

THE RULE OF LAW IS PARAMOUNT

DEFEND YOURSELF



STAND UP FOR YOUR RIGHTS!

A Mini Toolkit for Disciplinary Hearings

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On the Rule of Law

The Court of Arbitration for Sport (CAS) has ruled that “*Statutes and regulations of a (sport) association shall be interpreted and construed according to the principles applicable to the interpretation of the law rather than those applicable to contracts.*”¹ This differs only in procedure and not substance from South African jurisprudence in that the Constitutional Court has pronounced in *Numsa v Lufil Packaging* (2020) that:

[53] ... The [Numsa] constitution must be interpreted in accordance with the ordinary rules of construction applying to contracts in general.² The classic interpretative principle is that effect must be given to the ordinary language of the document, objectively ascertained within its context. It must follow therefore that in the course of interpretation, preference should be given to a sensible meaning rather than “one that leads to insensible or un-businesslike results or undermines the apparent purpose of the document”³

Furthermore, the Constitutional Court ruled in *Numsa v Lufil Packaging (Isithebe)*⁴ that:

[47]...A voluntary association, such as NUMSA, is bound by its own constitution. It has no power beyond the four corners of that document.

SAFA is a voluntary association, bound by the provisions of its constitution, and non-compliance with its constitution equates non-compliance with the rule of law.

The overarching principle unites the jurisprudence of CAS and the South African courts on the grounds that:

“[11]...A constitution of a trade union [a voluntary association like SAFA] is a statutory document. Non-compliance with it equates non-compliance with the law and ultimately non-compliance with the rule of law.”⁵

Section 1(c) of the South African Constitution proclaims that the country was founded on the supremacy of the Constitution and the rule of law. Therefore, SAFA and its Members, as voluntary associations, are obliged to respect the rule of law by acting at all times within the four corners of their own Statutes.

As a convenient starting point for the restoration of respect for the rules and the sanctity of the Statutes, the following

¹ CAS 2016/A/4787 *Jersey Football Association (JFA) v. Union of European Football Associations (UEFA)*, award of 28 September 2017

² *Wilken v Brebner* 1935 AD 175 at 187

³ [2020] 7 BLLR 645 (CC)

⁴ Op. cit.

⁵ See *Tonyela* judgment and *CSAAWU and others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7 (1 March 2022) at paras 19, 20.

steps must be examined when summoned to any disciplinary hearing:

On Representation

Article 101 of the SAFA Disciplinary Code clearly states that:

Article 101 [only]

1. *The parties may arrange to have legal representation.*
2. *If they are not required to appear personally, they may be represented.*
3. *The parties are free to choose their own representation and legal representation.*

It is trite law that only the first instance body charged with adjudicating the matter (in this case, the DC) can decide on matters of competence related to any disciplinary matter. The executive committee (or any of its representatives) has no authority to take decisions related to the case.

Therefore, in accordance with the SAFA Disciplinary Code, no other body or person can deny representation.

Pre-Hearing Procedure

Article 95 of the SAFA Disciplinary Code sets out the rights of the defendant as follows:

Article 95 Contents

1. *The parties shall be heard before any decision is passed.*
2. *They may, in particular:*
 - a) *refer to the file;*
 - b) *present their argument in fact and in law;*
 - c) *request production of proof;*
 - d) *be involved in the production of proof;*
 - e) *obtain a reasoned decision.*

3. *Special provisions may apply in certain circumstances.*

Therefore, the following needs to be clarified before the commencement of the hearing to ensure expeditious proceedings:

1. Were written charges issued to the defendant?
2. Was sufficient notice received?
3. Was the defendant given time to present written arguments in defence?
4. Was the defendant involved in the production of proof?
5. Was the defence given an opportunity to request production of proof?
6. Article 100(1) of the SAFA Disciplinary Code places the burden of proof on the association. Did the prosecution present proof of its claims and clarify which Rule that gives effect to the provisions of the Statutes was violated (there can be no penalty without a law) because the language in the Statutes is not sufficient to secure a penalty.

Points to Raise *In Limine* at the hearing:

Test the Jurisdiction and Standing of the Panel:

1. Is the panel legitimate? Were the members of the panel approved by the relevant Congress (LFA/Region/National – whichever is applicable)? When was this done?
2. What is the applicable law for the charge and the hearing (the Disciplinary Code or another regulation)? This will determine if the case is being prosecuted under the correct regulation/rule. It is common that people are charged under the SAFA Uniform Competitions Rules even though a charge may not be related to a violation which occurred

in the conduct of a league of a competition.

3. Under what Rule was the Panel convened to hear these specific charges?
4. Is this Rule valid in law (i.e. was it approved by the Congress: is it compliant with the provisions of PAJA and the Constitution and other established law)?
5. What provision of the SAFA Statutes is the Rule intended to enforce? As noted above, the association cannot act outside the four corners of its constitution.
6. Is the Rule clear and precise (*nulla poena sine lege clara*) such that an ordinary person can interpret its meaning and that it gives effect to a provision of the Statutes?
7. Does the panel have jurisdiction in the matter?
8. Was a prosecutor appointed in accordance with Article 46.8 of the Region's or LFA's Statutes (42.8 of the 2022 national Statutes)? If so, when was this appointment approved by the national Legal and Constitutional Affairs Committee or the Region's Legal, Membership and Disputes Committee? Ask for proof (minutes of the meeting where the decision was taken).
9. What are the terms of reference for this hearing and under what rules will the hearing be conducted (to determine if any new procedural rights will be applied or existing ones respected)?
10. Was due process followed (the *audi alteram partem* principle). Was sufficient notice given? Will the defendant be given sufficient time to present a case and face his/her accuser/s?
11. Is the alleged misconduct proscribed (*nulla poena sine lege*). Is there a rule

that says the person is prohibited from committing the act which he/she is accused of? If there's no such rule, then the charges cannot stand.

12. Are there substantive changes between the Rule in question and that of SAFA/FIFA/CAS?

The legality of the proceedings must also be established (ask for documentary proof of each statement):

What is the Validity of the Enabling Rule / Legislation:

1. Was the Statutes approved by the relevant Congress?
2. Was the Statutes reviewed by the relevant Legal Committee?
3. Are copies of the applicable Rules available to the participants?
4. In the case of the national Statutes, were these approved by FIFA?

What is the Status of the Applicant/s and the Respondent/s (Ask for proof)?

1. Is the Applicant authorized to bring the action?
2. Is the Respondent's representative duly authorized to represent the Respondent?
3. Is this an action against an individual or a structure?
4. Were the prosecutors provided by the Legal Committee or by an unauthorized official?

Confirm the Application of the Procedural Fairness Doctrine:

1. Was formal notice served on the Defendant, and how?
2. Did the Defendant receive adequate notice?
3. What constitutes adequate notice?

4. Was the opportunity presented for the Defendant to defend her/himself?
5. Did the Defendant invoke the right to legal representation or expressly waive it?
6. Was the procedure just and fair?
7. Was the right of appeal confirmed?
8. Was the charge made within a reasonable time after the misconduct was allegedly committed?

in the judicial proceedings of the association.

** END **

Points to Raise During or After the Hearing:

Frames of Reference of the Projected Outcome:

1. Is the alleged misconduct proscribed i.e. ***nulla poena sine lege*** (no penalty without a law / principle of legality)
2. Is the Rule clear and precise i.e. ***nulla poena sine lege clara*** (principle of predictability) –rules cannot be made “on the fly”
3. What are the Schedule of Penalties to ensure the outcome is proportional to the prescribed penalties?
4. If no Schedule of Penalties, how will the Panel apply the common law or will it use some other criteria?
5. On the principle of proportionality: (Does the sanction fit the severity of the infringement and what is the common law in this regard?)

At a minimum, these questions must be raised to ensure that everyone is treated equally before the judicial bodies of the association at all levels.

It is also important to establish the common law with regard to all violations and penalties imposed on parties to the proceedings so as to give effect to the principle of predictability