

**KEEPING SPORT OUT OF THE COURTS: THE NATIONAL SOCCER LEAGUE DISPUTE
RESOLUTION CHAMBER - A MODEL FOR SPORTS DISPUTE RESOLUTION IN SOUTH
AFRICA AND AFRICA**

by *Farai Razano**

SUMMARY: 1 Introduction – 2 Dispute Resolution in General – 3 National Soccer League Dispute Resolution Chamber 4 – Conclusion

I. Introduction

Sport has steadily become a big commercial enterprise in Africa. This growth is no surprise as sport throughout the world has undergone significant commercialisation, and estimations claim that world sport now constitutes more than three per cent of world trade.¹ This significant commercialisation of sport has brought with it an increase in competition and regulation. Inevitably, there has also been an increase in disputes in sport, making true the cliché that ‘where there is money to be made and lost, litigation is never far away.’² The disputes that arise in sport are varied and wide ranging, and include commercial disputes, disputes relating to the rules of and participation in sport and employment related disputes. These disputes can be resolved through a plethora of processes. The dispute resolution processes are mainly litigation in the courts or outside the courts through Alternative Dispute Resolution (“ADR”) mechanisms. ADR has now become the mainstream form of dispute resolution in sport related disputes across the world. This is due to a number of reasons that shall be discussed in more detail below. However, one of the key reasons is the need by sportspersons and sports federations to avoid washing their filth in public, thus trying their best to resolve their disputes within the sporting family.³ Consequently, most sporting codes – both National Sports Federations (“NSFs”) and International Sports Federations (“ISFs”) – prescribe in their rules or regulations that disputes be resolved through ADR processes rather than through the courts.

Football, in particular South African professional football, is one of the sporting codes that have rules or regulations that prescribe that disputes amongst participants in the sport be resolved through ADR rather than the courts. The Constitution⁴ and Rules⁵ of the National Soccer League (“NSL”), the Constitution of the South African Football Association (“SAFA”) and the Statutes of the *Fédération Internationale de Football Association* (“FIFA”) all enjoin participants in football to have their disputes resolved through ADR. As a result of these rules, the NSL has a Dispute Resolution Chamber (“the NSL DRC”) that deals with all disputes – other than those of a disciplinary nature – in professional football in South Africa.

This paper looks at dispute resolution in professional football in South Africa. The main area of focus is the NSL DRC; how it is constituted, its jurisdiction and jurisprudence. It concludes by arguing that the NSL DRC is an effective dispute resolution tribunal that should be a model for sports disputes resolution in South Africa. And as a result of the non-existence of centralised sports dispute resolution tribunals as is the case in other countries such as England, Ireland and Canada, the NSL DRC is also model for other sports and the development of *lex sportiva* (sports law)⁶ in South Africa and Africa as a whole.

* Senior Associate at ENSafrica (South Africa); Admitted Attorney of the High Court of South Africa; LLB, LLM – University of KwaZulu-Natal (South Africa), frazano@ensafrica.com

1 Gardiner, S; O’leary, J; Welch, R; Boyes, S and Naidoo, U. 2012. *Sports Law*. Routledge, Oxford p210.

2 Cloete R (ed). 2005. *Introduction to Sports Law in South Africa*. LexisNexis Butterworths, Durban p205.

3 Ibid.

4 As amended on 1 August 2012 <http://images.supersport.com/2012-08-01-NSL-Constitution.pdf> (accessed 5 November 2013).

5 As amended on 30 August 2012 <http://images.supersport.com/content/2012-08-30-NSL-Rules.pdf> (accessed 5 November 2013).

6 For a discussion on the development of sports law see generally Anderson, J. 2010. *Modern Sports Law: a textbook*. Hart Publishing, Oxford and Portland Oregon p. 1 – 27; Gardiner et al, op cit., p. 77 – 87; James, M. 2013. *Sports Law* (2nd ed). Palmgrave Macmillan p. 6 - 26.

2. *Alternative Dispute Resolution (ADR) in general*

Before looking at the NSL DRC it is important to look at Alternative Dispute Resolution (ADR) in sports in general and the various forms it has taken in modern times. It is also important to look at why ADR is increasingly the preferred means of resolving disputes in sports; the sports disputes resolution approaches in other countries and the attitude of the courts towards ADR. ADR is the resolving of disputes without resorting to the court. There are various forms of ADR ranging from conciliation, mediation, conciliation/arbitration or mediation/arbitration, arbitration and in some instances expert determination.⁷

Typically conciliation and mediation involve negotiations between the parties to a dispute assisted by a neutral person who tries to bring the parties to an agreement. Conciliation and mediation are almost similar and are very often confused as the same process. But conciliation and mediation are different. In conciliation proceedings, the conciliator generally suggests solutions to the parties. In mediation proceedings, on the other hand, the mediator simply assists the parties to negotiate and reach their own settlement.⁸ Conciliation-Arbitration (Con-Arb) or Mediation-Arbitration (Med-Arb) involve the parties attempting to resolve the dispute through conciliation or mediation and if that fails arbitration starts immediately after the conciliation or mediation (as the case may be).

Arbitration is the adjudication of a dispute by a third party – the arbitrator – that is appointed to adjudicate the dispute between the parties. In some instances the arbitrator's decision is final and binding. But in some there is a right of appeal to a further panel of arbitrators.

Expert determination is mainly used in disputes involving issues relating to quantum or fixing of an amount for a certain service or product.⁹ Expert determination would be the most preferred form of ADR where for example clubs have a dispute relating to the value of a player to be transferred between the clubs. An expert in the field, for example a players' agent, can be appointed by the parties to fix the value of the player.

ADR has been resorted to over the years by parties by agreement or in some instances, and very common in sport, as a result of the rules or regulations of NSFs or ISFs that prescribe that any disputes that arise amongst participants in the sport be resolved through ADR rather the courts.¹⁰ In football, FIFA requires all its affiliates, NSFs, to incorporate a clause to this effect in their rules.¹¹ The main reasons that make ADR preferable over the courts are that ADR is generally quicker, more flexible, less expensive, confidential, in some instances a win - win situation as parties compromise, maintain and preserve business relations, and is conducted by people with expertise and experience in the relevant field of sport.¹² Nothing more needs to be said here about the confidentially aspect of ADR as 'sports-persons and sports bodies prefer not to wash their dirty linen in public.'¹³ However, it is worth emphasising that sports related disputes referred to ADR are more often dealt with by people who have extensive experience in sport. This results in consistency due to the relatively small group of specialist arbitrators.¹⁴

7 For a general discussion on various forms of alternative dispute resolution processes see Blackshaw, I.S. 2011. *Mediating Sports Disputes*. In Nafziger, J.A.R and Foss, F.R (eds). 2011. *Handbook on International Sports Law*. Edward Elgar Publishing Limited, Cheltenham p. 65 – 87; Blackshaw, I.S. 2012. *Sports Marketing Agreements : legal, fiscal, and practical aspects*. TMC Asser Press, The Hague p. 460 - 463; Anderson, op cit., p. 77 – 112.

8 Blackshaw, I.S. 2011. *Mediating Sports Disputes*. In Nafziger, J.A.R and Foss, F.R (eds). 2011. *Handbook on International Sports Law*. Edward Elgar Publishing Limited, Cheltenham p. 67.

9 Ibid.

10 See generally Cloete, op cit., p. 205; see also Anderson, J. 2010. Keeping Sports out of Courts: the use of Alternative Dispute Resolution in Irish Sport. *Arbitration* 2010, 76 (4), 647 to 666; see also Gardiner et al, op cit., p. 138 – 144.

11 Article 68.3 of the FIFA Statutes provides that '...Associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, clubs, members of clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the Association or Confederation or to CAS. The Associations shall also ensure that this stipulation is implemented in the Association, if necessary by imposing a binding obligation on its members. The Associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary courts of law.

12 Blackshaw, op cit., p. 451 – 452.

13 Cloete, op cit., p. 205; Blackshaw, op cit., p. 65.

14 see Gardiner *et al*, op cit p. 138.

In some countries sports related disputes are resolved through centralised sports dispute resolution tribunals. Good examples are Ireland and England where tribunals such as the Dispute Resolution Authority (DRA) of the Gaelic Athletic Association (GAA), Just Sport Ireland and Sports Resolution UK are centralised tribunals that deal with sport related disputes.¹⁵ The jurisdiction of Just Sport Ireland, for example, is confirmed in the rules or regulations of various NSFs in Ireland. The rules or regulations of the NSFs prescribe that any dispute arising as a result of participation or amongst participants in that sporting code should be referred to Just Sport Ireland for resolution or determination.¹⁶ In New Zealand, for example, there is even a statute based national sports dispute resolution tribunal.¹⁷

Despite the many and compelling reasons in support of ADR as the preferred means of resolving sports related disputes, there are still cases in which parties to these disputes refer their disputes to courts for resolution. This happens even in instances where there are agreements between the parties to refer sports related disputes to ADR or the rules or regulations of their NSFs enjoin them to refer disputes to ADR or to be resolved through internal dispute resolution processes. However, it is important to note that the courts still retain or enjoy jurisdiction over sports related disputes despite arbitral agreements or arbitral clauses in the rules or regulations of NSFs. This is because such clauses do not oust the jurisdiction of the courts. But the courts are very reluctant to exercise their jurisdiction and prefer that sports related disputes be resolved through internal tribunals or ADR. In Ireland for example the courts' position has been that courts are not necessarily the suitable forum for the resolution of sports related disputes and sports matters are best decided or adjudicated internally by the relevant sporting body.¹⁸ Similarly in England it is a long established tradition that the courts are reluctant to, and do not, generally intervene in sports disputes.¹⁹ This is clearly seen from Lord Denning's comments in the *Enderby Town Football Club Ltd vs Football Association Ltd* matter that "justice can often be done better [in domestic tribunals] by a good lay person than by a bad lawyer and court."²⁰

Attempts by parties to resort to the courts rather than ADR are also a common feature in South African sport. And disputes in South African professional football are no exception. A number of professional football related disputes have been referred to the courts rather than to ADR in the past. The approach of the South African courts as shall be seen in the later parts of this paper is similar to that of the Irish and English courts mentioned above. While courts retain jurisdiction over sports related disputes, they are reluctant to interfere were ADR is available to, and is the chosen means to resolve disputes between, the parties. This is more so if there is an agreement between the parties to the dispute or the rules or regulations of their NSFs enjoin the parties to utilise internal dispute resolution processes or ADR.

3. *The National Soccer League Dispute Resolution Chamber*

3.1. *The football set up*

Professional football worldwide is arranged in a pyramid structure. In the South African context the descending hierarchy is as follows; at the apex is FIFA, followed by the Confederation of African Football ("CAF"), the South African Football Association ("SAFA") and the NSL at the base. SAFA – as the NSF – regulates all football in South Africa, amateur and professional. The NSL on the other hand is the only professional football body and a special member of SAFA. It regulates all professional football in South Africa. The NSL's activities are mainly regulated by the NSL Constitution and the NSL Rules. The NSL comprises two tiers of 16 teams each; the Premier Division, popularly known as the PSL and the National First Division ("the NFD").²¹ Anyone wishing to pursue professional football, be it as a footballer, club or official can only do so under the auspices of the NSL.

15 Anderson, op cit p 653.

16 Anderson, op cit., p. 654.

17 Anderson., op cit., p. 655.

18 Anderson, op cit., p. 648.

19 Blackshaw, op cit., p. 66.

20 [1971] Ch 591, at p. 605 quoted in Blackshaw, op cit., p. 66.

21 Rule 3.

3.2. *The establishment of the NSL DRC*

In terms of the Constitution of South Africa (“the Constitution”)²², ‘everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’²³ Consequently, a party to a dispute can approach the court or elect to have the dispute resolved through ADR as it is their constitutional right. Participants in sport also have such a choice. But there are limitations to the choice as shall become apparent below. In most instances the rules or regulations of their NSFs enjoin them to refer disputes to ADR. In some instances there are contractual undertakings by the parties to refer disputes to ADR. In any event, rules or regulations of NSFs are regarded as a contract amongst the members of the NSFs. And if they contain an arbitral clause, parties to such contract are required to refer disputes to ADR instead of the courts.

The turning point for dispute resolution in professional football in South African was the judgment of the High Court in the matter of *Coetzee v Comitits and Others*.²⁴ There can be no doubt that the Coetzee matter is South African football’s Bosman case.²⁵ Briefly and pertinent to this paper, Coetzee was a professional footballer who battled to get his clearance certificate from his previous club after his contract with the club had come to an end. Coetzee brought a challenge before the court arguing among other things, that the NSL Constitution and Rules relating to the transfer of footballers were inconsistent with the Constitution and therefore invalid. The court found in Coetzee’s favour and declared part of the NSL Constitution and Rules inconsistent with the Constitution and invalid. Although the court’s finding, arguably, related to specific provisions of the NSL Constitution and Rules, the Coetzee matter marked the turning point for the NSL’s Constitution and Rules in general. The NSL went on to effect significant changes – if not a complete overhaul of – its Constitution and Rules. Most notable of these changes are the changes to the rules relating dispute resolution. Prior to these changes, the NSL Constitution and Rules had provisions for the resolution of disputes internally, but there was no dispute resolution chamber. Arbitrations in terms of the NSL Constitution and Rules were ad hoc, held in terms of the Arbitration Act²⁶ and only convened after the dispute had been referred to the Chief Executive Officer (“CEO”) of the NSL for determination or where the parties had opted for arbitration directly.

Following the Coetzee ruling, as mentioned above, the NSL amended its Constitution and Rules to provide for internal dispute resolution among those involved in professional football through standing committees of the NSL. Article 16 of the NSL Constitution provides for the establishment of two standing committees under the NSL, namely the Disciplinary Committee and the NSL DRC. The Disciplinary Committee deals with all matters of a disciplinary nature. Disputes of a disciplinary nature include disciplinary charges that are instituted by the NSL on its own accord and disciplinary disputes instituted pursuant to protests or complaints by members of the NSL against one another. The Disciplinary Committee has powers to impose sanctions ranging from warnings, suspensions or bans, and monetary fines.²⁷ A party that is dissatisfied with the finding or sanction of the Disciplinary Committee can refer an appeal to SAFA in terms of the SAFA Constitution. If any of the parties is not satisfied with the SAFA Appeals Board’s decision the matter can be referred to arbitration in terms of the SAFA Constitution. The arbitration is final and binding. An appeal against the arbitrator’s decision can be lodged to CAS.²⁸

The NSL DRC, on the other hand, deals with any other disputes that are not of a disciplinary nature. Article 18.1 of the NSL Constitution provides that:

22 The Constitution of the Republic of South Africa, 1996.

23 Section 34 of the Constitution of the Republic of South Africa, 1996.

24 2001 (1) SA 1254 (C).

25 Case C-415/93, *Union Royale Belge des Sociétés de Football Association v. Jean-Marc Bosman, Royal Club Lidgeois v. Jean-Marc Bosman and others, and UEFA v. Jean-Marc Bosman*, December 15, 1995, 1995 E.C.R. I-4921. This case revolutionised the rules relating to the transfer and free movement of footballers in Europe. It confirmed that once a footballer’s contract had come to an end, such footballer is free to move to any club and no transfer fee can be demanded for the footballer. It also confirmed that European clubs cannot restrict the number of footballers from EU countries.

26 42 of 1965.

27 Rule 55.6.

28 Good examples of such appeals to CAS are the appeals – at the time of writing – by Thanda Royal Zulu Football Club and Chippa United Football Club relating to the sanctions imposed by the Disciplinary Committee following a boycott of matches by the NFD clubs during the NSL 2012 – 2013 season. The sanctions affected promotion of clubs from the NFD to the Premier Division of the NSL.

... all participants in professional football are required, and undertake as a condition of membership and/or registration with the NSL, to refer all and any disputes and differences, other than those of a disciplinary nature, as between them to the Dispute Resolution Chamber rather than to courts or administrative tribunals.

Article 24 of the NSL Constitution makes it clear that disputes should be resolved primarily through ADR and the courts should be the last resort. It provides that:

A club, official, player, coach, agent or any person subjected to the provisions of this constitution, may not seek recourse in a court of law or administrative tribunal on any issue that may be determined in terms of this constitution or rules of the League or SAFA or the statutes of FIFA unless all procedures prescribed in these prescripts have been exhausted.

Article 18 and 24 of the NSL Constitution are a compromise between FIFA Statutes and the Constitution. They give effect to the FIFA Statutes while at the same time ensuring that the constitutional right set out in section 34 of the Constitution is not infringed. Article 68.2 of the FIFA Statutes is couched in absolute terms i.e. 'recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.' Section 34 of the Constitution on the other hand puts the courts at the forefront. It prescribes that the Constitution '...is the supreme law of the Republic [of South Africa]; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'²⁹ As a result of this potential conflict and to ensure that the NSL Constitution and Rules are valid in terms of South African law, the NSL compromised between the two by providing for dispute resolution in terms of the football rules as the first instance and then the courts if the dispute remains unresolved. Therefore a participant in professional football will face difficulties in persuading the courts to exercise their discretion and deal with a matter if the 'internal remedies' (ADR in terms of football rules or agreements) have not been exhausted first. The NSL has to be commended on this as very often, in South Africa, the argument against ADR is that access to court is a constitutional right and an arbitral clause or rule does not oust the jurisdiction of the courts.

The standard NSL fixed term contract of employment for professional footballers also prescribes that any disputes arising from the contract must be referred to the NSL DRC.³⁰ In addition various NSL clubs have incorporated an arbitration clause in their contracts and employee handbooks stipulating that all disputes arising between the parties should be referred to the NSL DRC.

The NSL DRC is an independent tribunal whose members are appointed by the NSL Executive Committee and footballers or their representatives.³¹ Article 18 of the NSL Constitution provides for the establishment of the NSL DRC; demarcates its jurisdiction; prescribes the formalities that dispute referrals to the NSL DRC must comply with and the principles that the NSL DRC has to observe in dealing with any disputes brought before it. The NSL DRC is required to follow the principles of fairness and equity, 'just cause' and its developing jurisprudence in making its decisions.³² The Chairman of the NSL DRC is a senior advocate (barrister) and all the other members are attorneys (solicitors). Every dispute is adjudicated by a panel of three i.e. a permanent Chairman sitting with two other members that rotate from time to time.

3.3. *Procedure and jurisprudence*

The NSL DRC has jurisdiction over disputes relating to, among other things, the determination of the status of footballers, disputed transfers of footballers, unfair dismissal and breach of contract.³³ The NSL DRC also plays an advisory role by advising the NSL – at the request of the NSL – on the interpretation of FIFA Statutes and regulations governing the status and registration of footballers.³⁴ The NSL DRC has jurisdiction over all participants in professional football i.e. the NSL itself, clubs, clubs' officials, footballers, coaches and agents.³⁵ There have been debates about the NSL DRC's jurisdiction over agents as they are not members of the NSL. A number of disputes have been referred to the NSL DRC by agents who have argued that the NSL DRC has jurisdiction over agents. Notwithstanding the clear listing of agents in the NSL Rules,

29 Section 2 – Supremacy of the Constitution.

30 Clause 19(1) of provides that 'All disputes arising out of or relating to this contract, including disputes such as to the meaning or interpretation of any provision of this contract or as to the carrying into effect of any such provision or as to the termination or consequences of termination shall be referred to the Dispute Resolution in accordance with the NSL rules from time to time.'

31 Article 18.1.

32 Article 18.10.

33 Article 18.3.

34 Article 18.3.2.

35 Article 18.2.

the NSL DRC has held that it does not have jurisdiction over agents, unless of course the agent in question is a member of the NSL.

Rule 41 of the NSL Rules sets out the procedure that the NSL DRC has to follow when dealing with disputes. It also sets out the competent sanctions that the NSL DRC may impose. The NSL DRC has power to make awards, or impose certain sanctions, that are enforced in terms of football rules and South African laws. The NSL DRC can make an order for payment of damages or compensation, payment of a transfer fee, an order for specific performance, a declaratory order or a costs award. The effect of the awards that can be made by the NSL DRC is similar to the effect of awards that are made by other independent dispute resolution tribunals and the courts in relation to sport related disputes. The NSL DRC has made a plethora of awards since its establishment. These can be - and have been - enforced by the successful parties in terms of the relevant football rules and South African laws. In addition, Rule 58 of the NSL Rules provides for an expeditious way of enforcing the awards, orders or sanctions of the NSL DRC. It empowers the Chief Executive Officer of the NSL to deduct money from any amount due to the defaulting party by the NSL and pay it over to the party in whose favour the award was made. Thus – for instance – if a footballer has been awarded compensation by the NSL DRC against a club and the club fails to comply with the award within the prescribed time, the footballer can request payment from CEO of the NSL in terms of this Rule.³⁶

Although the NSL DRC deals with other types of disputes, including commercial sporting disputes, employment disputes between footballers and football club comprise the majority of disputes this body deals with. Article 18.4 of the NSL Constitution stipulates that any dispute relating to unfair dismissal has to be referred to the DRC within 30 days of the alleged dismissal or breach of contract.³⁷ This article has been the subject of a number of interpretation problems. Some parties have contended that the article prescribes that all disputes, of any nature, be referred to the NSL DRC within 30 days from the date that the cause of action arises. This is a significantly shorter period, for non-employment disputes, than the common law prescription period of 3 years. The NSL DRC clarified the position in the matter of *Mofokeng & Others and African Warriors Football Club*³⁸ when it held that Article 18.4 of the NSL Constitution does not apply to breach of contract disputes. Any dispute (other than dismissal disputes) can be referred to the NSL DRC within the common law prescription period of 3 years or any other statutory prescription period or any shorter prescription period as agreed by the parties. This was clearly explained by the NSL DRC in the *Mofokeng* matter when it held that ‘to stipulate, unilaterally, that a player must refer a contractual dispute within 30 days will be constitutionally unsound. The drafter could therefore not have intended to constrict a common-law right of referring a contractual dispute to 30 days.’³⁹ The 30 day period was introduced to align the procedure of the NSL DRC to that of the Commission for Conciliation Mediation and Arbitration (“CCMA”) – a specialist statutory dispute resolution body that deals with employment related disputes – and give effect to South African labour laws. It was also a measure to ensure that disputes are resolved within a reasonable period as there was a growing tendency of former employees – especially footballers – resurfacing after a very long time (more than 2 years in some instances) and referring disputes to the NSL DRC.

A party referring a dispute to the NSL DRC is required to pay an administrative referral fee.⁴⁰ All disputes referred to the NSL DRC must be in writing; set out all material facts upon which the claim is based; the relief that is sought; and the referrer is required to attach a list of all the documents that the referrer believes are relevant and will be utilised before the DRC. Any documents that are in the possession of the referrer must be attached to the dispute referral document.⁴¹ The referral document has to be served on the respondent(s) and proof of service must be provided to the NSL.⁴² In the event of a party not fully complying with these Rules, the NSL DRC has discretion - upon application by such party – to condone non-compliance with the Rules.⁴³ Once the referral has been received by the NSL, the matter is scheduled for the

36 Similarly in disciplinary matters, if a club for instance, has failed to pay a fine imposed by the NSL Disciplinary Committee – such can be deducted from the amount due to that club by the NSL.

37 The article provides as follows ‘Disputes that arise from allegations of unfair dismissal or breach of contract must be referred to the Dispute Resolution Chamber within a period of thirty days from the date of dismissal. The Dispute Resolution Chamber is entitled to condone the failure of a party to timeously refer such dispute on application and may do so in the event that the delay is not excessive, there is an adequate explanation for the delay, and there are good prospects of success.

38 (2012) 33 ILJ 2008 (ARB).

39 At p 2011D-E.

40 Rule 41.1. The amount was R1,000 + 14 % Value Added Tax at the time of writing.

41 Article 18.5.

42 Article 18.6.

43 Article 18.4.

voluntary process of conciliation. If the matter remains unresolved after conciliation, it will then be set down for arbitration on at least 14 days' notice to the parties.⁴⁴

Parties to the arbitration before the NSL DRC are entitled to a representative of their choice and are guaranteed a fair hearing. Every party has a right to speak on the facts, prove its case or disprove the case of a counter-party, is allowed to file any arguments and documents it seeks to rely on to prove its case, and has a right to call experts where expert evidence is required. All this is done with limited formalities. The formalities before the NSL DRC do not come anywhere close to the rigid rules of the courts or statutory tribunals, making the DRC procedure more attractive than the traditional litigation route.

Any party to the proceedings before the NSL DRC that is not satisfied with the award made by the NSL DRC can refer the matter to appeal to the SAFA Appeals Board in terms of the SAFA Constitution.⁴⁵ If any of the parties is not satisfied with the outcome of the appeal before the SAFA Appeals Board, that party can refer the matter to further arbitration in terms of the SAFA Constitution. The arbitration in terms of the SAFA Constitution is final and binding on the parties.⁴⁶ However, should a party wish to pursue the matter further, that party can refer an appeal to the Court of Arbitration for Sport ("CAS") in Lausanne, Switzerland.⁴⁷ If there are any grounds of review, a review application could be made before the court in terms of the Arbitration Act as the courts have inherent jurisdiction and the football rules do not oust the jurisdiction of the court.⁴⁸ The grounds of review are very limited and a review application can only be brought if the arbitrator has misconducted him/herself in relation to his/her duties as an arbitrator; the arbitrator has committed a gross irregularity or has exceeded his powers or the award has been obtained improperly. Review applications to court are, however, not encouraged as all disputes should be dealt with through the dispute resolution processes outlined in the football rules.

The NSL DRC has dealt with numerous disputes ranging from commercial sporting disputes, disputes between clubs, disputes relating to the status and registration of players, unfair dismissal disputes and breach of contract disputes since its inception. However, this paper mainly focuses on unfair dismissal disputes as these comprise the majority of the disputes resolved by the NSL DRC and they also clearly illustrate the growing body of *lex sportiva* in professional football in South Africa.

Unfair dismissal disputes are dealt with following a procedure that is substantially similar to that prescribed by Labour Relations Act ("LRA")⁴⁹ and followed by the CCMA. Prior to the amendment of the NSL Rules and the introduction of conciliation as a precursor to arbitration, a number of parties before the NSL DRC objected to the procedure that was followed by the NSL DRC. The parties contended that the NSL DRC was enjoined to follow the prescripts of the LRA and all matters had to be referred to conciliation before arbitration. This issue has now been put to rest by Article 18.7 which provides for voluntary conciliation before arbitration.

True to the form of ADR – compared to traditional litigation in court – the NSL DRC is a tribunal that deals with disputes with fewer formalities. In the matter of *Zothwane and Lamontville Golden Arrows Football Club*,⁵⁰ the NSL DRC emphasised that disputes before it must be dealt with, with minimum formalities. This followed an objection raised by one of the PSL clubs, Lamontville Golden Arrows Football Club ("Arrows") that Zothwane had not complied with the NSL Constitution and Rules in referring his dispute to the NSL DRC. Arrows contended that Zothwane had not presented a summary of the relevant factual, legal and regulatory considerations; had failed to support his case with decided cases or awards; and had failed to attach relevant documents to his referral. The NSL DRC accepted that the NSL Rules stipulated certain requirements that had to be complied with and that Zothwane had not complied with the NSL Rules. But it held that the applicable NSL Rules were wholly of a procedural nature. In particular the NSL DRC, emphasised that, "... rule 40.6 admonishes the NSL DRC to ensure that the proceedings are conducted fairly and quickly and with the minimum of legal formalities, in compliance with the rules of natural justice."⁵¹ This has been the position followed by the NSL DRC in many subsequent disputes before it where parties

44 Article 18.8.

45 Article 21.

46 Focus of this paper is the NSL DRC. Nothing will be discussed about the SAFA Appeals Board and subsequent arbitration as these are under a different body and in terms of the SAFA Constitution.

47 For a discussion on the CAS see generally Cloete, op cit., p. 203 – 223; James, op cit., p. 51 -66; Anderson, op cit., 79 – 97.

48 Louw, A. 2010. *Sports Law in South Africa*. Kluwer Law International BV, The Netherlands, p. 179.

49 Act 66 of 1995.

50 (2007) 28 ILJ 284 (ARB).

51 At 285E.

have sought to have claims dismissed purely for non-compliance with the NSL Rules. This approach by the NSL DRC promotes a quick resolution of disputes bearing in mind that a party before the NSL DRC is entitled to be represented by any person of its or their choice. In some instances the parties or their representatives are not legally trained and these technical issues may (and normally do) overshadow the need to resolve disputes expeditiously.

As is the case with sports related disputes in other countries discussed above, despite undertaking to refer all the disputes and differences between them to the NSL DRC rather than to court and administrative tribunals, some participants in professional football insist on referring their disputes to courts or other tribunals for resolution. One such case is the matter of *Soul Mmethi v DNM Investments CC t/a Bloemfontein Celtic Football Club*.⁵² Soul Mmethi (“Mmethi”), who was a professional footballer employed by Bloemfontein Celtic Football Club (“Celtic”) was retrenched by Celtic in 2009. Mmethi referred his claim to the Labour Court in terms of Section 77 of the Basic Conditions of Employment Act.⁵³ Mmethi contended that Celtic had breached his contract and he was entitled to damages.

Celtic raised a point *in limine* objecting to the jurisdiction of the court. It argued that the dispute was one that should have been referred to the NSL DRC rather than to the Labour Court as there was an agreement between the parties that all disputes would be referred to the NSL DRC. Celtic added that it was also a requirement of football rules that disputes and differences between participants in football be resolved through football dispute resolution tribunals (the NSL DRC in this case) except where there was no dispute resolution tribunal or the football dispute resolution tribunal could not grant the relief that a party referring a dispute sought. Celtic further argued that the NSL DRC was composed of a panel of arbitrators appointed by the NSL executive and footballers or their representatives, was a tribunal that guaranteed fair proceedings and it was competent to grant the relief that Mmethi sought. Celtic supported its arguments by referring to another football related dispute that had been referred to the CCMA instead of the NSL DRC, the matter of *Augustine v Ajax Football Club*.⁵⁴ In that matter Commissioner Taylor held that the CCMA had the discretion to determine the dispute or refer it to private arbitration as per agreement between the parties. Commissioner Taylor further held that there were more arguments in favour of enforcing the private arbitration provisions as agreed by the parties and directed that the matter be referred to the NSL DRC. Commissioner Taylor added that the NSL had in place a suitable, and specialist, dispute resolution tribunal with specialist skills and knowledge and Augustine (the employee who sought to have the matter heard by the CCMA) would not be placed in an inferior position, i.e. he enjoyed no fewer rights before the NSL DRC, and was unlikely to be prejudiced if the dispute was resolved by the NSL DRC. Mmethi on the other hand, correctly, argued that the football rules and the agreement between the parties did not oust the court’s jurisdiction and called upon the court to exercise its jurisdiction and adjudicate the matter.

Judge Molahlehi considered the arguments and ordered that the matter be referred to the NSL DRC. Judge Molahlehi confirmed that arbitration clauses in general, including the provisions of the NSL Constitution and Rules, do not oust the inherent jurisdiction of the courts. He added that the court will always have jurisdiction over (sports related) disputes. But that did not mean parties to an agreement could simply ignore the agreement and approach the courts. Judge Molahlehi further held that the court had discretion – and the real issue here was – whether to stay proceedings and refer the matter to the NSL DRC or hear it. In the present matter, Judge Molahlehi could not find circumstances justifying the court exercising its discretion to hear the matter.

The objections raised by the parties, such as Mmethi, and their motivation to have the disputes dealt with by the courts are unclear. One can, however, presume that these are driven by an apprehension of bias or unfairness on the part of the NSL DRC or are simply acts of ‘forum shopping’. Article 18.10 of the NSL Constitution enjoins the NSL DRC to be guided by the principles of fairness, equity and just cause in making its determinations and developing its jurisprudence. Therefore, rather than seeking have disputes resolved elsewhere, it would be more prudent for those involved in professional football to refer their disputes to the NSL DRC. At the NSL DRC disputes are dealt with by a specialist tribunal and with specific reference to football. In dealing with the specificity of sport and reference to the *Fabian McCarthy v Sundowns Football Club & Others*⁵⁵, Cloete had the following to say:

52 (2011) 32 ILJ 659 (LC).

53 77 of 1997.

54 (2002) 23 ILJ 405 (CCMA).

55 (2000) JOL 10381 (LC).

Whether the player – employee is protesting the unlawfulness or unfairness of the employer’s conduct, the boundaries of lawfulness, and particularly fairness, in the context of sport only can be fully comprehended with reference to the special nature of employment in sport.⁵⁶

This is more so where one would be required to deal with concepts such as ‘just cause’ or ‘sporting just cause’ or other principles of the growing body of *lex sportiva* in determining the fairness or unfairness of a dismissal in the football context. A court would not have easily dispensed of the matter without the need to hear evidence or argument on these principles, something that a specialist tribunal such as the NSL DRC can easily do.

Apart from the NSL Constitution requiring the NSL DRC to be an independent tribunal, the 2012 edition of the FIFA Regulations on the Status and Transfer of Players (FIFA Regulations)⁵⁷ and FIFA Circular no. 1010 prescribe minimum standards that a dispute resolution tribunal such as the NSL DRC must comply with. These are; the principle of parity when constituting the arbitration tribunal; the right to an independent and impartial tribunal; the principle of a fair hearing; the right to contentious proceedings and the principle of equal treatment. All of those who sit on the NSL DRC are independent lawyers. They are not employees of football clubs or the NSL. They are entirely independent and subject to the ethical and other rules that govern the practice of law in South Africa. They are not just independent in the sense that they are not appointed by clubs; they are truly independent in the fullest sense of that term.

As mentioned earlier, the Constitution is the supreme law in South Africa and any law or conduct has to be consistent with the Constitution for it to be valid. Consequently, any agreement or rules that enjoin parties to refer disputes to ADR, and any tribunal that is established in terms of such agreement or rules, in South Africa must comply with the Constitution. The procedures set out by any such agreement or rules and followed by the relevant tribunal must not infringe the rights set out in the Constitution.⁵⁸ In employment disputes, the courts have emphasised that arbitration clauses must not place parties in a less favourable position than they would be in if their dispute was referred to court or a statutory tribunal in terms of the LRA. The NSL Constitution and Rules relating to the resolution of unfair dismissal disputes are consistent with the LRA. They do not constitute an impermissible waiver of rights nor do they allow treatment of employees in a less favourable manner to that set out in the LRA. From the Mmethi and Augustine cases discussed above and the case of *National Bargaining Council for the Road Freight Industry and another v Carlbank Mining Contracts (Pty) Ltd and another*⁵⁹, it is clear that as long as a tribunal guarantees fair proceedings, no party is placed in a less favourable position or is accorded less rights than those stipulated in the LRA or in a collective bargaining agreement and an agreement exists between the parties to refer a dispute to a certain tribunal (such as the NSL DRC), the court will not interfere with such agreement or rules.

3.4. *The specificity of sport*

The NSL DRC applies the South African labour laws – in employment disputes – paying particular attention to the growing body of *lex sportiva*. For example, in dealing with issues relating to the lawfulness and fairness of the termination of fixed term contracts for operational reasons, the NSL DRC has on a number of occasions emphasised the specificity of football. In the matter of *Makoti and Maritzburg United Football Club*,⁶⁰ the NSL DRC made it certain that while it was guided by the principles of the LRA, the proceedings before the NSL DRC remained proceedings in terms of the NSL Constitution and were private arbitration proceedings. This finding was made while the NSL DRC was dealing with an objection to the DRC’s jurisdiction raised by Maritzburg United Football Club (“Maritzburg”). Maritzburg contended, among other things, that the LRA requires that all unfair dismissal disputes be referred to the CCMA for conciliation and if the dispute remained unresolved, then to arbitration. Maritzburg also contended that the NSL DRC enjoyed a similar stature to that of the CCMA. As a result where a dispute related to the retrenchment of more than a single employee, neither the NSL DRC nor the CCMA had jurisdiction to hear the matter – such matter had to be referred to the Labour Court. In dealing with the issue of conciliation as mandatory before a matter could be referred to arbitration for adjudication, the NSL DRC reiterated that the proceedings were a private

⁵⁶ Cloete, op cit., p70.

⁵⁷ www.fifa.com/mm/document/affederation/administration/01/95/83/85/regulationsstatusandtransfer_e.pdf (accessed 17 November 2013).

⁵⁸ In particular Chapter 2 of the Constitution which is the Bill of Rights.

⁵⁹ (2012) 11 BLLR 1110 (LAC).

⁶⁰ (2010) 31 ILJ 2791 (ARB)

arbitration and not a statutory arbitration in terms of the LRA hence the parties could not be coerced into the regimen of the LRA. The NSL DRC added that, in any event, there was no requirement in the LRA that there has to be a conciliation sitting prior to arbitration.

The NSL DRC then dealt with the issue that it could not deal with a matter involving the retrenchment of more than one employee as in terms of the LRA only the Labour Court could deal with such disputes as argued by Maritzburg. Maritzburg based its argument on section 191(5)(b)(ii) of the LRA which provides that in dismissals involving more than one employee, an ‘... employee may refer a dispute to the Labour Court for adjudication if the employee has alleged that the dismissal is... based on the employer’s operational requirements.’ The NSL DRC commented that the legislature had deliberately used the word ‘may’ instead of a mandatory word ‘must’ for a good reason. In the NSL DRC’s view, such disputes could still be referred to the CCMA or a competent tribunal as section 141 of the LRA enjoins the CCMA to arbitrate disputes that could otherwise be referred to the Labour Court for determination if the parties agreed in writing to arbitration under the auspices of the CCMA. This, as the NSL DRC found, empowered the NSL DRC to deal with disputes relating to the retrenchment of more than a single employee. The NSL DRC emphasised that:

The [NSL] DRC is a private dispute-resolution forum. While it should take cognisance of the provisions of the LRA and the jurisprudence developed by the courts, it is not strictly bound by the procedural technicalities of the LRA. There is no juridical reason why the [NSL] DRC cannot hear multiple dismissals for operational reasons.⁶¹

The NSL DRC has maintained an approach that is specific to football on the issue of termination of fixed term contracts for operational reasons. In South African law, fixed term contracts of employment are generally not terminable for operational or no fault reasons. In the *Makoti and Maritzburg* matter, the DRC found that a fixed term employment contract could be terminated for operational reasons provided the parties had incorporated a clause into their contract permitting termination on notice or dismissal for operational reasons. It found that Makoti and Maritzburg had incorporated such a clause in their agreement and the real issue it had to decide was the fairness of the selection criteria employed by the club when Makoti was retrenched. The NSL DRC emphasised that generally it is accepted that where the parties to an employment contract cannot agree on the selection criteria during a retrenchment process, it was the prerogative of the employer to determine the selection criteria to be used. The selection criteria used has to be objective and fair. The NSL DRC emphasised that football (like any other sport) is a special commercial venture that is centred on clubs’ successes in winning trophies (or championships) and in order to succeed clubs require excellent footballers. It added that if a footballer does not make the grade – he becomes surplus to the needs of the club and becomes financial burden. The NSL DRC then held that – based on his performance – Makoti had become surplus to the needs of, and a financial burden to, Celtic. Individual performance is generally regarded as a subjective and unfair selection criterion in retrenchment disputes. But due to the specificity of football and Makoti’s failure to challenge the selection criterion, the NSL DRC held that it was a fair and objective selection criterion in this instance.⁶²

The NSL DRC also emphasised the specificity of football in retrenchment matters in the matter *Mmethi and Bloemfontein Celtic Football Club*.⁶³ Mmethi referred his dispute to the NSL DRC following the court’s refusal to exercise its jurisdiction in his matter as discussed earlier. In this matter, the NSL DRC pointed out that the fact that the agreement between Mmethi and Celtic provided for the termination of a fixed term contract for, among other things, operational requirements was a critical factor to the matter and to football. The NSL DRC cited provisions of the FIFA Regulations, in particular Article 14 which provides that ‘A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.’⁶⁴ Although the NSL DRC noted that ‘just cause’ was not defined, it opined that ‘just cause’ may very well fall into the ambit of operational requirements. The NSL DRC then cited, with approval, the judgment of the Labour Court in *Hartslief v Lamontville Golden Arrows Football Club*,⁶⁵ i.e. that a fixed term contract can be terminated for operational requirements where the parties have specifically agreed to such termination. The NSL DRC emphasised the special nature of football and ‘just cause’ and had the following to say:

61 at 2797 A – B.

62 at 2799 G – 2799 I.

63 (2012) 33 ILJ 1307 (ARB).

64 at 1817 C.

65 (2007) 28 ILJ 638 (LC).

It would be egregiously naïve to liken the football industry to any other industry. The footballing milieu is populated by irascible egos and menacing competitiveness of both clubs and players. Clubs rampage for glory. They seek out players with exceptional talent and deft skills. But these players have short productive capacity. They are also vulnerable to the idiosyncrasies of the coach forged by his game style and playing strategy...Players who were prodigious may lose form and be excised from the team. Or the development of another player may make him surplus to the coach's needs. In football it is the coach who is burdened with the responsibility for the success of the club. And it is not only sensible but imperative that he makes the final decision on the selection of the team.⁶⁶

The above clearly supports the need for sport related disputes to be dealt with by tribunals that are *au fait* with sport, football in this case. Had these matters been heard by the CCMA or the Labour Court, various challenges would have arisen in determining issues such as 'sporting just cause' and the fairness of the selection criteria used by the employers. There would have been a need to lead evidence on the way football operates and other matters that the court or another tribunal could not take judicial notice of. The NSL DRC was, however, well equipped to take judicial notice of some of the issues - rendering it unnecessary to hear evidence on these issues thereby curtailing the proceedings and dispensing with the matters fairly quickly.

4. Conclusion

The NSL DRC is a fully functional dispute resolution tribunal that the NSL should be proud of. The NSL DRC is perhaps the most advanced and well organised dispute resolution tribunal in South African sport. Its decisions are reported in a leading employment law journal⁶⁷ from time to time and are subject to scrutiny by all concerned. This, it can be argued, has encouraged the NSL DRC to meticulously consider the disputes it deals with as its decisions will potentially be subjected to scrutiny once published. While most sporting codes have fully functional disciplinary committees, the same cannot be said about their dispute resolution tribunals (if any) that deal with disputes that are not of a disciplinary nature.

As mentioned above, the NSL DRC applies South African law to disputes paying particular regard to the specificity of sport. The majority of the employment related disputes that the NSL DRC has dealt with a clear evidence of this. The NSL DRC has on each occasion clearly espoused the special nature of sport and principles of *lex sportiva* in these matters. Procedurally, the NSL DRC – although subject to certain formalities set out in the NSL Constitution and Rules – deals with disputes quickly and with less formality. Every party before the NSL DRC is entitled to be represented by a representative of its choice and the representative does not have to be a legal practitioner in terms South African law. The NSL DRC is composed of members that are legally trained and have vast experience in the sporting and legal fields. Their expertise, particularly in sport, is a vital aspect of dispute resolution in sport. It ensures that the decisions of the NSL DRC are consistent with those of other football and sport dispute resolution tribunals such as the FIFA DRC and the CAS. This assists with creating certainty for parties referring disputes to the NSL DRC. The NSL DRC applies the general principles of South African law while at the same time preserving the specificity of sports and promoting the growth of *lex sportiva* in South Africa and the rest of the African continent.

As sport continues to be commercialised, the number of disputes in sport will also keep increasing as a result of the growing need to re-evaluate and clarify sports relationships. Litigation is at the forefront of the re-evaluation and clarification of these sports relationships.⁶⁸ It is therefore important that parties be encouraged to seek solutions through specialised alternative dispute resolution procedures. Unlike other jurisdictions such as England and Ireland discussed above, South Africa does not have a centralised sports related dispute resolution tribunal. Efforts by the Sports Lawyers Association of South Africa ("SLASA") to establish a dedicated sports dispute resolution tribunal crumbled following the disbandment of SLASA.⁶⁹ Until the establishment of a centralised sports related dispute resolution chamber, the NSL DRC is arguably the most advanced sports related ADR model that South African sport, and African sport at large, should consider adopting and following.

66 at 1817 E – G.

67 Industrial Law Journal.

68 James, op cit., p. 233.

69 Louw, op cit., p. 181.