HIGHLANDERS FOOTBALL CLUB

Versus

DYNAMOS FOOTBALL CLUB

And

PREMIER SOCCER LEAGUE

And

BANC ABC (PRVIATE) LIMITED

And

CUTHBERT CHITIMA

And

DON MOYO in his capacity as the Chairman, Ad Hoc Arbitrators Committee, Highlanders and Dynamos Banc ABC Semi-Final Match N.O.

And

KENNEDY NDEBELE, ACTING PREMIER SOCCER LEAGUE, C.E.O., N.O.

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17, 21 AND 23 SEPTMBER 2010

M. Ncube and D. Mhiribidhi for the applicant
C P Moyo for 2nd, 4th, 5th and 6th respondents
Ms N. Ncube for 3rd respondent

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order suspending the playing of the BANC ABC Super 8 Cup final game between the 1st respondent and CAPS United pending the application for review filed in this court under HC 1800/10.

The salient facts of the case are the following. The applicant ("Highlanders") and the respondent ("Dynamos") are football teams playing in the 2nd respondent, Premier Soccer League ("PSL"). Highlanders and Dynamos engaged each other in a semi-final fixture. The game was characterized by anarchy leading to its eventual abandonment when the referee deemed it too dark to continue. In short, Highlanders is unhappy with the determination of the Ad Hoc Arbitration Committee chaired by 5th respondent. Highlanders filed the above-mentioned application for review and they now seek to stay the final game of the competition pending the outcome of the review application. The application is opposed by all respondents save for 3rd respondent. The 6th respondent raised preliminary points which I propose to consider in turn before dealing with the application on merits.

Locus standi: The 6th deponent

The applicant did not file a written proof that he had authority to institute proceedings on behalf of Highlanders. Highlanders in answer states that he has authority but this was reflected in the minutes. He, however, stated that Highlanders minutes are confidential. I am satisfied that the deponent has authority to depose the affidavit on behalf of the applicant. Frankly, I do not understand why that 2nd and 6th respondents should make this an bona fide issue. The deponent Andrew Tapela is known to these respondents as secretary general of Highlanders. He represented Highlanders at the Ad Hoc Committee chaired by the 5th respondent i.e. he deposed to and filed the Highlanders match report on behalf of the applicant. In its ruling, the Ad hoc Committee stated:-

"We feel we have to single out and comment the Highlanders Chairman Mr T. Ndhlela, the team manager D. Mloyi and secretary A. Tapela for the manner they conducted themselves in the ongoing melee. They are true ambassadors of football" (emphasis added). Having previously dealt with Andrew Tapela extensively the 2nd and 6th respondents cannot be heard to challenge his authority to represent the applicant. This issue was raised in bad faith – Wang and Ors v Ranchod NO & Ors 2005 (1) ZLR 415 (H) and Mudzengi & Ors v Hungwe & Anor 2001 (2) ZLR 179 (H).

Irreparable damage

The issue raised here is that the applicant merely averred that the applicant will suffer irreparable damage without disclosing the nature of such damage. The articulation by the applicant may be lacking in clarity but the damage can easily be inferred from the applicant's papers i.e. the applicant will be prevented from further participating in the competition. This point in limine is without merit.

Appeal or review

The issue raised here is really one that can be determined when the application for review under HC 1800/10, supra, is heard.

Exhausting domestic remedies

The reason why the applicant brought its application for review is because of the BANC ABC Super 8 KNOCK OUT CUP (2010) Edition) provides -

"13. ARBITRATION

13.1 In order to expedite the resolution of protests so as not to disrupt the smooth flow of the competition, an ad-hoc Arbitration Committee shall be set.

13.2 The decision of the ad-hoc Arbitration Committee shall be final." (emphasis added)

This effectively closes all avenues to appeal the decision of the |Ad Hoc Arbitration Committee internally. This provision is clause 13.2, supra, extinguishes any recourse to domestic remedies, including appeal pursuant to the Zimbabwe Football Association ("ZIFA") Constitution and Rules. This distinction between the decision and penalty raised by the 6th respondent is without merit. Such distinction would have the effect of defeating the objective set out in clause 13.1.

Exclusion of ordinary courts:

This point is premised on Article 62 of FIFS Statutes which provides:

"1. The Confederations, Members and Leagues shall agree to recognize CAS as an independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS. The same obligation shall apply to licensed match and player's agents.

2. Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations." (emphasis added)

This court cannot decline to exercise jurisdiction in football matters on account of FIFA statutes. FIFA statutes do not outs the inherent jurisdiction of the court. The statutes are binding on its affiliates and not this court. FIFA statutes create a disciplinary dispensation for its members. I associate myself with KAMOCHA J in Khami United Football Club v Zimbabwe Footbal Association HB-22-10 (HC 589/10) on this point. This point is devoid of merit.

On the merits, it is clear that this is an application for an interdict. For the applicant to succeed it must satisfy the following requirements –

(a) A clear or prima facie right;
(b) A well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
(c) That the balance of convenience favours the granting of an interdict, and
(d) That the applicant has no other satisfactory remedy – Phillips Electrical (Pvt) Ltd v Gwanzura 1988 (2) ZLR 117 (HC); Nienaber v Stuckey 1946 AD 1049 at 1054; Flame Lily Investments (Pty) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor 1980 ZLR 388 and Rowland Electro Engineering (Pvt) Ltd v ZIMBANK 2003 (1) ZLR 223 (H).

It is beyond dispute that as a participant in the competition, Highlanders have a clear right to protest flaws in the competition. The basis of the protest is detailed in the applicant's papers. The applicant has a well granted apprehension that should be the final game to be played before the application under HC 1800/10 is determined, the latter outcome will be of academic nature.

The balance of convenience favours the granting of the interim relief. In the application under HC 1800/10 is ruled in favour of the applicant after the final game it would mean that the game between the applicant and 1st respondent will be replayed. If the other team CAPS FC has won the final game, the may not accept the turn of events resulting in further legal contestation. This is not good for all the parties involved including the 1st and 2nd respondents. This will, in any even defeat the objective of clause 13.1 of the competition as the cup tournament will be characterized by unnecessary litigation. It does not make sense that a cup final game is played when there are pending issues which may affect the outcome outside the football pitch. The balance of convenience favour the determination of all outstanding protests before the final game.

Finally, the applicant has no other satisfactory remedy as alluded to above in view of the provisions of clause 13.2 of the competition rules, supra.

It does seem to me that the parties in their papers delved unnecessarily on emotive aspects of the abandoned game and personalities involved. In the process they tended to lose focus on the main issue. The main issue seem to be whether the game was abandoned on account of behavior of Highlanders, supports (the basis for Ad Hoc Committees finding against applicant) or whether it was on account of poor visibility as reflected in the match referees report. If it is the former, then the Ad Hoc Committees findings would be understandable. But if it is the latter, then a replay of the game would most likely outcome would have been a

replay. It is for this reason that I had encouraged the parties to see if they cannot find common ground but it seems they failed. This issue will be dealt with by the court on review under HC 1800/10.

The applicant has conceded that it wrongly cited the 4th, 5th and 6th respondents. The applicant's founding affidavit does not deal with these respondents. The application against then should be dismissed with costs.

The 3rd respondent, as alluded to above, does not oppose the application. With such an attitude by the sponsor of the competition one would have expected the issue to have been resolved much earlier. The 2nd respondent submitted that they are opposing this application because they have been battling to attract sponsors. If they are to succeed in this endeavour, they have to develop and enhance their dispute resolution mechanisms. This case is not a good advertisement to attract sponsorship.

Accordingly, I grant the provisional order in terms of the amended draft order against the 1st and 2nd respondents only and I dismiss the application with costs on the ordinary scale against the 3rd, 4th , 5th and 6th respondents.

Phulu and Ncube, applicant's legal practitioners
Moyo and Nyoni, 2nd, 4th 5th and 6th respondents' legal practitioners