IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/42/2018**

In the Matter between:-

TŠOANELO KOETLE **1ST APPLICANT**

LIOLI FOOTBALL CLUB **2ND APPLICANT**

VS

LESOTHO NATIONAL OLYMPIC COMMITTEE & ONE **1ST RESPONDENT**

THE CHAIRPERSON OF THE DISCIPLINARY TRIBUNAL **2ND RESPONDENT**

JUDGMENT

Coram : **HON. M. MOKHESI AJ**

Date of hearing : **19 APRIL 2018**

Date of Judgment : **18 MAY 2018**

CASE SUMMARY:

Application to review unterminated disciplinary hearing on jurisdictional ground- Held jurisdictional ground can be challenged on review as it vitiates the proceedings.

ANNOTATIONS:

CASES:

Cusa v Tao Ying Metal Industries and Others (CCT 40/07) [2008] ZACC 15

Industrial Development Corporation of S.A (PTY) Ltd v Silver (419/2001) [2002] ZASCA 112

Jockey Club of South Africa v Forbes (662/91) [1992] ZASCA 237; 1993(1) SA649

Lesotho Evangelical Church v Mandoro LAC (1980-84) 127

Masinga and others v Director of Public Prosecutions LAC (2011-2012) 283

Mda and Another v DPP (C of A No.10/2004)

Smally Trading Company (PTY) Ltd t/a Smally Uniform and Protective Clothing v Lekhotla Mats'aba and 10 Others C of a (civ) 17/2016

Wahlhaus and Others v Addditional Magistrate, Johannesburg and Another 1959 (3) SA 113

Welkom Village Management Board v Leteno 1958(1) SA 490 (AD)

ARTICLES:

Robert Whitman, "Incorporation by Reference in Commercial Contracts" *21 Md. Rev.* 1 1961

PER MOKHESI A.J

[1] INTRODUCTION

The applicant approached this court for a relief in the following terms:

"1. A rule *nisi* be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:

2.1 The ordinary rules pertaining to the modes and periods of service shall not be dispensed with due to the urgency of this matter.

2.2 That THE DISCIPLINARY TRIBUNAL chaired by the 2nd RESPONDENT and scheduled to proceed on the 7th FEBRUARY 2018 at 1400hours at the office of 1st RESPONDENT against the 1st APPLICAN to be stayed and directed not to proceed pending finalization of this matter.

2.3 The 1st and 2nd RESPONDENTS are hereby directed to dispatch the record of 1st APPLICANT within fourteen (14) days of receipt of the Court Order herein.

2.4 Reviewing, correcting and setting aside the Ruling of 2nd RESPONDENT of the 1st FEBRUARY 2018 as being in contravention of the Constitution of the 1st RESPONDENT.

2.5 The purported suspension of the 1st APPLICANT be declared irregular, unlawful and null and void *ab initio* as it was done

in contravention of the Constitution of 1st RESPONDENT and its ANTI-DOPING RULES and also without the concurrence of the LESOTHO FOOTBALL ASSOCIATION.

2.6 Further and / or alternative relief as this Honourable Court may deem fit.

2.7 Costs of suit in the event of opposition hereto.

2.8 PRAYERS 1, 2.1, 2.2 AND 2.3 operate with immediate effect as interim orders."

[2] Factual Background

The applicant is a registered football player. He is registered with the Lesotho Football Association (hereinafter LEFA). He plays football professionally for the 2nd applicant (Lioli Football Club).The Lioli Football Club (2nd applicant) is a registered football club. The 2nd applicant is registered with the Lesotho Football Association.

The 1st respondent is a Lesotho National Olympic Committee (LNOC). LNOC is a voluntary association registered under the Societies Act No. 20 of 1966. The purpose of the LNOC is to ensure respect for the Olympic Charter and the Olympic Movement's Anti-doping Code.

What precipitated this application was when the 1st applicant on the 14th November 2017 was charged with the violation of anti-doping rules. He was charged by the LNOC. The Secretary General of the 1st respondent (LNOC) as a result of these violations served the applicant with a provisional or pre-cautionary suspension. Applicant was pre-cautionarily suspended from

participating in football activities pending finalization of the disciplinary case against him. The charge against the applicant was in the following terms: (in relevant parts).

> "Dear Mr. Koetle,
>
> **NOTICE OF ANTI-DOPING RULE VIOLATION ARTICLE 2.3 OF WORLD ANTI- DOPING AGENCY (NADA) CODE 9READ WITH LNOC ANTI-DOPING GUIDELINES 2.3) AND PROVISIONAL SUSPENSION**
>
> The LNOC as the designated National Anti-Doping Organisation (NADO) wishes to formally advise you that in terms of the WADA Code Article 2.3 and the LNOC Anti-Doping Guidelines, you are charged with anti-doping violation of:
>
> "Evading sample collection and/or without compelling justification, refusing or failing to submit to sample collection after notification as authorized in applicable anti-doping rules".
>
> In that you refused without compelling reasons to submit to testing by a duly authorized DCO Mr. Thabo Tŝoaeli who presented his credentials to you and purpose of testing on the 20th and 23rd October 2017.As a failure to adhere to the WADA Code is viewed in serious light, the LNOC acting in its capacity as the NADO hereby gives you notice as enjoined by Articles 20.4.10 and 20.5.7, a formal action against you based on the anti-doping rule violation is being instituted working with the ***Africa Zone VI RADO***.
>
> "In accordance with Article 7.9 of the WADA Code (read with Article 7.9.3 of the LNOC Guidelines) you are provisionally suspended with immediate effect from all competitions including training sessions with other athletes until this matter has been resolved. You are entitled to apply for the provisional suspension to be uplifted before the full hearing of this matter."

[3] A panel was constituted to hear this matter on the 11th January 2018. Before that panel, applicant's legal counsel raised the issue regarding the

constitution of the panel. The applicant had asked for the recusal of the panel's chairperson for potential conflict of interest. The panel ruled in favour of the applicant and the chairperson had to recuse himself from presiding over the hearing against the applicant.

The second hearing was then convened on the 1st February 2018. The applicant, again, raised issues with regard to the second hearing. He argued that the panel should have been instituted in terms of LNOC Anti-Doping Rules and not in accordance with RADO Anti-Doping Rules. The Chairperson of the Disciplinary Tribunal (2nd respondent) concluded that RADO Rules were applicable. He did not provide the written reasons as requested by the applicant's legal counsel. Without being in possession of the 2nd respondent's reasons, the applicant launched this application for relief in terms outlined above at para. 1.

[4] This application is opposed. The Chief Executive Officer of 1st respondent deposed to the answering affidavit, and in it he raised two points in *limine*; viz: (a) that this court does not have jurisdiction to review the proceedings in question as the Court of Arbitration for Sport is the only body vested with such powers; (b) that this court does not have jurisdiction to review unterminated disciplinary proceedings. When the hearing proceeded on the 19th April 2018 a holistic approach in terms of which the merits and the points in *limine* raised would be dealt with together was agreed upon by both counsel.

(1) Does *Court of Arbitration for Sport have exclusive jurisdiction?:*

It is the respondent's argument that this court does not have jurisdiction to entertain this review application in as much as the Court of Arbitration for Sport has exclusive jurisdiction in terms of the World Anti-Doping Code 2015. The approach to exclusion or deferment of court jurisdiction was articulated in the leading case ***Welkom Village Management Board v Leteno 1958 (1) SA 490 (AD)*** (the case was adopted and applied **in *Smally Trading Company (PTY) Ltd t/a Smally Trading Company (PTY) Ltd v Lekhotla Matŝaba and 10 Others C of A (civ) 17/2016 where the court (at 502C-503C)*** said:

> "It is not a general rule of law "that a person who considers that he has suffered a wrong is precluded from having recourse to a court of law while there is hope of extrajudicial redness" (**per VAN DER HEEVER, J.A. in the Bindura case, Supra, at p. 362)**.
>
> Whenever domestic remedies are provided by the terms of a statute, regulation or conventional association it is necessary to examine the relevant provisions in order to ascertain in how far, if at all, the ordinary jurisdiction of the court is thereby excluded or deferred. In **shames v South African Railways and Harbours, 1922 A.D 228**, much relied upon Mr. Miller, a dismissed railway servant – who, because he was a servant of the Crown, would at common law have been dismissible at will – had certain remedies available to him by statute; and it was held that he was not entitled to have recourse to the courts excerpt on the ground of some illegality or irregularity in the proceedings, and then only when such irregularity or illegality had been persisted in until the final stage and he had exhausted his statutory remedies. For, as **SOLOMON, J.A., put it at p. 236** of the report, "non constat that, if he had appealed to the various tribunals which under the Act are open to him, the irregularity complained of may have been set right and justice done to him."

The conclusion thus reached was, however, found to be a necessary implication from the terms of the relevant statute (**see Jockey Club of South Africa and Others v Feldman 1942 A.D 340 at pp. 351/2**). The rule of Shames' case, as interpreted by the majority of this court in Feldman's case, accordingly is that the court's jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication (**see also the Bindura case Supra at pp 362/3**). In **Dumah v Blom, N.O and the Klerksdorp Municipality, 1950 (1) S.A 274 (T), and Semena v de Wet and Another, 1951 (2) S.A 444 (T)** –which were with concerned with location regulations – it was held that, on the particular facts, the rule of Shame's case had no application. In **Golube v Oosthuisen and Another, 1955 (3) S.A 1 (T)**, certain location regulations provided that a person refused a site permit by the Superintendent might appeal to the Council, whose decision shall be final." DE WET, J. after stating – the effect of the relevant authorities, held that he could find no reason to imply an intension in the particular regulations before him that the court's jurisdiction should be limited in the sense that the court should only be entitled to entertain review proceedings after the aggrieved person had exhausted his remedies under the regulations. In the course of his judgment the learned Judge expressed the view that:

"The mere fact that the legislative has provided an extrajudicial right of review or appeal is not sufficient to imply an intension that recourse to a court of law should be barred until the aggrieved person has exhausted his statutory remedies." It is, I think, clear from the context in which this statement appears that what the learned Judge intended to convey was that the mere existence of a domestic remedy did not conclude the question, since it in each case necessary to consider all the circumstances in order to determine whether

a necessary implication arises that the courts' jurisdiction is either wholly excluded or, at least, deferred until the domestic remedies have been exhausted. So understood, I am in agreement with the learned Judge's above cited statement."

[5] Application of these principles to the facts of this case:

The operative article of the World Anti-Doping Code 2015 is Article 13. Article 13 deals with "Appeals" in different contexts under the following sub-articles;

Article 13.1	"Decisions subject to appeals "
Article 13.2	"Appeals from decisions regarding anti-doping rule violations, consequences, provisional suspensions, recognition of decisions and jurisdiction"
Article 13.4	"Appeals relating to TUES"
Article 13.5	"Notification of appeal decisions"
Article 13.6	"Appeals from decisions under part three and part four of the Code"
Article 13.7	"Appeals from decisions suspending or revoking laboratory accreditation."

That this court does not sit on appeal from the decisions of disciplinary tribunals is axiomatic, however, what was subject of much spirited argument before this court is whether the review jurisdiction of this court is ousted at all. Looking at Article 13 of the World Anti-Doping Rules, the operative word in Article 13 is "appeal." It is clear to me that the drafters of the Code did not seek to oust jurisdiction of this court to exercise its judicial review powers over the proceedings of the tribunal constituted under its rules, and this is implicit in the consistent use of the word "appeal" in Section 13.

In my view it can necessarily be inferred that the drafters of the Code did not intend to exclude this court's jurisdiction to review the proceedings instituted in terms of the WADA Code. In my view the point that this court's jurisdiction to review the proceedings of the 1st Respondent is excluded should be dismissed.

[6] **(**ii) *Review of Unterminated Proceedings*:

The second line of attack against this application is directed at the fact that it seeks to review unterminated disciplinary proceedings. It is trite that a court will not ordinarily accede to a request to review unfinalised proceedings except "where grave injustice might otherwise result or where justice might not by other means be attained. " **(*Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113).* At 119H – 120A** Ogilvie Thompson JA (as he then was stated the position thus:

> "While a Superior Court having jurisdiction in review or appeal will be slower to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has power where grave injustice might otherwise result or where justice might not by other means be attained….. In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available. In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrate's court." (This approach was adopted in ***Mda and Another v DPP (C of A No. 10/2004****)*

[7] In my view the same policy considerations are applicable with equal force to unterminated disciplinary proceedings. What remains to be determined is whether a jurisdictional issue (as is the case *in casu*) falls within the category

of rare cases where this court may accede to a request to review unterminated disciplinary proceedings. In my judgment, the answer should be in the affirmative. The importance of the jurisdictional issues can be highlighted by the fact that as a matter of practice a judge should only decide issues as they are formulated by the parties, but where lack of jurisdiction is apparent on the papers filed of record, the court is entitled to *mero motu* raise the issue of lack of jurisdiction and to direct parties to deal with it (***see CUSA v Tao Ying Metal Industries and Others (CCT 40/07) [2008] ZACC 15 at para 67***). This approach is understandable as lack of jurisdiction vitiates the entire proceedings. This much was made clear in ***Masinga and Others v Director of Public Prosecutions LAC (2011 – 2012)*** **283 at p.284 para C – G**.In ***Masing*****a,** the accused persons who had been extradited from South Africa to face criminal charges in Lesotho had challenged the jurisdiction of the High Court to hear their case on the basis of certain irregularities which they alleged occurred in the process of extraditing them. The High Court had ruled that it had jurisdiction. Dissatisfied with the ruling, accused appealed the decision of the High Court. In the Court of Appeal the Director of Public Prosecutions raised a point that as the proceedings were unterminated, it should be struck from the roll. The Court of Appeal (at para.2) held that the appellants were entitled to appeal the decision of the High Court in the circumstances as "[t]he absence of a court's jurisdiction to hear a matter will vitiate the proceedings."

In *casu*, the applicant had challenged the constitution of the Panel which was set up to decide his fate. He argued that the Panel ought to have been constituted in terms of the LNOC Anti-Doping Rules. In my view a challenge

to the constitution of the panel clearly attacked its jurisdiction to hear the disciplinary case against the applicant, and he was therefore entitled to launch this review proceedings despite the fact that the disciplinary proceedings were unterminated.

[8] The question whether the LNOC or RADO have jurisdiction to institute and hear disciplinary hearing against a football player for violating anti-doping rules can best be answered by examining whether the Lesotho Football Association as an affiliate of LNOC is a party to anti-doping regime to which LNOC subscribes.

Contractual Relationship:

The relationship between individual football clubs/ teams and the Lesotho Football Association (LEFA) is contractual. This relationship flows from the Constitution of National Football Federation (LEFA). The LEFA Constitution affords it corporate capacity and bestows upon it executive, regulatory and disciplinary authority over its constituent members and by necessary extension its members' employees (the players) (***Jockey Club of South Africa v Forbes (662/91) [1992] ZASCA 237; 1993 (1) SA 649 (A) at 654; Lesotho Evangelical Church v Mandoro LAC (1980 – 84) 127 at 129***). It follows therefrom that any disciplinary infraction by the player should have its source in the Constitution of LEFA.

Similarly, the relationship between LEFA and LNOC is contractual, as it is governed by the LNOC Constitution. For members of LEFA to be bound by commitments made between LEFA and LNOC, that binding power should flow directly from the provisions of LEFA's constituting document. I turn now

to examine whether LNOC Anti-Doping Rules of 2015 or Anti-Doping Rules for Signatory Members of Regional Anti-Doping Organizations of 2015 (RADO Rules) are applicable to the applicant. This exercise necessarily involves determining whether LEFA is bound by these Anti-Doping Rules (RADO Rules).

RADO Anti-Doping Rules of 2015 provides that for these Rules to be binding on National Federations they have to be part and parcel of these National Federations' Constitutions by incorporation. This theme that incorporation of RADO rules is the condition precedent for their binding power runs through RADO Anti-Doping Rules. These RADO Anti-Doping Rules provides in relevant parts:

> "1.1 Application to National Federations
>
> 1.1.1 National Federations shall accept these Anti-Doping Rules and incorporate these Anti-Doping Rules either directly or by reference into their governing documents, constitution and/ or rules and thus as part of the rules of sport and the rights and obligations governing their members and participants.
>
> 1.1.2 By adopting these Anti-Doping Rules and incorporating them into their governing documents and rules of sport, National Federations formally agree to be submitted to them and recognize the authority and responsibility of the RADO – member signatory and, when delegated, of the Regional Anti-Doping Organization."

The common theme running through all the above quoted Articles is that these Anti-Doping rules will only be binding upon LEFA once they are incorporated directly or by reference in their constitutions, this is logical because as stated earlier, the relationship between LNOC (and by extension the Associations to which LNOC is affiliated such as RADO), LEFA and its

members (Football clubs) is contractual. LEFA has got to first agree to be bound by these Rules by incorporating them directly or by reference in its Constitution. The doctrine of incorporation by reference is a law of contract doctrine.

[9] *Incorporation by reference* occurs when one document supplements its terms by embodying the terms of another (***Industrial Development Corporation of S.A. (PTY) Ltd v Silver (419/2001) [2002] ZASCA 112*** at para. 6). The importance of incorporating terms by reference was aptly articulated by **Robert Whitman**," **Incorporation by Reference in Commercial Contracts" *21Md. L. Rev.1 1961*** thus:

> "To complement the explosive development of modern business the use of commercial contracts has greatly expanded, and these documents have grown into intricate, detailed, hyper technical expositions. The doctrine of incorporation by reference alleviates this complexity by allowing a reference to incorporate into the agreement extrinsic materials which are given equal weight with provisions directly contained therein. Parties utilizing such incorporation may have the advantages of (1) speed and efficiency in the drawing of contracts; (2) stereotyped clauses which can be applied on innumerable occasions to achieve uniformity; (3) greater skill and care in the drafting of clauses to be incorporated, producing in turn, a clearer and more complete statement of intent; (4) certainly as to meaning and effect of incorporated terms after an initial construction by the courts; (5) retention of the basic provisions of the contract in convenient form."

LEFA's Constitution, upon close scrutiny does not incorporate the RADO Anti-Doping Rules either directly or by reference. The ineluctable conclusion, therefore, is that RADO Anti-Doping Rules are not applicable to the

Applicants. This conclusion renders it unnecessary to consider whether the Secretary General of the LNOC had any power to suspend, if at all, the 1st applicant. In the result the following order is made:

[10] Order

(a) The purported suspension of the 1st Applicant is declared irregular, unlawful and null and void *ab initio* as it was done in contravention of the 1st Respondent's Constitution and its Anti-Doping Rules.

(b) The Applicant is granted the costs of this application.

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M. MOKHESI

ACTING JUDGE

For Applicant: Attorney M. S Rasekoai

For respondent: Adv L. Molati