IOC.

The Paris Agreement was signed by the sport's highest authorities on June 22, 1994, following the Swiss Federal Tribunal's decision. The presidents of the International Olympic Committee (IOC), the Association of Summer Olympic International Federations (ASOIF), the Association of International Winter Sports Federations (AIWF), and the Association of National Olympic Committees (ANOC) signed an agreement that resulted in major CAS reforms, establishing it as a truly independent arbitral tribunal for sports.<sup>3</sup>

In the *CAS Bulletin 2021 ed1*, Estelle de La Rochefoucauld wrote that:

*Among the fundamental rights identified in the CAS case law, two main categories stand out: the procedural rights or guarantees, including in particular the right to a fair trial and, the substantive rights including notably the right to privacy, the freedom of expression, the right to work, the freedom of movement, the right to practice a sporting activity, the right to free disposal of one's body and the right to integrity.*

*These essential or fundamental rights are protected by the CAS in different ways depending on the case. They are, in any event, protected through the indirect application of the European Convention on Human Rights (ECHR) at the procedural level (1) and to a certain degree at the substantive level (2); Substantive rights are protected through the application of fundamental rights of a state nature under the concept of public policy (3); Through the general principles of law constituting the *lex sportiva* (4); Through the direct application of sports regulations recognizing and protecting some aspects of the parties' fundamental rights (5) and; Through the application of certain principles of Community law (6).<sup>4</sup>*

In that the fundamental rights of procedural fairness and equality are the main principles of sports jurisprudence, there is an obvious connection between the *lex sportiva*, which is predominantly driven by CAS, and Section 33 of the South African Constitution. The Promotion of Access to Administrative Justice Act (PAJA), the legislative embodiment of Section 33, recognises that SAFA engages in public benefit activities, as stated in Article 2.1 of the SAFA Statutes. South African courts have frequently confirmed that SAFA is subject to the PAJA.

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<sup>3</sup> The History of CAS, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html>

<sup>4</sup> Estelle de La Rochefoucauld, *The Fundamental Rights of the Parties Before the CAS*, CAS Bulletin, 2021, ed 1

In *Gibraltar FA v FIFA*, CAS delivered a striking statement on the topic of the global sports law when it stated:

*under CAS jurisprudence the principle of procedural fairness is surely among the unwritten principles of sports law to be complied with by international federations. Procedural fairness in the relationships between sports institutions and those subject to their authority – particularly in the realm of eligibility for and access to competitions – is one of the most important principles of lex sportiva, if not the most important one.*<sup>5</sup>

One of the primary papers cited in this book, the SAFA Disciplinary Code, recognises the importance of relying on established sports law, stating that "[d]uring all their operations, the judicial bodies of SAFA draw on settlements already established by sports doctrine and jurisprudence" (Article 145.3). In this book, I will demonstrate how a scattered common law (*stare decisis*) in South African football has fostered an environment of uncertainty and arbitrariness.

SAFA is not simply a boat driven by the wind blowing in its own sails, but its path is also influenced by the proverbial ocean of legal currents around it; it must operate within the ocean of principles that form the *lex sportiva* and South African law.

Furthermore, the power imbalance between a sport federation and an individual or affiliate necessitates a set of laws to balance each party's rights. The inherent power imbalance between the institution and its various stakeholders can be intimidating, and if not effectively handled, can lead to disproportional institutional power that often leads to abuse.

The necessity to correct this imbalance is recognised in CAS jurisprudence. In *RFEC v UCI* (CAS 2007/A/1381, no. 55), CAS declared that:

*[T]here is an imbalance between the association and the person affected. This is expressed by the fact that the person affected only has the choice of whether to accept performing the sport under the conditions dictated by the association or to give up performing the sport altogether. Since this imbalance carries the risk that the association abuses its position of power, certain protective standards must apply ("droits de protection") in the interests of the person affected."*

This is a fundamental principle of any sporting federation's rules and promotes respect for the laws of natural justice.

But, how does a sports organisation strike this balance and instil a culture of respect? The built-in separation of powers doctrine in the FIFA Standard Statutes, which defines the respective roles of the Congress, the Executive Committee, the Emergency Committee, the Standing and Ad Hoc Committees, the General Secretariat, and the Judicial Bodies, is a defining feature of the standardization exercise.

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<sup>5</sup> CAS 2014/A/3776 Gibraltar Football Association (GFA) v. Fédération Internationale de Football Association (FIFA), award of 27 April 2016



In Section 33 of the South African Constitution, the inalienable rights to equality, freedom of expression, choice, association, and justice, all derived from international public policy, are enshrined in the SAFA Statutes. The SAFA Statutes' Preamble states:

**RECOGNISING** a non-racial society in which: -

- all people shall be equal before the law;
- there is no oppressive interference with the rights of individuals;
- athletes/players compete equally and fairly in football;
- all shall have access to relevant, compulsory and equal education, adequate residential and recreational facilities in general and adequate housing in particular and have a universal franchise system determined by the will of the people;
- people enjoy the principles of democracy, accountability and transparency;
- all people enjoy freedom of association, freedom of movement, freedom of domicile, freedom to ownership of land, freedom to participate fully in the economy of the country and share in its wealth and live in peace, harmony and comfort.

**CONFIRMING** the philosophy of non-racialism to be the guiding principle in the organisation and in our endeavour to enhance unity, peace and harmony in sport in our country;

- that since unification of national football structures on 23 March 1991 and re-admission to CAF and FIFA one National Football governing body was constituted;
- that the National Football Federation is part of South Africa having a new constitution which entrenches norms and values of the civilized world and a Bill of Rights;
- that the aforementioned social conditions were and still are the fundamental requirements for the entry of South African sport into the international sporting community in general, and in respect of football in particular to the FEDERATION INTERNATIONALE de FOOTBALL ASSOCIATION (FIFA) and Confederation Africaine de Football (CAF), Confederation of Southern African Football Associations (COSAFA) and South African Sports Confederation and Olympic Committee (SASCOC)

It is necessary to promote greater respect for the fundamental principles of football's laws and develop a better understanding of South African football's rules, in particular, and South African sport in general. These rules find a basis in international good governance practices, universal principles of natural justice and other generally accepted human and procedural rights practices.

There are also some practical tips on how to prepare a defence against possible abuse of power and arbitrary conduct of incumbents who ignore the rules amidst a widespread notion that democracy simply means the rule of the majority. But, as Booker T. Washington once said: "A lie doesn't become the truth, wrong doesn't become right, and evil doesn't become good, just because it is accepted by a majority." Group bullying should therefore find no comfort in football.

There is also a common misapprehension of the meaning of certain fundamental clauses of the statutes. Some people provide imputed meanings and over-elaborate the meaning of

certain rules in favour of their own biases. This book is a firm statement against such arbitrary behaviour and promotes a greater respect for the rules that are already in existence in South African football, but which are habitually ignored by its practitioners who favour a stifling form of personal power.

It is imperative that the interconnectedness of the body of rules that comprise the regulatory framework of South African football should be more visible to its participants and stakeholders.

I hope this book will lead to the establishment of a discernible South African football jurisprudence that forms part of the global *lex sportiva*.

**\*\* END OF SNEAK PEEK \*\***