Arbitration CAS 2013/A/3276 Thanda Royal Zulu FC (Pty) Limited v. South African Football Association (SAFA), The National Soccer League, Chippa United FC, Santos FC, Mpumalanga Black Aces FC, Polokwane City FC, Adv. P. Pretorius SC N.O. & Adv. P. Mokoena SC N.O., award of 27 June 2014

Panel: Mr Fabio Iudica (Italy), President; Mr Mark Hovell (United Kingdom); Mr Vit Horacek (Czech Republic)

Football
Disciplinary proceedings for misconduct of a club
Priority of the lex specialis in case of contradiction between two provisions
Power of the International Federation over the National Federation
No direct applicability of rules and regulations of International Federation prior to implementation by National Federation

1. **Any contradiction between a special provision of a National Federation's Statutes describing in details the arbitration procedures and providing for a last appeal before CAS against an arbitral award issued at the end of the National Federation's domestic dispute resolution system, and a general provision of the same National Federation's Statutes whose wording is, at least partially, taken directly from the FIFA Statutes and which provides that in accordance with the relevant provisions of the FIFA Statutes, any decision passed by an independent and duly constituted arbitration tribunal of the National Federation should not be appealable to CAS, shall be resolved in favour of the *lex specialis* providing for the jurisdiction of CAS.**

2. **In the context of international football, National Federations and their members have the general obligation to respect the regulations of their supervisory bodies. This does however not mean that all the regulations implemented by these bodies are directly applicable to the National Federations and their members. On the contrary, FIFA leaves a certain discretion to the National Federations to deal with their affairs, in particular with regard to the purely national matters. Accordingly the commentary of Article 1 of the FIFA Regulations for the Status and Transfer of Players, stipulates that as a general rule, FIFA does not interfere in the day-to-day business of the associations, provided that severe infringements of the FIFA Statutes and/or regulations do not occur. At the same time the commentary stipulates that the autonomy of the National Federations is, however, limited by the basic principles of the Regulations that have to be observed at all times and in particular by those provisions that are binding at national level and have to be included without modification in the National Federations' regulations.**

3. **In order for them to be applicable at national level, the provisions of the FIFA regulations that have to be included without modification in the National Federations'**

regulations will first have to be implemented by the National Federations in their own regulations.

I. THE PARTIES

1. The Appellant is Thanda Royal Zulu FC (Pty) Limited (hereinafter referred to as the "Appellant" or "Thanda"), a professional football club, which was competing at the time of the events, and is still competing, in the National First Division ("NFD") of the National Soccer League, the division immediately below the Premier Soccer League ("PSL"), which is the top football division in South Africa. It is a member of the South African Football Association (hereinafter also referred to as "SAFA"), which is affiliated to the Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

2. The First Respondent is SAFA, which is the governing body for the sport of football in South Africa.

3. The Second Respondent is the National Soccer League (hereinafter referred to as the "NSL"), which is the entity in charge of organizing and managing, under the jurisdiction of SAFA, the highest football league in South Africa.

4. The Third Respondent is Chippa United FC (hereinafter referred to as "Chippa"), a professional football club, which is currently competing in the NFD.

5. The Fourth Respondent is Santos FC (hereinafter referred to as "Santos"), a professional football club, which is currently competing in the NFD.

6. The Fifth Respondent is Mpumalanga Black Aces FC (hereinafter referred to as "Black Aces"), a professional football club, which is currently competing in the PSL.

7. The Sixth Respondent is Polokwane City FC (hereinafter referred to as "Polokwane"), a professional football club, which is currently competing in the PSL.

8. The Seventh Respondent is Adv Paul Pretorius SC N.O., a South African Senior Counsel, who was appointed as arbitrator to render the decision under appeal in the present proceedings.

9. The Eight Respondent is Adv Mokoena SC N.O., a South African Senior Counsel, who was appointed as arbitrator to render a previous decision in the course of the present dispute.

II. FACTUAL BACKGROUND

10. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has

considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submission and evidence it considers necessary to explain its reasoning.

11. At the time when the initial fixtures of the NFD 2012/2013 football season were to take place, ongoing disputes dating back to the previous season and involving two other professional football clubs, FC Dynamos (hereinafter referred to as "Dynamos"), Polokwane and Cara Kicks held up the determination of the identity of two of the teams to play in the NFD. As a result, when the original fixture planning was done, the teams to be identified (pending the resolution of the dispute) were provisionally referred to as "Team A" and "Team B" (because their identities were still unknown). The NSL thus referred to them as Team A and Team B in the original block fixtures, to act as "place-holders" in the fixture generation programme until the disputes were finally resolved, and the actual names of the teams became known.

12. At the time of the first rounds of the season being played, the identities of the two teams that were to play had not yet been identified, and therefore matches involving those teams could not have been scheduled.

13. At the beginning of the season, in September 2012, almost all clubs participating in the NFD during the 2012/2013 football season refused to play the initial rounds of matches scheduled following a governance dispute in the NSL.

14. On 15, 19 and 22 September 2012, almost all the clubs taking part in the NFD failed to honour their fixtures, following the above-mentioned general boycott of scheduled NFD matches.

15. Only one team, Roses United (hereinafter referred to as "Roses"), did not take part in the boycott.

16. The previous disputes involving Dynamos, Polokwane and Cara Kicks were finally resolved after the three first rounds of the season were played. It was determined that Polokwane and Dynamos would participate in the NFD, the names of the teams where then substituted accordingly in place of the Team A or B that has originally been set. The matches of the first rounds concerning Team A and B were therefore re-scheduled, as they could not have been previously played, as seen above.

17. At the conclusion of the 2012/13 Season, the Appellant finished fourth in the NFD's log, behind Polokwane (1st), Santos (2nd) and Black Aces (3rd). In view of its fourth position, the Appellant was neither automatically promoted to PSL, nor qualified for the promotion/relegation playoffs.

18. In view of the circumstances, the boycott and the previous disputes involving inter alia Polokwane, all the teams taking part in the NFD did not play the same number of matches, in particular the Appellant (27), Polokwane (30) and Black Aces (27), Santos (28).

19. As a result of the above-mentioned boycott, two disciplinary enquiries were held. At each enquiry, the Appellant pleaded guilty. The NSL DC sentenced, on 13 May 2013, the Appellant

with a fine of R 50,000.00, wholly suspended for a period of twelve months on condition that the Appellant would not be found guilty of a similar offence during the period of suspension. In addition, the NSL DC considered that the matches were abandoned and forfeited by the Appellant, and that no benefits were to flow from these matches, with no points and no goals being awarded.

20. Against this decision, the Appellant lodged an appeal with SAFA, on 21 May 2013.

21. Relying on Rule 59 of the NSL Rules, the Chief Executive Officer of the NSL appointed Adv Mokoena SC to hear the appeal.

22. On 26 May 2013, Adv Mokoena SC dismissed the appeal lodged by the Appellant, and confirmed the decisions issued by the NSL DC.

23. On 28 May 2013, the Appellant lodged an application with the South Gauteng High Court (hereinafter referred to as the "High Court") requesting the review of the decision issued by Adv Mokoena SC.

24. On 18 June 2013, the High Court referred the case back to arbitration, to be decided *"by an arbitrator or arbitrators appointed in terms of the constitution and rules of the National Soccer League, as read with those of the South African Football Association"*.

25. On 24 July 2013, Adv Pretorius SC, who was appointed to rule the case, issued the following decision (hereinafter referred to as the "Appealed Decision"):

> *"225.1 Mr Mokoena had jurisdiction, in terms of Rule 59 of the PSL Rules, to act as arbitrator and to hear the appeal against the findings of the PSL Disciplinary Committee of 29 April and 13 May 2013.*
>
> *225.2 The application for review of Mr Mokoena's decision to uphold the sanctions handed down by the said Disciplinary Committees is dismissed.*
>
> *225.3 The TRFC is directed to pay the costs of the High Court proceedings and the costs of the arbitration before me save for the costs of SAFA in the arbitration proceedings before me. All other costs orders stand".*

III. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

26. Following receipt of the Appealed Decision, the Appellant filed a statement of appeal before the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code") on 2 August 2013. Together with the statement of appeal, the Appellant filed an application for provisional measures, aiming at the stay of the execution of the Appealed Decision.

27. On the same day, Black Aces addressed a letter to the CAS Court Office, dealing with the question of the application for provisional measures filed by the Appellant, and concluding to the dismissal of this application.

28. On 7 August 2013, Adv Pretorius SC informed the CAS Court Office that he would not file any submissions in the present proceedings, but that he would be ready to respond to any directive or query which the Panel might wish to address to him.

29. On 21 August 2013, the Appellant filed its appeal brief.

30. In accordance with Article R55 of the CAS Code, the NSL filed its answer on 17 September 2013, Black Aces on 23 September 2013, and Polokwane on 20 September 2013.

31. SAFA, Chippa, Santos, Adv Pretorius SC and Adv Mokoena SC did not submit any answer within the prescribed time limit granted thereto.

32. On 27 August 2013, the Deputy President of the Appeals Arbitration Division of the CAS rendered an Order on Request for a Stay, rejecting the application for provisional and conservatory measures requested by the Appellant.

33. On 18 November 2013, the Parties were informed that the hearing in the case at hand would be held on 6 January 2014, in Johannesburg, South Africa.

34. On 6 January 2014, the Appellant and Black Aces signed the order of procedure. The other parties did not sign the order of procedure.

35. On the same day, a hearing was held at the Holiday Inn Sandton in Johannesburg, South Africa (hereinafter referred to as the "the hearing").

IV. THE CONSTITUTION OF THE PANEL

36. On 9 October 2013, the CAS Court Office informed the Parties that the Panel to hear the appeal had been constituted as follows: Mr Fabio Iudica (Italy), as President of the Panel, Mr Mark Hovell (UK) and Mr Vit Horacek (Czech Republic), as Members of the Panel.

V. HEARING

37. On 6 January 2013, a hearing was duly held at Holiday Inn Sandton in Johannesburg, South Africa. All members of the Panel were present. The Parties did not raise any objection as to the constitution and composition of the Panel.

38. The following persons attended the hearing:

- The Appellant was represented by the following Counsel: Mr Norman Martin Arendse, Mr Corne Goosen and Mr Johan Van Gaalen, attorneys-at-law in Johannesburg, South Africa.

- For SAFA: Mr Poobalan Govindasamy, member of the National Executive Committee, and Mr Tebogo Motlanthe, legal officer.

- For NSL: Mr Brand De Villiers, CEO, and Mr Derek Blanckensee, General Manager, assisted by Counsel Mr Jeremy Gauntlett, Senior Counsel, Mr Frank Peiser, Junior Counsel, Mr Sandile July, attorney-at-law, and Mrs Xolisile Beryl Shezi, candidate attorney.

- For Chippa: Mr Simon Mpengesi, Chairman, and Mr Bongari Dlodlo, legal Director, assisted by Counsel Mr Brook Stevens and Mr Andrew Boerner, attorneys-at-law in Johannesburg, South Africa.

- For Black Aces: Mr Mario Morfou, Chairman, and Mr George Morfou, Co-Chairman, assisted by Counsel Mr Michael Murphy, attorney-at-law in Johannesburg, South Africa.

- Polokwane was represented by the following Counsel: Mr Claudio Bollo, Mr Angelo Christophorou and Mrs Corinne Berg, attorneys-at-law in Johannesburg, South Africa.

39. Santos, Adv Pretorius SC and Adv Mokoena SC were neither present, nor represented, at the hearing.

40. Mr Fabien Cagneux, Counsel for CAS, and Mr Serge Vittoz, ad hoc clerk, assisted the Panel at the hearing.

41. The NSL proposed to file a new document named *"Second Respondent's heads of argument"*, arguing that this was only a summary of its position, and that it could be used by the parties present and the Panel to better follow their argumentation. After having reached the approval by the other parties present, the Panel decided to accept the document, but stressed that it would be taken out of the file in case it contended any element not already on file.

42. The parties present then submitted their oral argumentation with regard to the jurisdiction of CAS in the present proceedings. The Appellant and the NSL then requested that the Panel take a decision on jurisdiction before addressing the merits of the case, if necessary.

43. The Panel rejected this request, arguing that in order to avoid the costs of holding a future hearing in South Africa, and for the sake of celerity, it was preferable to hear the Parties' position on the merits as well. The Panel referred to Article R55 of the CAS Code, which states that the Panel may rule on its own jurisdiction either in a preliminary decision, or in an award on the merits.

44. The Parties were also afforded the opportunity to present their case on the merits, to submit their arguments, and to answer the questions asked by the Panel. The Parties explicitly agreed at the end of the hearing that their right to be heard and to be treated equally in these arbitration proceedings had been fully observed.

VI. OVERVIEW OF THE PARTIES' SUBMISSIONS

45. The following outline of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference has been made in what immediately follows. The Parties' written submissions, their verbal submissions at the hearing and the contents of the Appealed Decision were all taken into consideration.

A. The Appellant's position

46. The Appellant made a number of submissions, in its statement of appeal, in its appeal brief and at the hearing. These can be summarized as follows:

i. CAS jurisdiction

1. In accordance with Articles 70.6 and 72.1 of the SAFA Constitution, appeals against an arbitration award and against a final and binding decision by SAFA shall be heard by CAS.

2. The arbitration proceedings before Adv Pretorius SC were initiated in accordance with the SAFA Constitution, and not according to Article 59 of the NSL Rules. Therefore, CAS has jurisdiction to hear the appeal.

ii. The jurisdiction of the SAFA Appeals Board

1. The NSL should have brought the Appellant's case to finality within the three-week time limit set forth in Article 9.2.2 of the SAFA Rules on Misconduct and Disciplinary Proceedings ("SAFA Rules MDP"). As it was not the case, the NSL DC's decisions are invalid.

2. The appeal filed with SAFA on 21 May 2013 should have been heard by the SAFA Appeals Board, and not by an arbitrator appointed by the NSL's CEO.

3. According to Articles 21.1 and 21.3 of the NSL Constitution, the appeal procedures should be conducted under the auspices and jurisdiction of SAFA.

4. The ruling of Adv Mokoena SC had the effect that the Appellant's right to appeal against the sanction imposed by the NSL DC was annihilated, and replaced by an "alien" appeal procedure conducted by the NSL.

5. Furthermore, the appointment of Adv Mokoena SC was not made in accordance with the applicable rules, in particular as Adv Mokoena SC was never a member of SAFA's panel of arbitrators.

6. The NSL had no power or authority to appoint an arbitrator in terms of Article 59 of its Rules, and only SAFA has the power to make such an appointment.

7. The NSL had no power or authority to deny the Appellant's right of appeal to the SAFA Appeals Board in terms of the SAFA Constitution and Rules, as the latter's Constitution and Rules supersede that of the NSL.

iii. Merits

1. The Rules and Constitution of SAFA are silent in regard to non-played or abandoned matches.

2. In these circumstances, the statutes of SAFA, CAF and FIFA should apply.

3. Only the FIFA Disciplinary Code deals with non-played or abandoned matches and stipulates the sanction that should apply.

4. The FIFA Disciplinary Code should have been applied in the case at hand. In accordance with Article 56 of the FIFA Disciplinary Code, the NSL DC could have ordered the matches to be replayed.

5. Furthermore, there was not only an agreement between almost all the teams of the NFD to boycott the first matches of the season, but also an oral agreement between the clubs and the NSL that the non-played matches at the beginning of the season would be rescheduled at a later stage.

B. SAFA's position (First Respondent)

47. SAFA did not file any written submissions, but gave oral arguments at the hearing. SAFA in substance considers that the arbitration before Adv Pretorius SC was conducted under the auspices and according to the rules of SAFA, and that therefore, Adv Pretorius SC's decision is appealable before CAS, in accordance with Article 70.6 of the SAFA Statutes.

48. SAFA did not express any position with regard to the merits of the case, save for submissions concerning the order for costs in the Appealed Decision.

C. NSL's position (Second Respondent)

49. The NSL made a number of submissions, in its answer and at the hearing. These can be summarized as follows:

i. CAS jurisdiction

1. The arbitral proceedings before Adv Pretorius SC, conducted under the rules of the NSL, have been authorised by the High Court pursuant to the Appellant's application for judicial review of the arbitral award by Adv Mokoena SC.

2. The arbitral award rendered by Adv Pretorius SC shall be considered as "a decision against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of [the NSL] may be made", as contemplated by Article 67.3 (c) of the FIFA Statutes. Thus Article 67.3 (c) applies, and excludes CAS's appeal jurisdiction, especially when read together with Rule 59 of the NSL Rules.

3. In the case of the NSL Rules, as held in CAS 2004/A/676, no provision is made for CAS arbitration. Appeals against decisions of the NSL DC are governed by Article 21 of the NSL Rules, which makes no provision for an appeal to CAS. What is more, Rule 59.1.1. of the NSL Rules explicitly states that the decision of an arbitrator shall be final. This excludes an appeal to CAS, as in the above-mentioned CAS case law.

ii. Merits

1. The Appellant's contention that it is common cause that an agreement existed in terms of which boycotting clubs would be permitted to play the matches which were not played at the beginning of the season is not true, as evidenced in the course of the proceedings.

2. The Appellant's reliance on Rule 9.2.2 of the SAFA Rules is legally misconceived, as the exercise of a duty conferred on a disciplinary body is not vitiated merely as a result of the fact that the power was not exercised within the prescribed time. Furthermore, the application of Rule 9.2.2 of the SAFA Rules is not possible as it was not incorporated in the NSL Rules. In any circumstances, the Appellant immediately accepted the irregularity of its conduct and recognised the disciplinary steps that would follow. Finally, by failing to rely explicitly on SAFA Rule 9.2.2 in its notice of appeal to the SAFA appeal board, the Appellant is estopped from raising this issue at this point.

3. Unlike the provisions on which the Appellant relies (Articles 31, 31bis and 56 of the FIFA Disciplinary Code), Article 12(g) of the FIFA Disciplinary Code – which also (in addition to Article 31) authorises the imposition of forfeiture as sanction – is expressly extended (by SAFA Rule 3.7) to the relevant disciplinary committee. Thus, the Appellant's allegation that the NSL DC did not have the power to impose the sanction of forfeiture is demonstrably wrong.

D. The other Respondents' position

50. Black Aces (Fifth Respondent) and Polokwane (Sixth Respondent) filed an answer to the appeal brief and gave oral arguments at the hearing. As their position is very similar to the NSL's one, their position will not be detailed in the present section of the award. However, their positions have been duly taken into consideration, and the Panel will directly refer to certain elements further in the award, when appropriate.

51. Chippa (Third Respondent) did not file any written submissions in the course of the proceedings. At the hearing, it was mainly passive, not commenting on issues raised by the other parties present.

52. Santos (Fourth Respondent), Adv Pretorius SC (Sixth Respondent) and Adv Mokoena SC (Seventh Respondent) did not file any written submissions, and were neither present, nor represented at the hearing.

VII. THE PARTIES' REQUESTS FOR RELIEF

53. The Appellant's requests for relief are the following:

> *"5. […] The applicant/appellant accordingly submits that the SAFA Constitution and Rules and Regulations read together with the NSL Constitution and Rules read together with the FIFA Statutes and the FIFA Disciplinary Code confers jurisdiction upon CAS to hear this appeal, and to provide relief in accordance with R 37 and R 48 of the CAS Code.*
>
> *6.1 The applicant/appellant humbly prays for both interim and preliminary relief sought on the basis set out above, and for final (main) relief.*
>
> *6.2 The applicant/appellant humbly prays that it is also entitled to the (main) relief sought in the Notice of Appeal, i.e. (a) the setting aside of the seventh respondent's award, and (b) the reinstatement of the applicant/appellant right of appeal to the SAFA Appeals Board in accordance with the SAFA Constitution and Chapter 5 of the SAFA Rules and Regulations Relating to Misconduct and Disciplinary Proceedings".*

54. The NSL's requests for relief are the following:

> *"58.4 For the reasons the NSL asks that the appeal be declined for lack of jurisdiction; alternatively that the appeal be refused on its merits. In either event, the NSL asks for an award of costs against Thanda inclusive of the costs of the two instructed counsels and one instructing legal practitioner".*

55. Referring to the Appellant's prayers for relief, Black Aces' requests the following:

> *"Ad paragraph 5*
>
> *The conclusions reached here are denied. CAS should, it is submitted, decline to hear the dispute for the reasons advanced in respect of jurisdiction elsewhere in this statement.*
>
> *Ad paragraph 6.1*
>
> *Interim relief has been refused and final relief is not appropriate.*

Ad paragraph 6.2

This is not relief that could conceivably relate to misconduct proceedings or disciplinary sanctions. This is relief of a non-disciplinary nature and could only have been appropriately sought before the Dispute Resolution Chamber of the NSL. Thanda cannot challenge a disciplinary sanction and then wind its way through all the different levels of appeal – along the way depriving the entire National First Division and the NSL of a right to be heard – and then in the final stage suggest that it should be afford relief which has nothing to do with misconduct proceedings, the disciplinary process, or a disciplinary sanction at all".

56. Polokwane's conclusions are the following:

"1. There being no practical basis upon which the Appellant could ever properly participate in the 2013/2014 PSL season, which is well under way now and will in all probability be completed, before all the various legal challenges are over, even if the CAS Tribunal were to grant the Appeal, there is accordingly no merits in the Appeal.

2. There is also, in any event, no legal basis for the CAS Tribunal to "create" or "re-instate" an Appeal right which the Appellant does not have and never had, due regard being had Rule 59 of the NSL Rules and the fact that it is common cause that direct Arbitration was called for in terms of the said Rules. The Arbitration has occurred and there is no basis to now provide for an Appeal, completely out of sequence to the process the Rules in question contemplate.

1. […]

2. […]

3. Having regard to the substantial costs incurred by the Sixth Respondent in defending its position and opposing the Appeal, the Appellant ought to be ordered to pay all legal costs incurred by the Sixth Respondent, upon the production of invoices by the Sixth Respondent's legal advisers".

VIII. CAS JURISDICTION

57. The Panel observes that the present arbitration is seated (as are all CAS proceedings) in Lausanne, Switzerland and involves parties that are neither domiciled, nor habitually resident in Switzerland. The present arbitration procedure is therefore governed by Chapter 12 of the Swiss Private International Law ("PILA").

58. Article 186 PILA reads as follows:

"1) The arbitral tribunal shall rule on its own jurisdiction.

2) The objection of lack of jurisdiction must be raised prior to any defence on the merits.

3) In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision".

59. According to Swiss legal scholars, this provision *"is the embodiment of the widely recognized principle in international arbitration of "Kompetenz-Kompetenz". This principle is also regarded as corollary to the principle of the autonomy of the arbitration agreement"* [ABDULLA Z., The Arbitration Agreement, in: KAUFMANN-KOHLER/STUCKI (eds.), International Arbitration in Switzerland – A Handbook for Practitioners, The Hague 2004, p. 29]. *"Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it (…). It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement"* [MÜLLER C., International Arbitration – A Guide to the Complete Swiss Case Law, Zurich et al. 2004, pp. 115-116]. *"It is the arbitral tribunal itself, and not the state court, which decides on its jurisdiction in the first place ... The arbitral tribunal thus has priority, the so-called own competence"* [WENGER W., n. 2 ad Article 186, in: BERTI S. V., (ed.), International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute, 2000]. The provisions of Article 186 are applicable to CAS arbitration [RIGOZZI A., L'arbitrage international en matière de sport, Basel 2005, p. 524].

60. Furthermore, the parties have expressly accepted at the hearing the competence of the Panel to rule on its own jurisdiction in the present case. The Appellant has repeatedly recognised, in correspondence and submissions, the competence of the CAS to decide both the issue of jurisdiction as well as the substantive issues in question.

61. The admissibility of an appeal before CAS shall be examined in light of Article R47 of the CAS Code, which reads as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".*

62. CAS jurisdiction is supported mainly by the Appellant and SAFA, and is contested *inter alia* by the NSL, Black Aces and Polokwane.

63. There is a dispute in the case at hand whether the arbitral award rendered by Adv Pretorius SC, the Appealed Decision, shall be considered as a decision of the NSL, or of SAFA.

64. The NSL, supported by Black Aces and Polokwane, considers in substance that the Appealed Decision was rendered in accordance with Article 59 of the NSL Rules, and shall therefore be considered as a decision of the NSL.

65. As to the Appellant and SAFA, they consider, in substance, that Adv Pretorius SC was appointed in accordance with the provisions of the SAFA Constitution, and that therefore its decision shall be considered as a decision of SAFA.

66. The relevant provisions of the SAFA Constitution with regard to arbitration are the following:

"Arbitration Article 70

70.1 SAFA shall establish an Arbitration Tribunal, which shall deal with all further appeals from the decision of the National Appeals Board and the decision of an arbitrator shall be final and binding.

[…]

70.2 The National Executive Committee shall draw up special regulations regarding the composition, jurisdiction and procedural rules of this Arbitration Tribunal.

70.3 Everybody or individual falling under the jurisdiction of SAFA shall ensure that any disputes that it has with a body or individual falling under the jurisdiction of SAFA is resolved in accordance with the dispute prevention and resolution procedures set out in the Constitution, Rules and Regulations.

70.4 Where no specific dispute prevention or resolution procedures are set in the Constitution, or where any member or an affiliate of a member, or individual prefers to, a dispute may be referred directly to arbitration for resolution. It is specifically provided that where Regional members or its affiliates or individual opt for arbitration, such arbitration may be conducted by a senior lawyer in the Province consented to by the parties.

[…]".

67. Article 59 of the NSL Rules, reads as follows:

"59.1 In any league or other competition under the auspices of the League, the Chief Executive Officer will have the power to do any or all of the following if he is of the opinion that the application of the normal procedures will result in a delay of such nature that the League and/or the sponsor/s may be brought into disrepute:

59.1.1 Order that a disciplinary matter, protest, complaint or appeal be referred directly to arbitration. In such event the decision of the arbitrator will be final;

59.1.2 Reduce the time periods allowed for an appeal or a request for arbitration".

68. In the case at hand, following the NSL CEO's decision to refer the matter directly to arbitration, in accordance with Article 59 of the NSL Rules, the NSL appointed Adv Mokoena SC as an arbitrator to resolve the dispute. The Appellant then contested Adv Mokoena SC's jurisdiction before the High Court, in particular in view of the alleged wrongful appointment of Adv Mokoena SC. The decision of the High Court reads in particular, as seen above, as follows:

"1. The issues raised in these proceedings are referred to arbitration by an arbitrator or arbitrators appointed in terms of the constitution and rules of the National Soccer League, as read with those of the South

African Football Association and any further instruments incorporated by reference in the constitution and rules of the said bodies ("the arbitration panel")".

69. Adv Pretorius SC was then appointed by SAFA, in accordance with the ruling of the South Gauteng High Court, which was accepted by the Parties.

70. As seen above, Article 70.4 of the SAFA Constitution states that *"where any member or an affiliate of a member, or individual prefers to, a dispute may be referred directly to arbitration for resolution"*. According to the definition included at the beginning of the SAFA Constitution, a member means a *"Regional Member, Associate Member or the Special Member"*, the latter being the NSL according to the same list of definitions.

71. It therefore appears that the NSL, as a member of SAFA, has the right, if it prefers to and in certain circumstances, to refer *"disputes"* directly to arbitration.

72. The Panel is of the opinion that this is exactly the goal of Article 59 of the NSL Rules. Indeed, by adopting this provision, the NSL decided that in certain circumstances, disputes *"may be referred directly to arbitration"*, which is the exact same wording as in Article 70.4 of the SAFA Constitution.

73. The Panel considers that this position is confirmed by Article 9.3. of the SAFA Rules relating to misconduct and disciplinary proceedings which states the following:

"[…] Competition Rules may contain any provisions designed to facilitate the speedy resolution of disputes affecting the outcome of competitions, provided only that such provisions are consistent with the requirements of procedural fairness, including, but not limited to provisions for

9.3.1 the direct referral to final arbitration of the disputes in question;

[…]".

74. The Panel considers that the decision taken by the NSL CEO to refer the case directly to arbitration was rendered, in view of the particular circumstances of the case, in accordance with Article 59 of the NSL Rules.

75. Furthermore, in the absence of any particular provisions with regard to the procedure to be followed in case of an arbitration under the NSL Rules, in particular with regard to the designation of the arbitrator(s), the Panel is of the opinion that Article 59 cannot be applied by itself, but shall be applied together with the provisions of the SAFA Constitution with regard to arbitration.

76. This position is supported by the High Court's decision, which, as seen above, referred the case back to arbitration by an arbitrator or arbitrators appointed in the terms of the constitution or the rules of the NSL, as read together with those of SAFA (emphasis added).

77. Furthermore, Adv Pretorius SC himself stated in the head of the Appealed Decision that the arbitration was a *"SAFA Arbitration"*. At par. 209 of the Appealed Decision, Adv Pretorius

SC also expressly stated that he was exercising his powers *"subject to the Constitution and Rules of the NSL and SAFA"*.

78. In view of the above, the Panel considers that the arbitration conducted before Adv Pretorius SC, which led to the Appealed Decision, was an arbitration conducted under the auspices of SAFA and, therefore, the Appealed Decision shall be considered as a decision of SAFA. Furthermore, in accordance with Article 70.1 *in fine* of the SAFA Constitution, the decision of an arbitrator shall be final and binding.

79. At this point, the Panel shall examine whether the constitution or rules of SAFA provides for an appeal to CAS against SAFA's final and binding decisions.

80. In this regard, Article 70.6 of the SAFA Constitution reads as follows:

> *"In accordance with Article 59 and 60 of the FIFA Statutes, any final appeal against an arbitration award shall be heard by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland"*.

81. Furthermore, Article 72.1 of the SAFA Constitution states the following:

> *"In accordance with the relevant provisions of the FIFA Statutes, any appeal against a final and binding SAFA decision shall be heard by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. CAS shall not, however, hear appeals on violations of the Laws of the Game, suspensions of up to four matches or up to three months, or decisions passed by an independent and duly constituted Arbitration Tribunal of an Association or Confederation"*.

82. The Panel is of the opinion that Article 70.6 of the SAFA Constitution is clear: any appeal against an arbitration award shall be heard by the CAS. Furthermore, it results from the systematic of Article 70 (Arbitration) of the SAFA Constitution, that a final and binding decision (Art. 70.1) rendered by the arbitrator is appealable to the CAS.

83. However, Article 70.6 seems to be in contradiction with Article 72.1 of the SAFA Constitution. According to SAFA, the term *"Association"* shall be substituted by "SAFA" in Article 72.1 *in fine*. This would mean that decisions passed by an independent and duly constituted Arbitration Tribunal of SAFA should not be appealable to CAS. This is in clear contradiction with SAFA's own position that an award rendered by an arbitral tribunal appointed by SAFA in accordance with Article 70 shall be appealable to CAS.

84. The Panel considers that the contradiction between Article 70.6 and 72.1 of the SAFA Constitution shall be resolved in favour of the jurisdiction of CAS. Indeed, whereas Article 70 is a special provision describing in details the arbitration procedures, Article 72.1 is a general provision which wording is, at least partially, taken directly from the FIFA Statutes, in particular its Article 67.1. Therefore, it must be concluded that SAFA, when drafting those provisions, meant to provide for a last appeal before CAS against the arbitral award issued at the end of its domestic dispute resolution system.

85. In view of the above, the Panel considers that CAS has jurisdiction in the case at hand.

IX. APPLICABLE LAW

86. Article R58 of the CAS Code provides the following:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

87. The *"applicable regulations"* in the case at hand are the SAFA and NSL rules and regulations.

88. The Parties have not expressly or impliedly agreed on a choice of law applicable to these proceedings before CAS. Therefore, the rules and regulations of SAFA and the NSL shall apply primarily, and South African law, as SAFA and the NSL are domiciled in South Africa, shall apply subsidiarily.

X. ADMISSIBILITY OF THE APPEAL

89. The Appealed Decision was notified to the Appellant on 15 July 2013.

90. There is no provision in the applicable regulations with regard to the time limit to file an appeal before CAS. Therefore, Article R48 of the CAS Code applies, i.e. the appeal shall be filed within 21 days after the notification of the Appealed Decision, which was done in the case at hand. It further complies with the other requirements of Article R48 of the CAS Code.

91. It follows that the appeal, filed on 2 August 2013, is admissible, which is also undisputed.

XI. MERITS

A. Introduction

92. Adv Pretorius SC, in the Appealed Decision firstly decided that Adv Mokoena SC correctly assumed and exercised his jurisdiction. However, he also addressed the merits of the case, in the event that his assumption about Adv Mokoena SC's jurisdiction was wrong. Adv Pretorius SC also stressed that the parties expressly stated that he would have the power to substitute his decision for that of Adv Mokoena SC.

93. The Panel is of the opinion that the question of the jurisdiction of Adv Mokoena SC is not an issue in the present proceedings. Indeed, the Appellant appealed against Adv Mokoena SC's decision before the South Gauteng High Court, which upheld the appeal, therefore annulled Adv Mokoena SC's decision, and reverted the case back to arbitration, in accordance with the NSL and SAFA Rules.

94. Furthermore, the Panel recalls that the present procedure is a *de novo* arbitration, the Panel having the full power to review the facts and the law, in accordance with Article R57 of the

CAS Code. Furthermore, according to the same provision of the CAS Code, the Panel may issue a new decision which replaces the Appealed Decision, or annul the Appealed Decision and refer the case back to the previous instance.

B. Discussion

95. There is no dispute between the Parties as to the fact that the Appellant boycotted the three first matches of the 2012/2013 season, together with the respective opponent teams, which led to these matches being not played.

96. In this regard, the Appellant pleaded guilty of the offence of Article 10.2 of the NSL Rules in front of the NSC DC.

97. However, the Appellant considers that Article 10.2 of the NSL Rules could not be applied in the case at hand, for the following reasons:

- An agreement existed between all clubs to boycott the first matches of the season, and the NSL agreed that the three first rounds of the NFD would be re-scheduled at a later stage;

- The NSL failed to bring the proceedings against the Appellant to finality within the three-week time limit set forth in Article 9.2.2 of the SAFA Rules MDP;

- The Disciplinary Committee was not authorised to sanction a forfeiture or abandonment in circumstances where a match was not played.

i. The alleged agreement

98. In its appeal brief, the Appellant stated the following with regard to the alleged agreement between the NFD clubs and the NSL as to the boycott conducted at the beginning of the 2012/2013 season:

> *"2.8 All clubs agreed not to participate, including the fourth respondent, fifth respondent and sixth respondent. Indeed, it was subsequently agreed (and it is common cause) that the National First Division season would kick off / commence on 5 October 2012 and that three (3) rounds would be re-scheduled in respect of the sixth respondent (Polokwane City FC), and one (1) was re-scheduled in the case of the fourth respondent (Santos FC).*
>
> *2.9 None of the matches in respect of the fifth respondent (Mpumalanga Black Aces FC) and the applicant/appellant, were re-scheduled resulting in them only having played twenty-seven (27) matches during the season.*
>
> *2.10 In effect, the agreement provided that games that were not played by the clubs would be played after 5 October 2012.*
>
> *[…]*

2.14 In breach of the agreement/s, the second respondent did not allow the applicant/appellant to play the three matches that the applicant/appellant did not play before 5 October 2012".

99. The Panel considers that the Appellant failed to demonstrate, with convincing evidence, that the alleged agreement was entered into between all the clubs of the NFD and, more important, that the NSL agreed to the terms of this alleged agreement.

100. This position is confirmed by the attitude of the Appellant, which, as seen above, pleaded guilty before the NSL DC. Had the Appellant considered that the NSL had agreed to re-schedule the boycotted matches, it would not have pleaded guilty to the offence of Article 10.2 of the NSL Rules.

101. The Appellant's position in this regard shall therefore be rejected.

ii. The application of Article 9.2.2 of the SAFA Rules MDP

102. As seen above, the Appellant considers that the disciplinary proceedings against it were not brought to finality within three weeks after the alleged misconduct, as imposed by Article 9.2.2 of the SAFA Rules MDP.

103. Under Article 9 of the SAFA Rules relating to misconduct and disciplinary proceedings, inter alia:

"9.1 Notwithstanding anything to the contrary contained within these Rules, the Rules of any League or Cup Competition played under the jurisdiction of the Association or a Member ("Competition Rules") must ensure that football is not brought into disrepute by delays in the resolution of misconduct proceedings which affect the outcome of competitions.

9.2 To this end, Competition Rules must provide for the application of special disciplinary procedures which ensure that, save in exceptional cases involving the deliberate concealment of material facts relevant to the misconduct in question, all misconduct proceedings which may result in the replaying or forfeiture of a match or the deduction of points, are brought to finality

9.2.1 in the case of a cup competition, before the fixtured date for the next round of the competition in question; and

9.2.2 in the case of a league competition, within three weeks of the date of the alleged misconduct.

[…]".

104. The Appellant's reliance on Article 9.2.2 is misplaced. It is clear from Article 9.2 itself that Article 9.2.2 is subject to the incorporation of the time limit *"in the competition rules of the NDF"*. The Appellant did not evidence that this provision was implemented in the NSL Rules.

105. The Panel therefore considers that Article 9.2.2 of the SAFA Rules MDP is not directly applicable before the proceedings before the NSL DC, and that therefore, the reliance on this provision by the Appellant is misplaced.

106. The Appellant's position in this regard cannot be followed and shall therefore as well be rejected.

iii. The application of Article 10.2 of the NSL Rules

107. Under Article 10.2 of the NSL rules:

> *"Where a match is not played because of the late or non-arrival of a team, the offending club will be charged with misconduct. In this regard impossibility of performance as the result of a vehicle breakdown, or that the offending team was unable to locate the match venue, will not be a defence to this charge. Where a club is found guilty of this offence its opponents in the said match will receive a "walk-over" (a 3-0 wing), unless the Disciplinary Committee is satisfied that another sentence would be more appropriate, under the circumstances. The Chief Executive Officer may decide in cases of Force Majeure that the match may be replayed in the event of the non-arrival of a team".*

108. There is no dispute between the Parties about the fact that the Appellant's boycott of the three first match of the season was an offence to Article 10.2 of the NSL Rules.

109. In this context, the NSL DC was empowered to impose on the Appellant, in accordance with this provision, a forfeiture ("walk-over"), unless it was satisfied that another sentence would be more appropriate, under the circumstances (emphasis added).

110. The NSL DC decided that under the circumstances of the case, and in particular the fact that not only the Appellant but also its respective opponents for the three above-mentioned matches failed to appear at these matches, the proper sanction was, in substance, that said matches were *"abandoned and forfeited"* by the Appellant, and that no benefits were to flow from these matches with no points awarded and no goals being awarded.

111. The NSL DC therefore decided to apply its discretion to impose any other sanction it finds appropriate, under the particular circumstances of the case, in accordance with Article 10.2 of the NSL Rules.

112. The Appellant considers that the NSL DC was not allowed to apply this sanction as the NSL DC *"had no power or authority to order the matches not played by the applicant/appellant and any of the other NFD clubs "abandoned" and "forfeited" since no "matches" as defined in the FIFA DC Code in fact took place, and none of the teams (save for one (1) [Roses FC]) turned up for any of the matches concerned".*

113. The Appellant relies in particular on Article 56 of the FIFA Disciplinary Code, which reads as follows:

> *"1. If a match cannot take place or cannot be played in full for reasons other than force majeure, but due to the behaviour of a team or behaviour for which an association or a club is liable, the association or the*

club will be sanctioned with a minimum fine of CHF 10.000. The match will either be forfeited (cf. art. 31) or replayed (cf. art. 31bis)".

114. By referring to the application of the FIFA Disciplinary Code, as well as the regulations of CAF, the Appellant seems to imply that these rules are directly applicable to the case at hand. The Panel considers that this approach is erroneous. Indeed, in the context of international football, the National Federations, such as SAFA, and their members, such as the NSL, have certainly the general obligation to respect the regulations of their supervisory bodies (such as CAF and FIFA, see art. 2.6 and 13.1.1 of the SAFA Constitution), but this does not mean that all the regulations implemented by these bodies are directly applicable to the National Federations and their members. On the contrary, FIFA leaves a certain discretion to the National Federations to deal with their affairs, in particular with regard to the purely national matters. In this regard, the Panel refers as an example to the commentary of Article 1 of the FIFA Regulations for the Status and Transfer of Players, which states in particular the following:

"As a general rule, FIFA does not interfere in the day-to-day business of the associations, provided that severe infringements of the FIFA Statutes and/or regulations do not occur.

The autonomy of the association is, however, limited by the basic principles of the Regulations that have to be observed at all times and in particular by those provisions that are in particular binding at national level and have to be included without modification in the association regulations".

115. This position of FIFA demonstrates that the National Federations have a large discretion with regard to purely national issues. It is true that certain provisions of the FIFA regulations have to be included without modification in the National Federations' regulations. Article 56 of the FIFA Disciplinary Code is certainly not among those particular provisions *"binding at national level and have to be included without modification in the association regulations"*.

116. Even if it was the case, the National Federation in question would still have to implement such FIFA binding provisions in its own regulations in order for it to be applicable at national level (see CAS 2008/A/1576 & 1628, par. 74 et seq.)

117. In any case, even if one assumed that Article 56 of the FIFA Disciplinary Code was directly applicable to the case at hand, the Panel deems that it is not in contradiction with Article 10.2 of the NSL Rules, as both of these provisions provide for the possibility given to the relevant disciplinary authority to declare the forfeiture of a match. Even if Article 56 of the FIFA Disciplinary Code was to be applied, the NSL DC still had the possibility to choose between the forfeiture and the replay of the matches. It can therefore in any case not be reproached to the NSL DC to have imposed, and to Adv Pretorius SC to have confirmed, this sanction to the Appellant.

118. The NSL DC's further decision to accompany the forfeiture by the non-attribution of any points and any goals to the teams that did not appear to the matches in question is not only in accordance with its large discretion to impose any sanction it deems appropriate, but it is also a fair and equal decision, considering the circumstances of the case. Indeed, as none of

the teams appeared at the boycotted matches, it is in particular logical not to apply the "3-0" usual rule in case of forfeiture.

119. With regard to fairness and equity, the Appellant also considers that the fact that it, and some other clubs, had played less matches than others at the end of the season is also neither fair, nor equal. The Panel notes that the primary cause of this state of affairs is that the clubs refused to play scheduled matches. The conduct of Roses to the contrary amply illustrates this. What the Appellant really complains about is that the boycott resulted in an unequal number of matches being played by clubs. But all clubs which took part in the boycott were imposed the same sanction. The only special case arose out of different circumstances – the issues arising out of the matches not played by Polokwane and Dynamos as seen above.

120. The Panel therefore considers that the sanction imposed on the Appellant by the NSL DC, and confirmed in the Appealed Decision, is in accordance with Article 10.2 of the NSL rules, and that therefore, the Appellant's position shall also be rejected on this point.

XII. CONCLUSION

121. In view of all the above, the Panel concludes first that the Appealed Decision shall be considered as being the final decision within the SAFA system of dispute resolution, and as SAFA's Constitution set forth an appeal to CAS against its final decisions, the appeal shall be declared admissible.

122. As to the merits, the Panel concludes that the NSL DC correctly assessed and applied the applicable rules, in particular by wisely using its discretion regarding sanctions, which is set forth by Article 10.2 of the NSL Rules. The Appealed Decision, which upheld the NSL DC's decisions shall therefore be confirmed.

123. For the avoidance of doubts, the Panel's position with regard to the three prayers for relief sought by the Appellant, is the following:

a) the interim and preliminary relief was already rejected by the Deputy President of the Appeals Arbitration Division of CAS on 27 August 2013;

b) the relief requesting the setting aside of the Appealed Decision is also rejected, in view of the Panel's position on the merits of the case;

c) the relief requesting the reinstatement of the Appellant's right of appeal to the SAFA Appeal Board has not only become moot, as the Panel decided to render a new decision on the merits, but would have in any circumstances be rejected, as the Panel decided, in par. 78 above, that the NSL CEO rightfully referred the case directly to arbitration, in accordance with Article 59 of the NSL Rules.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The Court of Arbitration for Sport does have jurisdiction to rule on the appeal filed by Thanda Royal Zulu FC (Pty) on 2 August 2013.

2. The appeal filed on 2 August 2013 by Thanda Royal Zulu FC (Pty) Limited against the decision rendered in the SAFA Arbitration by Adv Pretorius SC on 24 July 2013 is dismissed.

3. The decision rendered in the SAFA Arbitration by Adv Pretorius SC on 24 July 2013 is confirmed.

(…)

6. All other motions or prayers for relief are dismissed.