

## **FAIR PLAY? FOOTBALLERS THE VICTIMS OF CLUBS WHO STRUGGLE FINANCIALLY**

by *Johan van Gaalen\**

**SUMMARY:** Introduction – 1. South African Position in Respect of Retrenchments in General – 2. Retrenchment as a Breach of Contract – 3. Sport Specificity Justifies Retrenchment? – Conclusion

### *Introduction*

Does a Club's relegation or financial difficulties justify early termination of a footballer's fixed term contract of employment? Due to the world wide economic crises, this issue becomes more and more relevant to the football environment.

In this article a general reference will be made to world football, however specific reference will be made to the situation in South Africa and the applicable domestic laws. All reference to case law, is in respect of South African reported cases.

This matter raises the central question, namely:

*“Whether Football Clubs may retrench football players whom are contracted on fixed term contract.”*

Flowing from the question is whether retrenchments for operational requirements are a just cause (gives the respondent the entitlement) for prematurely terminating a football player's fixed term contract.

### *1. South African Position in Respect of Retrenchments in General*

The following legal principles have become solidified and well engrained in the current South African labour law and South African constitutional dispensation (any references to case law, will be South African cases, save where it is expressly indicated otherwise):

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- Consultation in terms of the South African Labour Relations Act means a *bona fide* attempt to reach consensus with an employee before a retrenchment takes place.<sup>1</sup>
- There must be a proper disclosure of information / essential information before adequate consultation can take place and failure to do so renders the retrenchment procedurally unfair.<sup>2</sup>

It has been held that where an employee is employed on a fixed term contract of employment and where such employee was dismissed where such work for which he was employed is still available – in this case the position to play football – and the employee is dismissed for operational reasons, a dismissal is deemed to be unfair.<sup>3</sup> What makes this situation even more ridiculous is that Clubs retrench footballers whilst other football players were in fact recruited at the same time by the Club.

Retrenchment should be the last resort and Clubs must proof that retaining the employee is not feasible.<sup>4</sup> Restructuring should be considered at the very least e.g. footballers should be offered to stay at the Club and play for a lesser salary, until such time the financial situation of the Club has improved.

It is trite in the South African Labour Law that both the employer and the employee must take part in a debate to discuss alternatives.<sup>5</sup> That the process of consultation between Club and footballer must be aimed at genuinely seeking consensus on issues.<sup>6</sup> It is submitted that Clubs abuse the financial excuse in order to get rid of footballers whom either is not fitting in the plans of the coach or does not perform properly. Poor work performance is a total different procedure and the guideline therefore has been laid down in football cases.

The South African Labour Relations Act defines an operational requirement as follows:

- “Operational requirements” means requirements based on the economic, technological, structural or similar needs of the employer.<sup>7</sup>

The South African Code of Good Practice in respect of Dismissals for Operational Requirement clearly stipulates that dismissal as a result of operational requirement should be based on the economic, technological, structural or similar needs of the employer. The Act at Section 213 is clear and unambiguous insofar as the definition of an “operational requirement”. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Relegation of a Club, which result in the Club’s grants be reduced by its association, could therefore be regarded as a reason. Technological reasons refer to the

<sup>1</sup> CWIU v Johnson & Johnson (Pty) Ltd [1997] 9 BLLR 1186 (LC).

<sup>2</sup> Chotia v Hall Longmore & Co (Pty) Ltd [1997] 6 BLLR 739 (LC).

<sup>3</sup> Mkhiva v BCS Joint Venture [1997] 8 BLLR 1014 (LC).

<sup>4</sup> Manyaka v Van de Wetering Engineering (Pty) Ltd [1997] 11 BLLR 1458 (LC).

<sup>5</sup> Fletcher v Elna Sewing Machine Centres (Pty) Ltd [2000] 3 BLLR 280 (LC).

<sup>6</sup> Strauss v Plessey (Pty) Ltd [2002] 1 BLLR 105 (LC) AND Alpha Plant and Services (Pty) Ltd v Simmonds & others [2001] 3 BLLR 261 (LAC).

<sup>7</sup> South African Labour Relations Act at Section 213.

introduction of new technology which effects work relationship. With all due respect, it could never be a valid reason in the football environment. The rules of the game of football stipulates that 11 (eleven) players shall start a match on the field and 7 (seven) players shall be on the bench as reserves. Technology can never replace players. Structural reasons relate to the redundancy of post consequent to a restructuring of the employer's enterprise. It would be impossible to justify structural reasons as a reason for retrenchment of players in the football environment, in light of the rules of the game as referred to above in the paragraph supra.

The South African Labour Relations Act requires that the criteria for selection must be either agreed on with the consulting party but if no criteria have been agreed on, then fairness and objectiveness must be used. A criteria that the footballer does not form part of the Club's future plans or the footballer did not perform, must be regarded as a subjective criterion that could in no way be fair and reasonable. Performance could never be justified as a criterion for retrenchments of footballers. A non performing player could not be retrenched in these circumstances and the necessary disciplinary process needs to be followed in order to deal with non performing players. According to the firm jurisprudence of the FIFA DRC, the principle of contractual stability, a contract cannot be dependent on the performances of the player. This is a subjective criterion, which can be easily abused.

## *2. Retrenchment as a Breach of Contract*

It is a common fact that all the footballers are contracted on fixed term contracts. Rule 36 of the South African National Soccer League deals with professional contracts and reads as follows:

### *"36 PROFESSIONAL CONTRACTS*

- 36.1 Every club employing a professional player must have a written contract with the player.*
- 36.2 Every contract of employment of a professional player shall have a minimum duration of one full season and a maximum duration of five full seasons and shall be consistent with the laws of the Republic of South Africa as well as the Constitution, Rules and Regulations of SAFA.*
- 36.3 The expiry date of a contract may only fall on 30 June in any year. It shall however be allowable for a contract to be terminated before its scheduled expiry date by mutual consent between the player and the club for which he is registered, in which case the player may only be registered by a new club during the next registration period or at and time thereafter."*

In terms of the rules of the South African National Soccer League and general practise worldwide, a fixed term contract may only be prematurely

terminated for reasons of just cause. The FIFA regulations<sup>8</sup> prohibit the unilateral termination of a contract during the course of a season in order to ensure contract stability. In terms of the standard fixed term contract, needed to be signed by all footballers playing football in the South African Premier and National First Division, it is stipulated that a contract between footballer and Club may only be terminated as follows under the following circumstances:

18 *Termination of Employment:*

*Notwithstanding the fact that this is a fixed term contract, the Club may terminate this agreement by the giving of 1 (one) month's written notice prior to its expiry if:*

18.1 *The footballer is found guilty of misconduct justifying dismissal;*

18.2 *The footballer is found to be incapable of competently fulfilling the job for which he has been employed.”*

Retrenchments in South Africa are regarded as a no fault dismissals on the part of the employee. The footballer can therefore not be responsible for the unilateral termination of the fixed term employment contract. If no agreement can be reached between a Club and a footballer in respect of the early termination of the footballer's contract and the Club unilaterally enforces such a condition, it will constitute a breach of contract. In terms of a contract, with the same or similar clause of termination as stipulated above, the Club will not be entitled to retrench a footballer and therefore will breach the fixed term contract. Termination of the footballer's contract due to retrenchment in the above circumstances should be regarded as unlawful, without just cause.

The South African Labour Appeal Court<sup>9</sup> has held that an employer may not under any circumstance retrench an employee on a fixed-term contract if the termination occurs before the contract's expiry date, unless the contract provides for termination at an earlier date. Retrenchment in these circumstances will constitute a breach of contract, for which the employee will be entitled in principle to claim compensation for the salary lost during the balance of the contract period. Such termination will therefore be regarded as unlawful. There is no reason why this principle could also be applied in the football environment of South Africa and possible in the world.

It was furthermore held in the Buthelezi matter<sup>10</sup> that in terms of the common law a party to a fixed term contract has no right to terminate such contract in the absence of repudiation or a material breach of the contract by the other party. In other words, the respondent had no right to terminate the applicants' fixed term contract, even on notice unless the terms of the contract provide for such termination, which it did not. Acting Judge Davis in the Buthelezi matter stipulated: *“When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour*

<sup>8</sup> FIFA Regulations on the Status and Transfer of Players, regulation 16.

<sup>9</sup> Nkanyiso Eustace Buthelezi v Municipal Demarcation Board (2005) 26 ILJ 443 (LAC).

<sup>10</sup> Nkanyiso Eustace Buthelezi v Municipal Demarcation Board (2005) 26 ILJ 443 (LAC).

*and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things.”*

In light of the above, a club’s argument that the club was relegated or the footballer do not fit in the club’s future plans or the applicants did not perform, cannot be accepted as valid and fair reasons for termination of the fixed term contracts. Clubs are taking the risk when concluding a contract for longer than 1 year and therefore a club cannot complain when the risk materializes. In fact, the player and the club both take risks when they enter into a long fixed term contract. The player put himself to risk to bind himself for a certain period at one club, whereas he could have been contracted after one year, maybe to a premier club or any other club for a higher salary. Both parties took risks and made a choice and there is no unfairness in the exercise of the choice, therefore the party in breach, must bear the consequences.

Acting Judge Nugent, in the *Wolfaardt* matter<sup>11</sup> stipulated that a contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law.

The Federation Internationale De Football Association (“FIFA”) forms the overarching regulatory body dealing with football internationally. FIFA has complied what is known as the regulations on the status and transfer of players which essentially deal with a variety of regulatory issues governing essentially that which Football is all about namely playing of a game by players and how the status of these players will be determined at various levels regarding various issues. Essentially the regulations laid down global and binding rules concerning the status of players (“Regulations”) and their illegibility to participate in organised football and their transfer between clubs belonging to different Associations.<sup>12</sup> The Regulations under the heading “Maintenance of Contractual Stability between Professionals and Clubs” reads as follows:

*“13. Respect of Contract:*

A contract between a professional and a Club may only be terminated upon expiry of the term of the contract or by mutual agreement.

*14. Terminating a Contract with just cause:*

A contract may be terminated by either party without consequences

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<sup>11</sup> *Fedlife Assurance Ltd v HJ Wolfaardt* – par 22.

<sup>12</sup> Introductory provision, para 1 (scope).

of any kind (either payment of compensation or in position of sporting sanctions) where there is a just cause.

16. *Restriction on terminating a contract during a season:*

A contract cannot be unilaterally terminated during the course of a season.”

Even if Clubs can prove that the retrenchment of footballers can be regarded as a valid reason and just cause for termination, the FIFA regulation 16 is clear in that a contract cannot be unilaterally terminated during the course of a season. Retrenchments are regarded as no-fault dismissal on the part of the employee / footballer, and therefore the termination of the contract is unilaterally.

In light of the above South African case law, it is clear that it is prohibited to terminate a fixed term contract without the parties agreeing on the conditions of which such contract can be terminated. In other words, if the parties have not agreed that the fixed contract can be terminated due to retrenchment, any retrenchment of such person will result in an unlawful termination of the contract, meaning a breach of contract occurred. Therefore the manner in which a fixed term contract may be terminated, which will also apply to footballers, should be agreed in terms of the contract and be so regulated. This is fair and reasonable with special reference to the principle of contract stability as prescribed by FIFA and practise in the greater part of the football world.

However, the South African clubs attempt to avoid liability when wanting to retrench, and created a club handbook in which it is stipulated that clubs may retrench footballers. It must be noted that this handbook is unilaterally drafted by the club and enforce on a player joining the club. South African football players are required to sign a standard NSL fixed term contract / a written fixed term contract. The particular contract provides as follows:

“3. *Appointment and Duties:*

3.1 *The Footballer shall perform to the best of his ability all duties and functions (own emphasis) set out in this contract and also in the handbooks and codes of practice issued by the Club and the football rules as amended from time to time which documents are incorporated herein by reference”.*

The clubs with handbooks rely on the above clause and submit that the handbook is incorporated into the fixed term contract of the player by reference and therefore the club is entitled to retrench a player. With reference to the above clause and clause 18 of the standard NSL contract (stipulated above) is submitted that the handbook of a club incorporated herein only regulates the player’s duties and functions and the contract of employment may only be terminated if a player was found guilty of misconduct or if a player was incapable to play. Therefore, despite the clubs prescribing in its handbook that a player’s contract may be terminated due to retrenchments, it is submitted that such manner of termination must be unlawful due to the only grounds the club and player agreed upon in respect of termination, is regulated in the fixed term contract. It is clear in terms of the standard NSL football contract that the handbook of a club only regulates

the duties and functions of a player and not the personal rights of a player, such as termination.

### *3. Sport Specificity Justifies Retrenchment?*

A school of thought contends that the nature and the very existence of football gives rise to a term known as sport specificity. Differently put, the school contends the specificity of sport and in particular the game of football allows that a club may retrench based on the decision by a technical team or a head coach to restructure a team to the exclusion of a particular player as in this case of MOKORO<sup>1</sup> and on that basis sports specificity justifies the player's dismissal on the basis of operational requirements. It is submitted that the overarching legislation captured in the South African Labour Relations Act 66 of 1995 (as amended) (South African Labour Relations Act) which amplifies the provisions of the South African Constitution<sup>2</sup> clearly overrides any form or notion or inclination to the term sport specificity. Furthermore, it is with due respect that the term of sport specificity cannot be used when and needed by clubs in order to benefit them, which results in contract instability.

### *Conclusion*

Retrenchments could not be a fair reason to terminate a player's fixed term contract, if the parties have not expressly agreed thereto. No agreement, no entitlement and definitely no just cause. This practise definitely results in unfair play.

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<sup>13</sup> Mokoro vs Ajax Cape Town NSL DRC, SAFA Appeal & SAFA Arbitration

<sup>14</sup> Act 108 of 1996.