

## **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

### 1. 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.<sup>1</sup> 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.’<sup>2</sup> 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.<sup>3</sup> 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 Constitution<sup>4</sup> and Rules<sup>5</sup> 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

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\* 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](mailto: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).

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)<sup>6</sup> in South Africa and Africa as a whole.

## 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.<sup>7</sup>

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.<sup>8</sup> 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.

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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.

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.

Expert determination is mainly used in disputes involving issues relating to quantum or fixing of an amount for a certain service or product.<sup>9</sup> 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.<sup>10</sup> In football, FIFA requires all its affiliates, NSFs, to incorporate a clause to this effect in their rules.<sup>11</sup> 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.<sup>12</sup> 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.'<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> In New Zealand, for example, there is even a statute based national sports dispute resolution tribunal.<sup>17</sup>

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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.

15 Anderson, op cit p 653.

16 Anderson, op cit., p. 654.

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

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.<sup>18</sup> Similarly in England it is a long established tradition that the courts are reluctant to, and do not, generally intervene in sports disputes.<sup>19</sup> 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."<sup>20</sup>

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

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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.

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”).<sup>21</sup> Anyone wishing to pursue professional football, be it as a footballer, club or official can only do so under the auspices of the NSL.

### 3.2. The establishment of the NSL DRC

In terms of the Constitution of South Africa (“the Constitution”)<sup>22</sup>, ‘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.’<sup>23</sup> 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 Comitit and Others*.<sup>24</sup> There can be no doubt that the Coetzee matter is South African football’s Bosman case.<sup>25</sup> 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

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<sup>21</sup> Rule 3.

<sup>22</sup> The Constitution of the Republic of South Africa, 1996.

<sup>23</sup> Section 34 of the Constitution of the Republic of South Africa, 1996.

<sup>24</sup> 2001 (1) SA 1254 (C).

<sup>25</sup> 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. 1-4921. 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 demand for the footballer. It also confirmed that European clubs cannot restrict the number of footballers from EU countries.

Arbitration Act<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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:

... 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

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<sup>26</sup> 42 of 1965.

<sup>27</sup> Rule 55.6.

<sup>28</sup> 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.

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.’<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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

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<sup>29</sup> Section 2 – Supremacy of the Constitution.

<sup>30</sup> 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.’

<sup>31</sup> Article 18.1.

<sup>32</sup> Article 18.10.

<sup>33</sup> Article 18.3.

footballers.<sup>34</sup> The NSL DRC has jurisdiction over all participants in professional football i.e. the NSL itself, clubs, clubs' officials, footballers, coaches and agents.<sup>35</sup> 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, 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.<sup>36</sup>

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.<sup>37</sup> 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*

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34 Article 18.3.2.

35 Article 18.2.

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.'

*Club*<sup>38</sup> 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.’<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> The referral document has to be served on the respondent(s) and proof of service must be provided to the NSL.<sup>42</sup> 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.<sup>43</sup> Once the referral has been received by the NSL, the matter is scheduled for the 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.<sup>44</sup>

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.

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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.

44 Article 18.8.

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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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”)<sup>49</sup> 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*,<sup>50</sup> 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

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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).

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."<sup>51</sup> This has been the position followed by the NSL DRC in many subsequent disputes before it where parties 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*.<sup>52</sup> 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.<sup>53</sup> 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

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51 At 285E.  
52 (2011) 32 ILJ 659 (LC).  
53 77 of 1997.

matter of *Augustine v Ajax Football Club*.<sup>54</sup> 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*<sup>55</sup>, Cloete had the following to say:

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.<sup>56</sup>

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<sup>54</sup> (2002) 23 ILJ 405 (CCMA).

<sup>55</sup> (2000) JOL 10381 (LC).

<sup>56</sup> Cloete, op cit., p70.

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)<sup>57</sup> 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.<sup>58</sup> 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*<sup>59</sup>, 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

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<sup>57</sup> [http://www.fifa.com/mm/document/affederation/administration/01/95/83/85/regulationsstatusandtransfer\\_e.pdf](http://www.fifa.com/mm/document/affederation/administration/01/95/83/85/regulationsstatusandtransfer_e.pdf) (accessed 17 November 2013).

<sup>58</sup> In particular Chapter 2 of the Constitution which is the Bill of Rights.

<sup>59</sup> (2012) 11 BLLR 1110 (LAC).

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*,<sup>60</sup> 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 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

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60 (2010) 31 ILJ 2791 (ARB)

by the procedural technicalities of the LRA. There is no juridical reason why the [NSL] DRC cannot hear multiple dismissals for operational reasons.<sup>61</sup>

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.<sup>62</sup>

The NSL DRC also emphasised the specificity of football in retrenchment matters in the matter *Mmethi and Bloemfontein Celtic Football Club*.<sup>63</sup> 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.'<sup>64</sup> 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 *Hartsliet v Lamontville Golden Arrows Football Club*,<sup>65</sup> i.e. that a fixed term contract can be terminated for operational

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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).

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:

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.<sup>66</sup>

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 journal<sup>67</sup> 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

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<sup>66</sup> at 1817 E – G.

<sup>67</sup> Industrial Law Journal.

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.<sup>68</sup> 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.<sup>69</sup> 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.

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68 James, op cit., p. 233.

69 Louw, op cit., p. 181.

# Cleansing the game: Mapping and Tackling State-Induced Corruption Trends in African football

By James Tsabora\*

SUMMARY: 1. Introduction – 1.2 The Definitional Maze – 1.3 Corruption and African Football – 1.4 Football and the African State – 1.5 Corruption and African Institutions – 1.6 Cleansing the game – 1.7 Conclusion

## 1. Introduction

In *Issue 1/2013* of the *African Sports Law and Business Bulletin*, an article by Majani and Osoro provides a descriptive overview of the major setbacks affecting African sports.

<sup>1</sup> One of the setbacks identified in the article is “corruption” arising from governmental and political interference in sports on the continent. In addition to generally listing, albeit briefly, some forms and patterns that has been taken by corruption in sports, their article further highlights the benefits of eradicating this disease from sports in Africa. The identification of corruption as a problematic setback in African sports is a welcome initiative. Corruption in African sports has been rampant and corrosive particularly over the last three decades.<sup>2</sup> It has killed and suppressed African talent, destroyed institutions and impoverished persons who deserve to be rewarded for their sporting exploits whilst simultaneously enriching a huge number of undeserving individuals. Further, the manner in which this politically connected elite has benefitted from African sports means that sports have taken more than it has given Africa.

This article seeks to outline and examine corruption trends that arise owing to state and governmental intervention and involvement in African football. Football is arguably the richest and most popular sport on the continent, and in comparison to other sports, provides employment and income to a substantially higher percentage of the African population. State interest in football is thus no surprise and it is this interest that engenders a desire to be involved in the administration, management, financing and development of football in Africa.

A general study of state-induced corruption in African football discloses three important facets. Firstly, in highlighting the nature of corruption in African football, it is not difficult to note that the nature in which state involvement promotes and enables corruption differs from country to country

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\*Lecturer in Law, Midlands State University, (Zimbabwe); LLB (University of Zimbabwe), LLM (University of KwaZulu-Natal, South Africa) and PhD (Rhodes University, South Africa), [jtsaborah@yahoo.com](mailto:jtsaborah@yahoo.com)

<sup>1</sup> See E Majani and N Osoro ‘Sports management and government interference in Africa (2013:1) *African Sports Law and Business Bulletin* 65.

<sup>2</sup> See for instance T Ross ‘2013: Africa’s dark year in football’ available at <http://www.africa.com/blog/2013-africas-dark-year-in-football/> accessed on 03 January 2014. *Newsday* (Zimbabwe) ‘Zifa submits Asiagate report to Fifa’ available at <https://www.newsday.co.zw/2012/12/07/zifa-submits-asiagate-report-to-blatter/> accessed on 06 January 2014; ; SportLive ‘Fifa officially opens South African match-fixing probe’ available at <http://www.sportlive.co.za/soccer/sa/2013/11/15/fifa-officially-opens-south-african-match-fixing-probe> accessed on 06 January 2014; BBC News ‘Nigerian FA official banned for taking bribes’ available at <http://www.bbc.com/sport/0/football/25121568> accessed on 06 January 2014.

and from time to time. Thus, the trends identified in this article may be less prominent in one country, but more significant in another. Consequently, some football associations are affected by forms of corruption different from the trends and patterns identifiable in other associations on the continent. There are also some corrupt practises in other African football associations quite different from those mentioned in this article, but arising from governmental involvement in football administration and management. In extrapolating the major trends, this article has resisted the temptation to provide specific examples of state induced corruption in African football. These examples are widespread, and have been well documented in other easily accessible literature on African football.<sup>3</sup>

Secondly, an analysis of corruption in African football illustrates that this kind of corruption is not conducted through means and methods fundamentally different to corruption in other sports. In a basic sense, the means and methods are essentially similar; they are however slightly tweaked and modified to enable maximum exploitation of football, and in order to appropriately fall in line with the uniqueness of football as a sport. Thus, as with the game of football, though the players may change, the game remains essentially the same.

Thirdly, and most importantly, the linkages and prevalence of corruption within Africa's major economic activities, private and public, makes it difficult to escape the notion that corruption in African football mirrors the depth and breadth of corruption not only in sports but in African society at large. Thus corruption in African football is just a description of a microcosm. This theoretical assumption underpins the arguments in this article; patterns and trends of corruption in football reflects, in varying degrees, corruption in Africa's industry and commerce, in Africa's social, economic and political systems. Consequently, in exploring corruption in football on the continent, this paper interrogates the integrity of African social institutions, particularly how they are run and administered, and their potential in harnessing, developing and nurturing talent on the continent in the 21<sup>st</sup> century.

## 1.2 The Definitional Maze

To start with, the definition of the term 'corruption' is important before its discussion commences. Most people find no difficulty in imagining what kind of behaviour constitutes corruption, despite the absence of a single, universally accepted definition. In relation to sports generally, it is strongly argued that corruption can be defined according to which persons are involved in it. Thus, this article finds it necessary to distinguish corruption by sportspersons, or athletes who contest in competition and tournaments, from corruption by other persons who are not athletes, but who seek to take advantage of sports to make money out of the industry.<sup>4</sup> Gorse and Chadwick define the former as 'any illegal, immoral or unethical activity that attempts to deliberately distort the result of

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<sup>3</sup> See for instance instances mentioned in *Killing Soccer in Africa: A FAIR Transnational Investigation* (2010).

<sup>4</sup> See W Maennig 'Corruption in international sports and how it may be combated' 08 – 13 (2008).

a sporting contest (or any element of it) for the personal material gain of one or more parties involved in that activity<sup>5</sup>. Examples of this kind of corruption could include match fixing and doping by players. Global studies and investigations into corruption by athletes show that in Africa, this kind of corruption is the least problematic, being most prevalent in the developed economies of Europe, North America and Asia.<sup>6</sup> Since this paper focuses on the behaviour of sports and related public officials and the general governance of sports, the above definition of corruption is of little relevance.

The most problematic kind of corruption in African sports is that driven and conducted by public officials, sports administrators and sports management authorities.<sup>7</sup> Thus, for the purposes of this paper, the relevant definition of corruption is the more general one concerning behaviour of public officials. *Transparency International*, an international non-profit organisation that deals with global corruption provides a more relevant definition, that views 'corruption' as '... the abuse of entrusted power for private gain'.<sup>8</sup> Nye, a renowned academic on this subject defined it as '...behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence.'<sup>9</sup> Generally therefore, corruption can simply be understood as the abuse or complicity in the abuse of private or public power, office or resources for personal gain. The accrued income, benefit or gain does not enrich the national fiscus, or more often than not, the deserving individuals, organ or institution.

### 1.3 Corruption and Football

Corruption in football has been accelerated by the general development of the game as a professional discipline, a commercial enterprise<sup>10</sup> and a pure source of entertainment on the continent and beyond. As a consequence of this, national, regional and international regulatory bodies have attempted to keep pace with increasingly complicated and organised corrupt practices by regularly updating, adapting and revising existing rules that seek to stamp corruption from sports. In Africa, the hierarchical regulatory structure often commences with the national football association, followed by the Confederations of African Football (CAF) and then finally *the*

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<sup>5</sup> S Gorse and S Chadwick 'Conceptualising Corruption in Sport: Implications for Sponsorship Programmes' July/August (2010) *The European Business Review* 40-45.

<sup>6</sup> S Gorse and S Chadwick 'The prevalence of corruption in international sport: a statistical analysis' *Report prepared for the Remote Gambling Association and their Partners, the European Gaming and Betting Association and The European Sports Security Association*, Fig 3.

<sup>7</sup> See for instance *Killing Soccer in Africa: A FAIR Transnational Investigation* (2010), emphasizing (page 3) that 'while players have sacrificed their personal fortunes to develop not just soccer but their own communities, and have in some cases bailed out their national teams, the administrators tasked with developing the game focus on personal gain.'

<sup>8</sup> See the definition at <http://www.transparency.org/whatwedo?qclid=CMfJILT64bsCFWcUwwod8GMAAA> accessed on 03 January 2014.

<sup>9</sup> See JS Nye 'Corruption and political development: a cost-benefit analysis' 61:2 (1967) *The American Political Science Review* 417 at 419.

<sup>10</sup> For instance, according to Forbes Magazine, Real Madrid Football Club is worth US\$3, 300 billion, whilst Manchester United Football Club is worth 3, 165 billion dollars. See information at <http://www.forbes.com/teams/> accessed on 03 January 2014.

*Fédération Internationale de Football Association* (FIFA). Regrettably, this regulatory system, complemented by national and international criminal justice systems has faced extreme difficulties in attempting to cleanse the game. Corruption in African football is thus a reality, and the need for effective mechanisms to combat it cannot be underestimated.

It should be noted that in the not-so-distant past, football, as with various other sports in most African states, was a purely entertainment activity. Sportspersons and administrators were involved in sports on a part time basis, with rewards and medals being granted instead of regular salary. Sports could not be seriously considered a day job, but an additional activity that augmented, if possible other primary sources of regular income.<sup>11</sup> For instance, in years immediately following their independence from colonialism, most African nations did not have a Sports Ministry. These early years were however superseded by the gradual commercialization of football, and its later identification as a solid source of living for administrators, footballers, governments and public officials alike.

The involvement of huge multinational enterprises, national politicians and other international agencies ensured the flow of huge funding into football in Africa and beyond. This has brought to the fore the money spinning capacity of football, giving rise to a host of commercial issues such as intellectual property rights, image rights, television rights, multi-million shirt sponsorship deals, innovative medical methods among others. This income generating capacity of football has been welcomed not only by career sportsmen and administrators desirous of making an honest living, but by corrupt persons within the African state as well.

Further, the fact that football brings together billion dollar sponsors, commercial television, and a billion fans and supporters across the world means that the days of football as a partially rewarding and purely entertainment activity are past. There is now an opportunity to make money out of this sporting activity and all stakeholders, including individual persons, administrators, the state, sponsors and other corporate institutions are determined not to miss out. Unfortunately, this also means the existence of yet another platform for corrupt practices to take root and flourish. With so much money flowing in, the opportunities for individuals and institutions to acquire filthy lucre increase.

#### 1.4 Football and the African State

The ubiquity of the state in every aspect of life is a reality in Africa. The state is often the biggest employer, the biggest provider of essential services and thus possesses the largest influence in the

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<sup>11</sup> In England for instance, an average soccer player's salary in 1961 was 20 pounds per week. In 2013, a top football star such as Wayne Rooney of Manchester United Football Club earns as much as 170 000 pounds a week. See <http://www.sportingintelligence.com/2011/01/20/from-20-to-33868-per-week-a-quick-history-of-english-footballs-top-flight-wages-200101/> and <http://www.dailymail.co.uk/sport/football/article-1229982/Manchester-United-set-off-Wayne-Rooney-bumper-new-deal-fend-Barcelona.html> accessed on 04 January 2013.

day to day life of the African citizenry. The relationship between African states and their ordinary citizens is thus a close one. A disturbing feature of this relationship is the 'aspiration' of African governments to control and influence not only the direction of public life, but also the nature of private enterprise and private social life. This means that most governmental systems are structured in a way that would enable and ensure the state would be committed to control private enterprise and other issues such as sporting activities. The motivation for this control is neither clear nor completely justified, but a consequence of it is the reluctance of the African state to dissociate itself from major sporting activities within their borders.

For the past thirty years, the rise in corruption in all forms of sports in Africa has been increasingly attributed to this tight connection between the state and ordinary sports.<sup>12</sup> Football has not been an exception. Across Africa therefore, the administration of football has largely not been based on the professional needs of the game: more often than not, it is not the seasoned, qualified administrators that are placed at the helm of the profession, but persons known for their political clout or connections. There have been few instances though, where seasoned administrators have been placed at the helm of administration and management responsibilities in various associations. Apparently, however, it has always been the case that these persons are gradually co-opted into mainstream politics, and eventually the state through political patronage. Eventually, football administration in various African countries ends up as one of the many platforms not only where national politics is played out but where corruption is practiced at a national scale. Corruption in the state has thus deeply and extensively extended into football with political figures and state officials using this discipline as a conduit for filthy lucre.

One of the ways in which political corruption is extended into sports is in the appointment of sports administrators. More often than not, the appointment system allows the state to have an influence in either the processes of nominations and elections or in the ultimate selection of the winning candidates. A lot of politicking is done during the campaigning process and the whole process resembles to a large degree, national political elections. Eventually, persons with more political support and political resources end up at the helm of football administrations, and on most occasions lack the necessary qualifications, training or experience needed to run sports. These eventual winners are always eager to be part of the corrupt elite open to bribes and other corrupt actions by political figures, state officials, corporate executives and other agencies and criminal networks to the detriment of football in Africa.

Yet another avenue in which corruption is practiced in African football is the funding systems of sports in Africa. Despite generating huge revenues that, if appropriately applied, could go a long way, African football has always struggled to finance itself. Where does all the money go? African clubs always struggle to finance their own budgets, especially if they are involved in continental

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<sup>12</sup> D Booth 'Hitting Apartheid for Six: The Politics of the South African Sports Boycott' 38 (2003) *Journal of Contemporary History* 477.

commitments such as the CAF Champions League. National teams often struggle to raise money to fulfill international fixtures. The solution to this has been to beg for government intervention, through the Ministry responsible for sports. When the funds come, usually from treasury, there is always a condition. Either the Treasury appoints its own person to ensure the money is properly applied, or the relevant Ministry would itself handle the financial aspects on that particular occasion in order to ensure its funds are not embezzled. The fact that begging money from Treasury has become the norm and not the exception seems to 'compel' the governments to handpick their own permanent representatives who they shoulder with specific roles and responsibilities in the main football administration body. Without such persons on board, most governments have been unwilling to disburse funds with the fear that it will be misappropriated. These governmental representatives have not helped the anti-corruption cause in any way; in fact they have provided the conduit by which corruption is conducted by governmental officials through sports. Thus the actual fear of African governments is that disbursing money to football associations without their representatives on board would deny government officials a piece of the cake.

FIFA has been firmly opposed to political interventionism in football. A number of governments have thus experienced the wrath of FIFA when they either dissolved football associations or appointed governmental representatives onto these associations in breach of FIFA rules.<sup>13</sup> However, such dissolutions or appointments have been carried out clandestinely, albeit seemingly without government intervention. The truth is government officials have found many ways of circumventing FIFA rules on political non-intervention, and FIFA can do nothing much about it.

On other occasions, FIFA's non-political intervention stance has been akin to Russian roulette, consequently, but inadvertently abetting and aiding corruption.<sup>14</sup> The Nigerian case is a stark example: FIFA insisted that the government had to reinstate Nigerian Football Federation officials who had been suspended by the government pending completion of a corruption probe. This meant that the government's hands were tied and officials implicated in multi-million dollar corrupt practises free to continue at the helm of African football administration.

Corruption has consequently become more complex to tackle in Africa, with corrupt individuals always formulating even more sophisticated ways to beat and circumvent the system. For the reason that football authorities and policing systems are targeted against corrupt practises, and often "shoot without missing their mark", corrupt individuals "have learned to fly without perching on a twig".<sup>15</sup>

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<sup>13</sup> See BBC News: 'World Cup 2010: Fifa issues ban deadline to Nigeria' available at [http://news.bbc.co.uk/sport2/hi/football/world\\_cup\\_2010/8780028.stm](http://news.bbc.co.uk/sport2/hi/football/world_cup_2010/8780028.stm) accessed on 05 January 2013. In this case, FIFA had threatened with expulsion from the football if the government refused to reverse its decision to suspend the national team after a poor World Cup performance in South Africa in 2010.

<sup>14</sup> For a descriptive commentary, see The Guardian 'Free-for-all and corruption in African football shames Fifa' accessed on 06 January 2014.

<sup>15</sup> A proverb from the novel, *Things Fall Apart* by Chinua Achebe: "Eneke the bird was asked why he was always flying on the wing and not perching. He answered: Men have learned to shoot without missing their mark, and I have learned to fly without perching on a twig."

Apart from national teams, state interventions have also been extended to African football clubs. African politicians and political parties are notorious for wanting to align themselves with popular football clubs, and are often found giving hand outs, donations and even finances to these clubs at their time of need. These hand outs are usually meant to buy the supporters of the concerned football club, or to persuade the football club's leadership to nominate the politicians as patrons. The end result is always acrimonious, with the football club heavily indebted and thus indentured to the "patron" and owing millions. Even more lamentable, the patron would end up suing the football club and attaching its important assets for sale, effectively bankrupting the club or driving it into liquidation.

The trends and patterns of corruption identified above may either be conducted clandestinely or in public, and the only hope for confronting them is through effective anti-corruption agencies, or national legal, administrative and judicial systems. To what extent, however, can such institutional responses provide a buffer against corruption in African football?

### 1.5 Corruption and African Institutions

The presence and effectiveness of legal, administrative and judicial institutions to anticipate and fight criminal and corrupt behaviour is imperative in any nation. The lack of such important institutions aids and abets corruption and eventually destroys the potential of sports as a national source of revenue. However, it is not only the presence of necessary institutions that guards against corrupt practises; such institutional systems should be independent, fully functional and not exist as a mere appendage of the executive arm of the state. The involvement of public officials in the system affects the incidence of corruption, and determines the rate at which the institutional system can deal with corrupt behaviour or achieve successful outcomes.

Corruption flourishes in the absence of a national institutional system established for the purposes of fighting criminal and corrupt behaviour in football and other sports. The absence of such an institution means there lacks necessary personnel, judges, investigators and prosecutors, the judicial infrastructure, and the substantive or procedural penal legislation for the punishment of corrupt behaviour. Whilst most African states boast of functional judicial and security systems, a few war torn states, or those emerging out of conflict might not enjoy the same institutional presence. Thus, for instance, it could be extremely difficult to probe match fixing allegations in Somalia, or South Sudan today owing to political instability, but easier to do so in countries such as South Africa or Ghana that are relatively at peace.

As pointed above, the presence of institutions is merely the first step but does not in itself guarantee corrupt-free sports on the continent. Such institutions should be credible, transparent, effective accountable. This is because corruption in African football has stretched not only to affect available decision making bodies such as independent tribunals, but has also expanded into national judicial, administrative and security systems as well.

The judicial system is one of the readily available dispute resolution systems, and in order to discharge its mandate, has to be complemented by investigating and prosecuting authorities as well as law enforcement agencies. An effective and independent judicial system can go a long way towards curbing corruption and cleansing the sport of the scourge. Unsurprisingly, governmental corruption in African football has eroded the integrity of this institution as the last buffer against corrupt behaviour. State officials may circumvent or defeat the judicial system by adopting sophisticated schemes to cover up involvement and to whitewash their participation in corrupt behavior. Such tactics include methods adopted for the purposes of shielding implicated public officials from criminal responsibility arising from corrupt behaviour. Further, obstructive tactics can be adopted, leading to unjustified and unreasonable delays by prosecuting authorities, and such disruptive behaviour promotes corruption and is intended at subverting justice.

Further, the fact that a state has competent courts does not mean that deserving cases are always brought before the courts, or if brought, always achieve a conviction. Thus, the judiciary may be competent and independent, whereas the investigating and prosecuting authorities are against the prosecution of public officials for political reasons. The commencement of investigations might mean nothing if the prosecuting authority is determined to frustrate and hinder investigative efforts. There should thus be a commitment to justice by all important arms of the judicial system, since competence in one arm may not guarantee a successful outcome. Yet another tactic that shields corrupt officials from investigation is the selective application of the law. Investigating and prosecuting authorities may be eager to investigate and prosecute corrupt practises by ordinary persons not connected to the state but be reticent with respect to officials from within the state departments.

Many other factors can provide initial indications of compromised judicial, administrative and institutional systems in confronting corruption in African football. For instance, in compromised systems, public officials are free to directly or indirectly interfere in investigations or prosecution, or even deliberately obstruct due process when their associates are implicated in corrupt practises. Where the stakes are high, direct political subordination of investigative, prosecutorial or judicial branches exists and the executive wishes win the day.

In summation therefore, the involvement of state and public officials in corruption complicates anti-corruption efforts and challenges crime fighting institutions. State officials can easily corrupt the institutional system in a more dangerous way than ordinary persons. Caution is thus urged as to the extent to which state officials can be involved in African football, particularly in those aspects of the game with the greatest money spinning potential. The state is the most powerful social institution in Africa and unscrupulous officials can apply its widespread resources to commit corrupt practises and circumvent the system. There is no doubt that there is a critical need to minimize the involvement of public officials in African football, and gradually cleanse those areas that public officials have used to siphon resources out of football. In doing this however, chosen strategies

should ensure that the beneficial association between the state and African football remains in the interests of this sport. But how, it can be asked, can such a cleansing be carried out?

### 1.7 Cleansing the Game

It is tempting to suggest that the easiest way to ending an unequal relationship where one party preys on the other, and that enables and promotes corrupt, unethical behaviour is a separation. For African football, a complete, ugly separation would however bring more harm than good. With most states struggling under fragile economies, funding for football will dry up within days in the absence of governmental financial support. Institutions would collapse and football would cease to be regarded as a rewarding profession in most states. Further, state involvement in African football has meant that football does not fall to the mercy of greedy corporates. The state has done a lot of good in establishing ethical regulatory frameworks, policing institutions and funding systems that regulate how corporate institutions and other entities can involve themselves in sports. In another light therefore, the African state appears as a benevolent paternalist. African football administration systems are unsurprisingly shaped by this notion that severing the connection between state and African football would, in all probability, lead to the demise of football.

A separation between the state and football therefore needs to be amiable, to ensure that the State continues to support and fund football. Such a separation should ensure that the parties continue to develop independently and in ways that are mutually beneficial. The question of whether or not football needs the state might be easy to answer in a continent where the state has made, arguably, the greatest contribution in the development of football. The nature of state contribution has unfortunately led many, including African football itself to believe that it cannot stand on its own without state intervention. It would be wrong to make this conclusion about African football, with few states, such as South Africa, leading the way in showing that only minimal state involvement is required. Minimal intervention would enable the full development of soccer, minimize governmental interference, reduce the incidence of corruption and most importantly erase the incorrect perception that the African state has developed and funded African football for the reason of preying onto it.

### 1.7 Conclusion

Cleansing African football of corruption is bound to be a difficult task in view of its linkages with corruption in other mainstream state economic activities such as industry and commerce. The more corrupt these other systems become, the higher the likelihood that such corruption will permeate other aspects such as sports. Further, the failure to deal with such rampant corruption will mortally implicate sport development institutions and enable corrupt practises to be more sophisticated and corrosive to the detriment of African football. Yet, the stronger the efforts at cleansing these other aspects become, the better are the chances for successfully cleansing

football of corruption. Removal of cells of corruption from body tissues will result in better and abler organs and healthier football bodies.

In fragile economies where governmental involvement is imperative, such a cleansing might have to ensure continued involvement of the state in football administration. The degree, nature and shape of this involvement is however debatable. An involvement that is honest, transparent and based on the objectives of football development is welcome. Further, the development of transparent institutions for the effective management and administration of football and for the harnessing, nurturing and developing of football talent will bear fruits for African football in both the medium and long term. It is thus necessary for effective frameworks to be set up for the purposes of delimiting the 'rules of engagement' between the state and football in Africa. Such initiatives will benefit the development of African football and will elevate it to the same level this sporting activity has reached in other continents with highly advanced systems such as Europe.

# Dispute Resolution in Nigerian Football: The need for a National Dispute Resolution Chamber.

By Kelvin C. Omuojine, Esq.\*

Summary: 1 Introduction; 2 Dispute Resolution in Football; 3 The Nigerian Experience; 4 The Nigerian Experience;

## 1. Introduction

As sport has grown over the years in terms of commercial value, there has been a corresponding growth in sports-related disputes. This increased commercial significance of sport means that the stakes are higher than ever before. Not only are there heightened expectations from the on-field performance of sports men and women; there are also increasingly significant off-field obligations on all those involved in sports. Where obligations are unfulfilled, there must be a means of enforcing them. Also, when disputes arise, there must be a means of resolving them. These represent fundamental principles on which any society or industry thrives.

Traditionally, the main form of dispute resolution has been court-based legal proceedings i.e. litigation. However, in many jurisdictions, alternative dispute resolution (ADR) mechanisms have been embraced as a means to circumvent the challenges associated with litigation. These challenges are typically the inordinate length of time it takes for legal proceedings to be concluded by courts, the huge costs often incurred by litigants, as well as the acrimony that characterises such proceedings. The football world has likewise developed its own sport-specific dispute resolution mechanism, based largely on arbitration. The aim is to curtail the recourse to ordinary courts for the settlement of football-related disputes and the attendant disruptive problems associated with it. The point has often been made that where sport lacks a means within its structures to effectively and efficiently resolve sports-related disputes, seeking redress from the ordinary courts would be inevitable. This often disrupts the sports calendar and brings with it the typical challenges associated with litigation by being antagonistic, procedurally slow and relatively expensive.

In Nigeria, as with many other parts of the world, football is the most popular sport and has grown from a mere pastime to a means of economic empowerment. Based on a recommendation by the *Fédération Internationale de Football Association* (FIFA) in 2004, the Nigerian Football League (NFL)<sup>1</sup> became established as a professional football league and upon incorporation in 2006, landed its first sponsorship deal (worth ₦1.1billion over a four year period) with Globacom Nigeria

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\* State Counsel/Sports Law Consultant, LL.B (Delta State University), B.L (Nigerian Law School), LL.M Sports Law (Nottingham Trent University), [omuojine@gmail.com](mailto:omuojine@gmail.com)

<sup>1</sup> Now defunct, giving way to what is now known as the Nigerian Professional Football League (NPFL).

Limited.<sup>2</sup> As in other parts of the world, the number of football-related disputes in Nigeria has increased significantly in recent years and with it the ever-increasing need for an efficient football dispute resolution mechanism.

## 2 Dispute Resolution in Football

There is no gainsaying the advantages of alternative dispute resolution mechanisms over litigation. Basically, the benefits of speed, amicable resolution of disputes, reduced costs, etc, make ADR a preferred option. While these benefits are also apt in relation to sports disputes, that of speed appears to hold very high practical significance. One of the common problems associated with courtroom litigation is the inordinate length of time it often takes for disputes to be resolved. Even after a judgment is given in favour of one of the parties to litigation, there are often procedural exertions required to enforce such judgments. Also, there may be the added time involved in the process of appeal against the judgment by the losing party. For a professional football player, time is always of the essence, whether it is playing time or the time it takes to resolve his dispute with his club. Thus, the ability to have a dispute speedily resolved between a football player and his club may be the difference between him spending his time on the pitch or in the courtroom. Although the court ruling in the landmark Marc-Jean Bosman<sup>3</sup> case is celebrated by many for its impact on the free movement of football players within the European Union, the case took five years to be resolved by the court, having commenced when he was 25 years old and in his prime. Despite having won the case, the football player obviously lost at least a good portion of his career to the cause. Suffice to say that this case presents a fitting case study for the essence of dispute resolution in football.

Marc-Jean Bosman, a Belgian footballer, played for Belgian First Division team R.F.C. de Liege. Upon the expiration of his contract, his intended move to French club, Dunkerque failed because the French club failed to meet the transfer fee demanded by his Belgian club. With the football rules then allowing clubs to obtain a transfer fee for players despite expired contracts, Bosman approached the court arguing that those rules amounted to restraint of trade and violated the principle of free movement of workers established in the European Union (EU). After five years and appeals against each ruling, the case reached the European Court of Justice, where the Court agreed with this argument and issued the landmark ruling, the basic significance of which is that EU players may now move to another club without a transfer fee, upon the expiration of their contract. For Bosman, the length of time involved in finally settling the case was injurious to his professional career. Having played in the Belgian First Division prior to the trial, he moved to playing in the French lower leagues during the period of the trial, ending up at Belgian Third

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<sup>2</sup> B.S. Adetunji, *Influence of the Nigeria Premier League on the Development of Soccer in Nigeria*, (being a Thesis submitted in partial fulfillment of the requirements for the award of Degree of Master of Science (M.Sc) in Sports Management, Ahmadu Bello University, Zaria, Nigeria), September, 2011.

<sup>3</sup> *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman* [1995] ECR I-4921.

Division team C.S. Vise after the trial. For the football governing body, the ruling amounted to an encroachment into its sphere of regulation and resulted in a shake-up of its rules.

Without a competent means of internal dispute resolution, more and more cases would have to be referred to the courts and the tendency of court rulings (such as the Bosman ruling) to have abrupt and profound impact on sporting rules portends a relegation of the concept of self-regulation that sports governing bodies thrive on. It is to avert more of such that FIFA has taken steps to develop a comprehensive football dispute resolution mechanism. In order to stem the problems associated with the taking of football disputes to the courts and to promote the specialized dispute resolution mechanism operational in football, the rules and regulations of the world football regulatory body, FIFA stipulate that recourse to ordinary courts of law is generally prohibited.<sup>4</sup> FIFA further requires its members i.e. national football associations to insert a clause in their statutes or regulations prohibiting disputes, including those involving leagues, members of leagues, clubs, members of clubs, players, officials and other association officials, from being taken to ordinary courts of law; rather provision should be made for arbitration.<sup>5</sup>

Article 68(2) of FIFA Statutes generally prohibits recourse to ordinary courts of law as a means of resolving football-related disputes, providing as follows:

*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.*

Furthermore, for the purpose of resolving football-related disputes, the FIFA Statutes expressly recognizes the jurisdiction of the Court of Arbitration for Sport (CAS) “to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players’ agents.”<sup>6</sup> However, with its headquarters located in Switzerland, approaching the CAS for the purpose of resolving a domestic football dispute would naturally result in significant expense and thus defeat the idea of cost efficacy. This is the reason the jurisdiction of CAS referred to in the FIFA Statutes is basically that of appellate jurisdiction – to hear appeals against decisions of FIFA legal bodies, Confederations, National Associations or leagues – after internal dispute resolution channels may have been exhausted.<sup>7</sup>

With regard to the internal dispute resolution channels, especially contractual or employment-related disputes, the first point of call for an aggrieved party should be the National Dispute Resolution Chamber (NDRC). For this purpose, FIFA requires national associations to insert a clause in their statutes or regulations prohibiting football disputes from being taken to the ordinary

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<sup>4</sup> Article 68(2) of FIFA Statutes, July 2013 edition.

<sup>5</sup> Article 68(3) *ibid.*

<sup>6</sup> Article 66(1) of FIFA Statutes, July 2013 edition.

<sup>7</sup> Article 67 *ibid.*

courts of law, unless specifically provided for by FIFA regulations or binding legal provisions; rather, such disputes should be taken to a recognized independent and duly constituted arbitration tribunal or to the CAS.<sup>8</sup> The NDRC is one of such arbitration panels. With a Dispute Resolution Chamber (DRC) already established by FIFA to cater for disputes of international dimension, FIFA has enjoined national associations to establish NDRCs to cater for disputes within their respective jurisdictions.<sup>9</sup> The DRC or NDRC can simply be described as an independent Arbitration Tribunal set up by FIFA or the national football association respectively for the purpose of settling football disputes. FIFA describes its DRC as the deciding body that provides arbitration and dispute resolution on the basis of equal representation of players and clubs and an independent chairman.<sup>10</sup> The scope of disputes envisaged herein is usually those relating to the status and transfer of players, employment or contractual stability disputes between clubs and players; in other words, disputes other than disciplinary proceedings.<sup>11</sup>

As it is with any ADR mechanism, for a NDRC or football arbitration tribunal to acquire legitimacy, it must be independent, duly constituted and guarantee the fundamental principles of justice, including fairness and equal representation. The enforceability of their decisions is enhanced through disciplinary proceedings being instituted against the defaulting party. While affording parties of the benefits of speed, expertise, reduced costs, amicable resolution, exclusivity, etc, this football-specific dispute resolution mechanism is growing in credibility and acceptance.

### 3 The Nigerian Experience

As stated earlier, for football-related disputes, recourse to the ordinary courts of law is generally prohibited and national associations are required to establish their own arbitration tribunals for the resolution of such disputes. The Nigeria Football Federation (NFF) is the member association recognized by CAF and FIFA as being responsible for the organization and supervision of football in Nigeria.<sup>12</sup> It is for the purpose of meeting the obligation to establish a domestic dispute resolution tribunal that Articles 4(3), 72 and 73 of the NFF Statutes provide as follows:

*Article 4:*

3. *NFF shall provide the necessary institutional means to resolve any internal dispute that may arise between Members, Clubs, Officials and Players of NFF.*

*Article 72:*

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<sup>8</sup> Article 68(3) *ibid*.

<sup>9</sup> FIFA Circular no. 1129, dated 28 December, 2007.

<sup>10</sup> [www.fifa.com/aboutfifa/officialdocuments/doclists/disputeresolutionchamber.html](http://www.fifa.com/aboutfifa/officialdocuments/doclists/disputeresolutionchamber.html) (retrieved on 19th February, 2014).

<sup>11</sup> Regulations for the Status and Transfer of Players and the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

<sup>12</sup> Albeit the Federal High Court of Nigeria, in a judgment delivered on 20<sup>th</sup> January, 2012, declared the NFF an illegal body unrecognized by the laws of the country (in Suit No. FHC/ABJ/CS/179/10: *Sam Jaja v. NFF & Ors.*).

*NFF shall establish a National Dispute Resolution Chamber which shall deal with all internal national disputes between NFF, its members, players, officials, match and players agent that do not fall under jurisdiction of its judicial bodies. The Executive Committee shall draw up special regulations regarding the composition, jurisdiction, procedural rules of the National Dispute Resolution chamber, which shall be in compliance with the FIFA directive on the subject.*

*Article 73*

- 1. NFF, its Members, Players, Officials and match and player's agents will not take any dispute to Ordinary Courts unless specifically provided for in these Statutes and FIFA regulations. Any disagreement shall be submitted to the jurisdiction of FIFA, CAF, WAFU or NFF.*
- 2. NFF shall have jurisdiction on internal national disputes i.e. disputes between parties belonging to NFF. FIFA shall have jurisdiction on international disputes i.e. disputes between parties belonging to different Associations and/or Confederations.*

Presently however, the NFF is yet to establish the NDRC. This is despite several calls for its establishment in order to resolve the numerous outstanding football disputes in the country. In 2007, FIFA issued a circular to its member associations decrying the fact that only a few member associations had established a judicial body to adjudicate over employment disputes between players and clubs and advocating the establishment of NDRCs to lighten the burden on the FIFA DRC and ease the process of adjudication.<sup>13</sup> FIFA has since also entrusted member associations such as the NFF with the initial responsibility for adjudicating over domestic football employment disputes. To this end, the world regulatory body approved the NDRC Standard Regulations to guide national associations in establishing and implementing their own dispute resolution mechanisms.

Employment disputes represent a good number of the football disputes in Nigeria. Players are often at loggerheads with clubs over non-payment of financial entitlements and other contractual issues. Even at the league level, the Nigeria Premier League Rules have consistently contained provisions prohibiting contractual, employment and other football disputes from being taken to the ordinary courts of law, requiring that such disputes be referred to the national Dispute Resolution Chamber. This creates a vacuum as the local football authorities have failed to institutionalize the internal dispute resolution mechanism as recommended by FIFA.

This absence of the NDRC has resulted in many football disputes either going unresolved or being referred to the ordinary courts of law. In March 2010, a former President of the Nigerian referees

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<sup>13</sup> FIFA Circular no. 1129, dated 28 December 2007.

Association, Dr. Sam Jaja instituted a legal action in court to challenge the decision to disqualify him from contesting for the position of Chairman of the Nigeria Premier League Board.<sup>14</sup> In concluding the case two years later, the court arrived at the profound decision that the NFF – the recognized football governing body in Nigeria – as then constituted, was not recognized by Nigerian law and thus illegal and void. It is most likely that if recourse had been made to an available internal dispute resolution body, Jaja would most likely not have challenged the legality of the body he sought to be a part of. Instead, the legal action took the acrimonious dimension that is often part of litigation and the consequence was the judgment, which although is currently being appealed against, has already had far-reaching implications for football administration in Nigeria. It was as a result of the judgment that the top-flight football league, formerly known as the Nigeria Premier League (NPL) metamorphosed into the Nigeria Professional Football League (NPFL) and the regular elections into the management board of the league were scuttled, leading to the setting up of an Interim Management Committee, which has also metamorphosed into the current league organizers – the League Management Company.

It does appear that in the absence of the NDRC, the Players' Status Committee has had to bear a heavy burden with respect to the resolving disputes involving the status and transfer of players, employment and contractual stability. The Players' Status Committee is established under Article 59 of the NFF Statutes for the purpose of regulating the transfer system and status of players. In addition, there is also provision for an Arbitration Tribunal to be set up to settle disputes relating to players' status within the Nigerian football family.<sup>15</sup> There have indeed been occasions where disputes were referred to the Arbitration Tribunal of the Players' Status Committee. But at a media briefing held on November 27, 2013, the Executive Secretary of the Association of Professional Footballers of Nigeria complained about the inadequacy of the Arbitration Tribunal of the Players' Status Committee to deal with the numerous disputes as well as the non-enforcement of awards made by the tribunal. Notably, he also complained about the absence of a NDRC to efficiently resolve these disputes.<sup>16</sup>

While many disputes remain outstanding, instances of the inadequacy of the Arbitration Tribunal of the Players' Status Committee, as complained of by APFON, are illustrated by a number of disputes involving Warri Wolves FC. The club gained promotion to the top-flight in the 2008/09 league season and typically recruited a host of players to play in the top-flight league campaign. Despite finishing fourth in the final standings, at the end of that season the club refused to renew the contracts of no less than 18 of its players. Apart from the non-renewal of their contracts, these players were aggrieved for being unceremoniously disengaged without the payment of their financial entitlements, including sign-on fees, and took their case to the Players' Status and

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<sup>14</sup> Suit No. FHC/ABJ/CS/179/10: *Sam Jaja v. NFF & Ors*

<sup>15</sup> Article 59(2) of NFF Statutes.

<sup>16</sup> Channels TV online <http://www.channelstv.com/home/2013/11/28/nigerian-footballers-lament-ill-treatment-by-nff/> (retrieved on January 13, 2014).

Arbitration Committee set up by the NFF. After days of deliberation, with the club and players duly represented, the tribunal made an award in favour of the 18 former players of Warri Wolves, directing the club to pay them a combined total of ₦16,625,000.00 as financial entitlements owed. It is a positive remark that the tribunal sittings were concluded within just three days (10 - 12 May 2010) and the tribunal delivered its decision on 20 May 2010. Nonetheless, the sad reality is that while many more cases remain unresolved, this award has neither been complied with or appealed against by the club, nor enforced by the football authorities.

If this dispute resolution mechanism meets the need for speed and efficiency, what then is the value of a tribunal's decision if it is not complied with and cannot be enforced or enjoyed by the party who obtained it? The means of enforcement of decisions of the Dispute Resolution Chamber as established by FIFA rules is institution of disciplinary proceedings against the defaulting party; this may include the exclusion from competition. It is not far-fetched that if Warri Wolves FC is faced with exclusion from participating in the league until they comply with the decision of the tribunal, they would indeed comply. This is without prejudice to the channels for appealing against the decision, if they are not satisfied with it.

#### 4 The National Industrial Court Alternative

Historically, the National Industrial Court of Nigeria was established in 1976 as a tribunal for the resolution of trade disputes.<sup>17</sup> Presently, the National Industrial Court is recognized as a superior court of record vested with exclusive jurisdiction to adjudicate over matters relating to labour, employment, industrial relations, etc.<sup>18</sup> The Court was established to address the need for speedy and efficient dispensation of justice with specific regard to trade, industrial or employment-related disputes. The aim was to check the socio-economic instability occasioned by the inadequate system of resolution of industrial disputes. Many legal practitioners acknowledge that proceedings at the National Industrial Court are dispensed with faster than those in the regular courts.

Having ascertained that the scope of jurisdiction of the National Industrial Court covers labour and employment-related matters. It is pertinent to point out that this jurisdiction includes the matters relating to the enforcement, interpretation or appeal against any award or ruling made by any tribunal or administrative body in respect of a labour or employment dispute.<sup>19</sup> Obviously, the scope of jurisdiction of the National Industrial Court then ordinarily covers employment disputes between football players and their clubs, including any award, decision or ruling made by a football administrative/arbitral tribunal in respect of such disputes. An instance would be the dispute between Warri Wolves FC and its former players highlighted earlier. Indeed, this implies that the

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<sup>17</sup> Labour sector reforms led to the promulgation of the Trade Disputes Decree of 1976; the extant statute is the Trade Disputes Act, Vol. 15, Cap. T8, Laws of the Federation of Nigeria, 2004.

<sup>18</sup> See section 254(C)(1)(a) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act No. 3 of 2010; section 7 of the National Industrial Court Act, 2006.

<sup>19</sup> Section 254(C)(4) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act No. 3 of 2010; sections 7(1)(c)(ii), 7(4) and 8(a) of the National Industrial Court Act, 2006.

former players of Warri Wolves, who obtained an arbitral award against the club, could approach the National Industrial Court for the purpose of enforcing the award. As a matter of fact, that is what some of them did. It will be recalled that football rules and regulations generally prohibit recourse to courts; however, a practical question arises as to how tenable it is for such a requirement to be upheld in the absence of a viable mechanism to emphatically resolve disputes as well as enforce the decisions reached. It is a trite principle of self-regulation that in the absence of a proven efficient system of internal administration of justice, external intervention by the municipal system of administration of justice will become inevitable.<sup>20</sup>

On May 14, 2012, two years after the arbitral award, Akpotor Power, together with eight other former players of Warri Wolves, approached the National Industrial Court to enforce the arbitral award made in their favour against Warri Wolves.<sup>21</sup> Being a club owned by the government of Delta State, the nine football players joined the Delta State Football Association, the Delta State Sports Commission and the Delta State Government in the suit. Whereas proceedings at the National Industrial Court are widely acknowledged as being a faster than the other courts; they may not necessarily be free from the technicalities that clog litigation proceedings. As a result, about a year later, the only decision reached by the court was one on a preliminary objection. The court ruled on 17 June, 2013 that the added parties (Delta State Government and its agencies) should not have been joined as parties to the suit since they were not parties to the proceedings at the arbitration tribunal. Consequently, their names were struck out from the suit with Warri Wolves being left to defend the proceedings by themselves. The thinking was simple – the state government, as owner and benefactor of the club, should stand financially liable. However, the court did not see it that way, owing to one of the many technical details that go with litigation. Also, as has been reported, the occasional absence of parties that stalls court proceedings seems to be taking its toll on the case.<sup>22</sup> All these have had the effect of slowing down the proceedings. Consequently, the ideal of speedy and efficient dispute resolution is lost.

Another instance where a football-related dispute was taken to the National Industrial Court is the case of *Osiwa Igbuya v. Delta State Football Association*.<sup>23</sup> In March 2009, Igbuya sued the Delta State Government for ceasing to fund Okpe Football Club of Sapele, claiming the sum of ₦96,219,000.00 as arrears for the overhead costs of running of the club as well as salaries of officials and players for the previous three years. On 11 June, 2012, it was the decision of the court that although the Nigeria Football Association<sup>24</sup> Act envisaged the creation of State FAs, it did not

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<sup>20</sup> Michelle *et al*, *The Interplay of Public Health Law and Industry Self-Regulation: the Case of Sugar-Sweetened Beverage Sales in Schools*, (April 2008) Vol.98 No.4, American Journal of Public Health.

<sup>21</sup> Suit no. NICN/EN/29/2012: Akpotor Power & 8 Ors. v. Warri Wolves FC & 4 Ors.

<sup>22</sup> Daily Independent online, *Absence of Counsel Stalls Warri Wolves Sacked Players' Case in Enugu*, (<http://www.dailyindependentnig.com/2013/11/absence-counsel-stalls-warri-wolves-sacked-players-case-enugu/>) (retrieved on February 19, 2014).

<sup>23</sup> Suit No: NIC/EN/32/2011.

<sup>24</sup> Now known as the Nigeria Football Federation.

create them as juristic persons capable of suing and being sued.<sup>25</sup> The implication is that despite the fact that the State FA is responsible for football administration within the state, it cannot be sued. Consequently, the case was struck out by the court. In this instance, the futility and ineptitude of this channel of resolution of the football-related dispute is evident from the following:

- i. the same NFA Act recognises each State FA as a member of the National Football Association Council; and
- ii. the NFF Statutes specifically stipulates the powers and functions of each State FA, including the “authority to perform the functions of the NFF within its area of jurisdiction in the State”.<sup>26</sup>

Within an institutionalized football-specific system of dispute resolution, where a recognized regulatory body such as a State FA defaults, it would not be shielded from liability on such grounds of technicality as witnessed in the Igbuya case before the National Industrial Court. Also, the inordinate delay experienced by Akpotor Power and others in seeking to enforce the award made by the arbitral tribunal shows that the National Industrial Court may not be a viable option for the resolution of football disputes. One is constrained to draw the inference that National Industrial Court is indeed not a viable channel for the efficient resolution of football disputes or even the enforcement or arbitral awards made by football tribunals. Overall, the Nigerian experience with respect to football disputes has clearly been one of frustration and lack of reparation.

This not only adds a voice to the calls for institutionalization of dispute resolution mechanism and the establishment of the NDRC in Nigeria, it also adds credence to the arguments in favour of *lex sportiva* i.e. sports law jurisprudence. It emphasizes the need for recognition and development of sports law jurisprudence, including specialist *quasi*-judicial bodies to adequately regulate sports legal relationships and efficiently adjudicate over sports disputes, bearing in mind the specificity of sports.

## 5 Recommendations/Conclusion

It is evident that there is a dispute resolution mechanism vacuum in football administration within Nigeria. Also, the mere establishment of an arbitration tribunal would not suffice without firms steps to guarantee the enforcement of their decisions. The following recommendations are therefore made:

- a) The NFF should fulfil its statutory obligation to establish the NDRC as there is dire need for an institutionalized judicial body to adjudicate over football disputes. This would curtail

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<sup>25</sup> Section 1 of the NFA Act establishes the NFA as a corporate body capable of suing and being sued; and although section 7(2)(b) stipulates that each State FA shall be a member of the National Football Association Council, the Act does not go on to create State FAs or grant them legal personality to sue and be sued.

<sup>26</sup> Article 21(3) *ibid*.

the administrative instability caused by court actions as well as promote the welfare of players and provide safeguards for stakeholders and investors. In an era where Nigerian football is littered with disputes, there is no denying the need for the NDRC.

- b) The national and league administrators must ensure that decisions of the football judicial bodies are sacrosanct. Disciplinary proceedings must be instituted against parties that fail to comply with such decisions. For instance, it is incredible that Warri Wolves have been allowed to participate in further league seasons despite refusing to comply with the arbitral award made against them since 2010. Their brazen nature of their refusal to comply with the award can be gleaned from the fact that they never appealed against it.
- c) Beyond football, there is the need for the establishment of a sports-specific national dispute resolution body, which would be the national equivalent of the world sports dispute resolution body – the Court of Arbitration for Sport. In the United Kingdom for instance, Sports Resolutions UK is the national body that serves this purpose. In recognition of this need, the National Council on Sports of Nigeria endorsed the decision of the Nigerian Olympic Committee (NOC) to establish the Nigerian Court of Arbitration for Sport (NCAS) as a solution to the recurrent sports (mostly football) disputes being taken to ordinary courts. On June 9, 2011 a Planning Committee was inaugurated by the NOC to develop the legal framework/guidelines for the establishment of NCAS. The committee headed by Adokiye Amiesimaka submitted its report to the NOC during the Annual General Meeting on May 25, 2012. However, since then, it is not apparent that further steps have been taken by the NOC.

In conclusion, the relevance of the calls for an institutionalized dispute resolution mechanism for football in particular and sports in general has been aptly depicted as follows:

*In the absence of an independent, neutral and reliable body in the prevailing sports structure to fairly and definitively resolve sports-related disputes, it is commonplace for athletes, administrators and other participants in sports to seek redress in civil courts. Unfortunately, the sports calendar can be easily disrupted by the usually slow litigation process which can also be relatively expensive. In addition, court action usually only fans the embers of conflict which goes against the Olympic spirit and discourages the private sector from participating in the development of sports.<sup>27</sup>*

Surely, when football disputes are left unresolved or allowed to escalate to the courts, the result includes frustration, acrimony, underdevelopment and stagnation. This, sadly, is the experience in

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<sup>27</sup> A. Amiesimaka, *Creating an Independent ADR Body for Sports (1)*, Punch Newspapers online (<http://www.punchng.com/sports/penetrating-passes/creating-an-independent-adr-body-for-sports-1/>) (retrieved on January 13, 2014).

Nigeria and it goes to show that the need for the institutionalization of a national football dispute resolution mechanism is indubitable.

## **The problem with African football: Corruption and the (under)development of the game on the continent.**

By Manase Kudzai Chiweshe\*

SUMMARY: 1. Introduction – 1.2 Corrupt nature of African football administration – 1.3 FIFA's non-interference policy – 1.4 Football (under)development in Africa and corruption – 1.5 What does the future hold for African football? – 1.6 Conclusion

### 1.1 Introduction

Rampant corruption, maladministration and lack of accountability have negatively impacted on the development of football in Africa.<sup>1</sup> Football has turned into a billionaire dollar industry across the world but Africa remains at the periphery of this lucrative system. It is believed that many factors such as the predatory and globalised nature of major European leagues, Africa's problem stem from systematic and institutionalised problems with its football administration structures. This paper highlights examples from across Africa to show that corruption is an endemic part of football administration on the continent. The continued under performance of African teams over the years will be used as a yardstick to measure the stagnant nature of the game in Africa. Local leagues and clubs on the continent are largely run unprofessionally except in a very few countries such as South Africa and accusations of match fixing are abound. Coupled to this, political interference provides a context in which football becomes a complex social construct in which space, culture, politics and economics intersect to produce very little development of the game as a vibrant commercial entity. Yet FIFA's standing statutes of non-interference have often meant corrupt leaders continuing in their positions for decades. The question is what then for African football given the deep rooted and structured nature of corruption.

Corruption is synonymous with African football.<sup>2</sup> The tale of the game on the continent is full of controversy and complex problems involving missing funds, election rigging, presidents who serve for decades, under paid players and poor infrastructure. This paper provide examples from across Africa that highlight how the under development of the game is intrinsically linked to the lack of transparency in how the game is being managed. The nature and level of corruption might be different from country to country but what is clear from literature is that most, if not, all African countries have serious administrative problems. The major obstacles facing all countries from combating corruption in football are FIFA's statutes of non-interference<sup>3</sup>. With protection ensured

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\* Senior Lecturer, Centre for Development Studies, Chinhoyi University of Technology, Zimbabwe. Email: [manasekudzai@gmail.com](mailto:manasekudzai@gmail.com)

<sup>1</sup> Rukuni, C. & E. Groenink (eds.) 2010. *Killing Soccer in Africa*. FAIR Transnational Investigation, pp. 2, [www.fairreporters.org](http://www.fairreporters.org) (accessed 7 June 2012).

<sup>2</sup> Ibid, pp. 2.

<sup>3</sup> FIFA Statutes Regulations Governing the Application of the Statutes Standing Orders of the Congress July 2012 General Provisions Section 68.2 state that. 'Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations.

from the global football mother body, most national association leaders run roughshod and this leads to the detriment of the game. There is corruption in sport all over the world yet somehow when it comes to football in Africa the practice has devastating effects especially on the players earning a livelihood from the sport.

Whilst there are many definitions of corruption, this paper views it as the abuse of public office for private gain. Within football this is when any official or person or persons use their position of trust in order to gain an undue advantage.<sup>4</sup> Across the world football corruption is evident in many activities including vote buying, match fixing, bribing officials, player transfers, sponsorship deals and even team selections. Across Africa issues of nepotism, tribalism, regionalism and religion also play an important part in corrupt activities. Corruption determines access to space, resources and fair chance. It hurts all people who depend on the integrity of people in power.<sup>5</sup> In football this includes local clubs, young players and football fans in general. Corruption suffocates development and makes processes expensive especially where there is need for infrastructural development like in Africa. Corruption is not an African problem but endemic to world sport.<sup>6</sup> The nature, scale and impact of corruption in Africa is however different. In Africa corruption is usually related to how officials use money from sponsors, government and FIFA earmarked for the development of the game for personal use. In such a scenario grassroots football is effectively compromised.

## 1.2 Corrupt nature of African football administration

Khumalo<sup>7</sup> argues that bad governance within football is a universal problem which begins at the very top at FIFA (Fédération Internationale de Football Association). The scandals, greed and corruption cases across the world over the past years point to a world football system crippled by controversy. Football governance in Africa is based on national associations which in turn report to the Confederation of African Football (CAF) which is the continental footballing body. National associations are independent bodies whose leaders are chosen by a few members involved in football administration. In most countries such as Zimbabwe and Nigeria the majority of football fans are not involved in this process and in most countries only those who have been involved in football administration for a number of years are allowed to run for office. As such the fans have no way of holding administrators accountable. Administrators only answer to FIFA or CAF which are not involved in everyday happenings of footballing nations. There is upward accountability which leaves African fans alienated from the footballing fraternity. This has serious implications in the

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Recourse to ordinary courts of law for all types of provisional measures is also prohibited.' Also Section 13.1(g) states each association is to manage their affairs independently and ensure that their own affairs are not influenced by any third parties

<sup>4</sup>See: <http://www.seco.admin.ch/themen/00645/00657/00659/01387/index.html?lang=en> (accessed 6 February 2014)

<sup>5</sup> See: <http://www.transparency.org/whatwedo?gclid=CLDV8pzLvr0CFekBwwodsw0AeQ> (accessed 3 May 2013)

<sup>6</sup> For example In Europe there is a growing epidemic of match fixing and illegal betting. An infographic at Sports Betting Online highlights the impact of the £306 billion illegal betting industry across. <http://www.sportsbettingonline.net/blog/match-fixing-football-european-epidemic/> (accessed 3 March 2014)

<sup>7</sup>Khumalo, T. 2013. *Football's rotten core must be excised*, <http://www.citypress.co.za/you-say/footballs-rotten-core-must-be-excised/> (accessed 4 February 2013)

commercialisation of the game since it is the same fans that are required to part with their money to finance football on the continent.

Corruption is institutionalised within African systems and football structures are not different. Pannenberg<sup>8</sup> shows that corruption in Africa has many names: 'a 'little something', a 'gift', a 'motivation', an 'envelop' or a 'dash'. Most of them refer to eating – indeed, 'to eat' means people using public money for private purposes. Nigerians call it 'sharing the national cake' which tells you that the practice is to some extent 'legitimized.' African football, as with its politics, has developed a system of patronage in which rich and powerful individuals use their positions within football to amass wealth, power and continued political influence. This is what Price terms the 'Big Man Small Boy Syndrome' in which The Big Man controls and gives orders; the Small Boy obeys and does not dare to speak his mind.<sup>9</sup> Most of the people employed in football in Africa are clients who are placed there in most cases without any proper qualifications or skills to perform the task.

A report by the Forum of African Investigative Reporters<sup>10</sup> (FAIR) labels football administrators as corrupt, greedy and inefficient administrators. Khumalo concludes that while players (such as George Weah, Salif Keita, Didier Drogba and Kalusha Balwa) have sacrificed their personal fortunes to develop not just soccer but their own communities, and have in some cases bailed out their national teams, the administration tasked with developing the game focus on personal gain.<sup>11</sup> Football can be a lucrative livelihood for senior administrators with access to funds from FIFA, taxes from affiliates including premier soccer leagues and from national team games. Very little is ploughed back into structures that promote junior football or coaching structures. The FAIR report outlines instances of vote buying and corruption in elections for footballing positions. One example is in Zimbabwe where two football councilors admitted receiving US\$2000 each for their votes in electing football president.<sup>12</sup> It also implicates journalists in Zimbabwe who allegedly took and demanded payments from football officials to write favorable stories. Football agents are also often accused of paying off coaches bribes so players they represent are called up to the national team, increasing their market value. This leads to many internal problems between players when they report for national duty. The best players do not always get selected and this impacts on the performance of African teams at international competitions.

In South Africa, the lead up to the World Cup in 2010 is alleged to have been tainted by match fixing involving senior soccer administrators. The matches in question included friendly matches

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<sup>8</sup>Pannenberg, A. 2010. Football in Africa: Observations about political, financial, cultural and religious influences, *NCDO Publication Series Sport & Development*, p14.

<sup>9</sup>Price, R. 1974. 'Politics and Culture in Contemporary Ghana: The Big-Man Small-Boy Syndrome.' *Journal of African Studies*, 1:2.

<sup>10</sup>Rukuni, C. & E. Groenink (eds.) 2010. *Killing Soccer in Africa*. FAIR Transnational Investigation. Download the report at [www.fairreporters.org](http://www.fairreporters.org) (accessed 7 June 2012)

<sup>11</sup> Khumalo, T. 2013. *Football's rotten core must be excised*, <http://www.citypress.co.za/you-say/footballs-rotten-core-must-be-excised/> (accessed 4 February 2013)

<sup>12</sup> Ibid, pp. 6.

Thailand, Bulgaria, Columbia and Guatemala.<sup>13</sup> An initial report by FIFA Chris Eaton showed that there was enough evidence to initiate a probe. The report highlighted that South African Football Association (SAFA) officials had been involved in match fixing through convicted Singaporean Wilson Perumal Raj. There are 'allegations of death threats and violence, offers of cash payments to officials, six-figure cash sums being banked on the way to matches, referees and linesmen being flown from around Africa and Europe specifically to corrupt games, and dramatic attempts to remove officials suspected of corruption minutes before matches began.'<sup>14</sup> All these cases highlight a systematic and deep rooted problem which involves powerful individuals across the continent. The masses that follow football can only sit and watch as their game is hijacked by greedy and corrupt officials without any development at the grassroots or improvement in infrastructure.

Sugden and Tomlinson<sup>15</sup> argue that the problem which is most worrying in Africa is the scale of corruption. Admos Adamu who was the head of Nigeria's football association allegedly misappropriated US\$800 000 grant from FIFA meant for infrastructural programmes. Former Cameroonian goalkeeper Joseph-Antoine Bell once claimed that 90 out of 100 dollars in football disappears in private pockets<sup>16</sup> Corruption is bad because it, among other things, demoralizes the players.<sup>17</sup> FAIR report cites the following cases of corruption from across Africa to highlight the wanton and brazen acts of corruption affecting African football:

- In Cameroon mobile phone company MTN pumped in \$600,000 of an \$800,000 project to renovate a number of stadiums. The other \$200,000 was to come from Fecafoot, the Cameroonian FA, but instead, \$146,000 ended up in the pockets of the then sports minister, Thierry Augustin Edzoa, so that he could "breathe easier", he said after the payment. The work never happened. The \$600,000 is unaccounted for.
- Under Adamu, Nigerian football has reached a position whereby only 10% of the \$7m received from the sponsor Globalcom reaches the clubs. Television rights for the Nigerian league are worth around \$5m, but since this deal was signed no Premier League club has received a share of the money.
- In Ivory Coast, FIF received \$1.6m a year from the Ivorian Petrol Refinery Company, SIR, but local clubs never got any of the money. The fund's existence only became public when SIR stopped the donations in 2007 on discovering the money was not being distributed.<sup>18</sup>

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<sup>13</sup> Oliver, B. 2010. *Free-for-all and corruption in African football shames FIFA*, <http://www.theguardian.com/football/2010/oct/24/corruption-african-football-fifa> (accessed on 5 January 2014)

<sup>14</sup> Kelso, P. 2012. *Match fixing corruption shakes South Africa to the core*, <http://www.telegraph.co.uk/sport/football/teams/south-africa/9754415/Match-fixing-corruption-shakes-South-Africa-to-the-core.html> (accessed on 6 September 2013)

<sup>15</sup> Sugden, J. & A. Tomlinson. 2003. *Badfellas: FIFA Family at War*. Edinburgh/ London: Mainstream Publishing.

<sup>16</sup> Oliver, B. 2010. *Making a killing out of African football*, <http://www.theguardian.com/football/2010/oct/24/football-corruption-cameroon-nigeria-ivory-coast> (accessed 5 March 2014)

<sup>17</sup> Pannenberg, A. 2010. *Football in Africa: Observations about political, financial, cultural and religious influences*, *NCDO Publication Series Sport & Development*

<sup>18</sup> Oliver, B. 2010. *Making a killing out of African football*, <http://www.theguardian.com/football/2010/oct/24/football-corruption-cameroon-nigeria-ivory-coast> (accessed 5 March 2014)

There is a lot of money flowing into the African game from 'companies whose core businesses are mining, agriculture, oil and gas, beverages and otherwise, but also by international sports companies such as Adidas and Puma and by television networks on the continent. There is also money coming in from other types of sponsorships and FIFA development projects. Much of the funds are earmarked for grassroots development but one only has to see the poor football facilities in Africa to notice that the money may be spend elsewhere.'<sup>19</sup>

### 1.3 FIFA's Non-Interference clause

FIFA have a standing policy of non-interference by government or other external parties into football matters. The FIFA statutes state that 'each member shall manage its affairs independently and with no influence from third parties.'<sup>20</sup> This rule was put in place to combat political and government interference in football matters especially in authoritarian regimes. Stories of imprisonment and torture of players and officials highlight the necessity of this rule necessary.<sup>21</sup> In Africa, where football is followed passionately, political interference is part of the game but covertly as the FIFA statutes forces government not to take over control of football matters. FIFA Director of National Membership and Development notes that, 'political interference is when a government tries to take direct control. The most common case of political interference is when a government perceives that the Executive Committee of the national association is not performing well enough and decides to take action. Often, because the national team is losing too many games, they decide that changes must be made and want to put someone else in charge. Other than that, it can be a lot of different things. For example, a government organizing its own competition, outside of the association, or a government which decides to change the result of a league, because they favor one team more than the other.'<sup>22</sup> However, this same rule has been criticized for protecting corrupt officials.

This rule has often been cited as a bullying tactic by FIFA to circumvent global democratic processes. Any talk of good governance in football is often viewed as an intrusion by FIFA 'into its established prerogatives of power, privilege, purse and space.'<sup>23</sup> To ensure that there is no interference there is a strict policy which leads to suspension of countries whose governments interfere in football matters. Football authorities are thus untouchable as Bob Munro, vice-chairman of the Kenyan Professional League argues that: 'In many cases, 'government interference' is because of gross mismanagement and/or corruption in the national football association. But who

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<sup>19</sup>Pannenborg, A. 2010. Football in Africa: Observations about political, financial, cultural and religious influences, *NCDO Publication Series Sport & Development*, p14.

<sup>20</sup>Farell, C. 2013. *FIFA's non-interference rule is holding back serious investigations*, <http://hereisthecity.com/en-gb/2013/05/24/fifa-non-interference-rule-is-holding-back-serious-investigatio/> (accessed 23 January 2014)

<sup>21</sup>For instance in countries such as Iraq (under Saddam Hussein) where the president's son was once the football association president athletes were tortured and beaten for poor performance like the Olympic team in 2000

<sup>22</sup>See: <http://www.fifa.com/aboutfifa/news/newsid=1528544/> (accessed 20 March 2014)

<sup>23</sup>Khumalo, T. 2013. *Football's rotten core must be excised*, <http://www.citypress.co.za/you-say/footballs-rotten-core-must-be-excised/> (accessed 4 February 2013).

suffers most when FIFA impose a ban? Sadly, it is the innocent clubs, coaches, players and referees. What judicial or other regulatory process in the world punishes the innocent victims?<sup>24</sup> Kenya was in 2004 banned by FIFA because the government had interfered with footballing matters after the high court tried to remove football leaders for various cases of corruption and maladministration including failure to produce annual audited accounts for four years and allegations of misappropriation of funds. Football clubs in the country had tried without success to lobby FIFA to intervene as the corruption worsened yet when the judiciary intervened they were quick to act. Government of Kenya was forced by FIFA to ignore its high court and reinstate the officials which is curious given the wide ranging debates on national sovereignty. FIFA has proven to be sovereign to itself with little regard for what national governments think or do.

In 2009, the National Sports Council in Zambia suspended Bwalya from all sporting activities after he was implicated in a corrupt scandal involving the transfer of a youth player to Israeli club, Maccabi Tel-Aviv, in 2008. Bwalya had refused to stand before a parliamentary committee to answer questions on the transfer. The ban was rescinded after FIFA intervened with a letter signed by general secretary Jerome Valcke stating that 'This current controversy circles around issues falling under the direct competence of FIFA, (a) the defence of the fundamental principle of the autonomy of the FIFA member associations from external influence, (b) the disputes around international transfers of players.'<sup>25</sup> Zimbabwean President Mugabe in 2006 attempted to investigate the misuse of a fund meant for the national team participation at the African Nations Cup. He had ordered the Sports Commission to evaluate the use of the fund other allegations of corruption within the national association but when FIFA threatened to ban Zimbabwe the investigation was stopped.<sup>26</sup>

Government in Africa is the biggest sponsor of national teams. It is also involved in infrastructural development that impacts on the development of the game. In South Africa, the world cup was staged successfully due to the cash outlay by the government yet the same government cannot question football leaders over corruption charges. FIFA cannot expect governments to invest into the game and yet not have control over how the money is utilised. In Nigeria after the 2010 World Cup, President Goodluck Jonathan suspended all national team participation from international tournaments in a bid to clean out corruption within the Nigerian Football Federation (NFF).<sup>27</sup> FIFA gave Nigeria three days to reverse the decision or face a ban and the government reversed its decision. On 5 October 2010, FIFA then announced a ban On Nigeria after the government controlled commission on sports forced the acting general secretary of NFF to step down and the

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<sup>24</sup>Oliver, B. 2010. *Free-for-all and corruption in African football shames FIFA*, <http://www.theguardian.com/football/2010/oct/24/corruption-african-football-fifa> (accessed on 5 January 2014)

<sup>25</sup> Rukuni, C. & E. Groenink (eds.) 2010. *Killing Soccer in Africa*. FAIR Transnational Investigation, pp. 26, [www.fairreporters.org](http://www.fairreporters.org) (accessed 7 June 2012).

<sup>26</sup> Ibid, pp. 24.

<sup>27</sup> Rukuni, C. & E. Groenink (eds.) 2010. *Killing Soccer in Africa*. FAIR Transnational Investigation, pp. 14, [www.fairreporters.org](http://www.fairreporters.org) (accessed 7 June 2012)

national courts took actions against football administrators.<sup>28</sup> The corrupt looters are thus protected and immune to prosecution even in countries where there are mechanisms to demand transparency. National laws and courts cannot hold them accountable as noted by a Zimbabwean coach in the FAIR report, 'Nobody dares touch these looters [corrupt football executives] because of the FIFA policy of non-interference. The football community will never get to the bottom of the rot.'<sup>29</sup>

#### 1.4 Football (under)development in Africa and corruption

Discussing the state of the game on the continent requires a nuanced analysis based on specific contextual factors. Measuring the growth of football can be done using many parameters all of which have weaknesses but put together provide a sense of the dire state of football. Wilson<sup>30</sup> has focused on the performance of African teams at the world cup to highlight how the standard of football on the continent seems to be increasingly lagging behind dominant football nations. When Cameroon beat England to reach the quarterfinals in 1990 there was widespread believe that Africa will provide an eventual winner. The preceding tournaments have been marred by failure which according to former Ivory Coast coach Vahid Halilhodzic, is caused by three major reasons: corruption, disorganization and individualism. According to him 'African football suffers from chronic organizational problems...There [Africa], politicians are interfering in absolutely everything, especially football. The reasons are obvious: Football is very popular, particularly on the national level, and some marginal political characters are using football to collect political points...Basically, what we have is organizational chaos, but corruption also plays its part.'<sup>31</sup>

In Africa sport is intrinsically linked to politics as such most people in administrative positions are not there on merit but through patronage. This poses many problems especially given the many administrative challenges facing football associations. A good example is the embarrassment of Togolese players threatening to strike for non-payment of bonuses at the 2006 World Cup in Germany. There are many cases in which national governments have come in to rescue national teams after administrators failed to raise money for travel or bonuses.<sup>32</sup>Corruption demoralises players and as was seen in Zimbabwe<sup>33</sup>, players also get involved in the corruption. Politicians know the importance of ensuring control over this political resource. National teams are important symbols of nation building, patriotism and pride. This leads to football positions having increasing political significance. Most football administrators are thus chosen through nefarious means which

<sup>28</sup>Hoiriis, K. 2010. *Corruption kills soccer development in Africa*, <http://www.playthegame.org/news/detailed/corruption-kills-soccer-development-in-africa-4999.html> (accessed 4 February 2014)

<sup>29</sup>Rukuni, C. & E. Groenink (eds.) 2010. *Killing Soccer in Africa*. FAIR Transnational Investigation, pp. 22, [www.fairreporters.org](http://www.fairreporters.org) (accessed 7 June 2012)

<sup>30</sup>Wilson, J. 2010. *Corruption, disorganization blamed for Africa's poor showing at Cup*, [http://sportsillustrated.cnn.com/2010/soccer/world-cup\\_2010/writers/jonathan\\_wilson/06/25/africa/index.html](http://sportsillustrated.cnn.com/2010/soccer/world-cup_2010/writers/jonathan_wilson/06/25/africa/index.html) (accessed 23 December 2013)

<sup>31</sup>Ibid.

<sup>32</sup> For instance FAIR report on corruption in African football notes how Kenyan government had to rescue the national team trip for a friendly in Uganda whilst football administrators were in America on purported association business

<sup>33</sup> See: <http://www.kickoff.com/news/30834/13-banned-for-life-in-zimbabwe-match-fixing-scandal> (accessed 5 March 2013)

have little to do with competence. This political nature of the game has often been used as an excuse for FIFA's policy of non-interference as noted by one official, 'allegations of false corruption are also often used by governments as an excuse to try to remove football officials from an association. They cannot remove football officials and put their friends at the top.'<sup>34</sup>

Footballing infrastructure across Africa is in a bad state.<sup>35</sup> Only a few countries such as South Africa and Morocco boast of world class stadia and facilities. Other countries such as Angola, Burkina Faso, Egypt and Mali have benefitted from hosting the Africa Cup of Nations which has led to building and renovation of some stadia. On the whole however football infrastructure in Africa is in a poor state. This makes attending games across the continent a dangerous endeavour and yearly people lose their lives at stadiums. Stadium deaths are also due to 'contempt for spectator safety on the part of the administrators and non-professional security personnel are the prime causes. Mismanagement worsens the situation (people are allowed in when the venue is already full). Sound management practices and well-trained personnel could do much to alleviate these problems.'<sup>36</sup> There is no money going into improving stadium security or increasing the comfort of fans within stadiums. This affects attendance which in turn hurts local clubs most of whom depend on gate takings for survival. Commercialisation and globalisation of football seems to have left Africa behind. Mega deals with television stations and company sponsorship will reduce to nil if corruption is not eradicated. In some countries such as Zimbabwe very few corporate companies want to be associated with the national association. This closes one stream of lucrative financing which is devastating for many poor nations. Corruption creates suspicion and mistrust and examples outlined in this paper highlight how companies have been duped into financing personal aggrandisement in the past.

### 1.5 What does the future hold for African football?

Football will remain popular and part of the social fabric in Africa. However the development of the game as a viable commercial entity will never be realised if the current organisational malfeasance continues. Africa can forget of crowning a world champion at senior level and infrastructural development will not improve in the foreseeable future because of institutionalised corruption. Local football needs sound management, serious youth development for boys and girls, better coaches' training, and infrastructural improvements at the grassroots.<sup>37</sup> This requires money to flow to the grassroots and not into pockets of officials. Without this approach African football will slowly suffocate. It is not proper to continuously ask governments to prop and sponsor the sport yet they have no jurisdiction in monitoring how monies they unveil are used. Local clubs in Africa face

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<sup>34</sup> Oliver, B. 2010. *Free-for-all and corruption in African football shames FIFA*, <http://www.theguardian.com/football/2010/oct/24/corruption-african-football-fifa> (accessed on 5 January 2014)

<sup>35</sup> Pannenborg, A. 2010. Football in Africa: Observations about political, financial, cultural and religious influences, *NCDO Publication Series Sport & Development*, pp. 19

<sup>36</sup> Ibid.

<sup>37</sup> See: <http://www.footballiscominghome.info/the-hosts/bafana-chan2014/> (accessed 3 March 2014)

serious challenges of sustaining themselves in the long run. With little talent being developed from the grassroots there is a chance most fans will stay away from the games. The few good players coming through are often taken to Europe at young ages in what has been described as new form slavery.<sup>38</sup> The global reach of European clubs has seen the rise of transnational fan identities which has meant many African football lovers resorting to televised matches especially in the English Premier League. Local leagues impoverished by years of under development and maladministration are finding it difficult to compete with the increased accessibility of satellite television across the continent. African football is thus at a crossroads and dealing with corruption is a near impossible task without upsetting FIFA's non-interference policy. As long as there is economic and political benefits to running football in Africa, corruption will always be an integral part of the game. The multifaceted and institutionalized nature of corruption is difficult to legislate for and many have given up on ever cleaning the African game.

## 1.6 Conclusion

African football is in a bad state by all standards. Lack of investment in grassroots structures is putting the future of the game into jeopardy. Football infrastructure remains in dilapidated state yet a lot of money continues to flow into the African game. Corruption is slowly suffocating the game across the continent. Dealing with corrupt individuals is made difficult by standing FIFA rules of non-interference in football matters by governments or state bodies. The threat of bans from football often cover national government into submission and prevents thorough inspection and monitoring of footballing authorities. FIFA are part of the problem in African football corruption and with evidence of so many cases of theft, it is surprising that little action has been taken to tackle the problem. The people who suffer are the fans and the millions of children across the continent denied the chance to fulfil their dreams because of a lack of basic infrastructure and adequate coaching expertise. The performance of African teams at the World Cup continues to deteriorate and this is a microcosm of the effects corruption has over a long period of time.

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<sup>38</sup> Peltz, R.J. 2010. The sportswriter as development journalist: Covering African football, *Ecquid Novi: African Journalism Studies*, 31:2, 149-173.

## Club Licencing in African football – are we there yet?

By Farai Razano\* and Felix Majani\*\*

SUMMARY: 1 – Introduction; 2 – Overview of the FIFA Club Licencing Regulations; 3 – CAF and Club Licencing Regulations; 4 – Implementation of Club Licencing by CAF’s member associations; 5 - Conclusion and the way forward for African football club licencing.

### 1 Introduction

During September 2013 the Confederation of African Football (“CAF”) issued an ultimatum to its Member Associations (MAs) for their non-compliance with and slack implementation of the CAF Club Licencing Regulations. This followed a CAF congress where the committee tasked with the monitoring and implementation of the CAF Club Licencing Regulations resolved that the state of the implementation of and compliance with the CAF Club Licencing Regulations was concerning.<sup>1</sup> CAF then imposed a December 31 2013 deadline for MAs to ensure that they complied with the CAF Club Licencing Regulations. The MAs were ordered to – at the very least – establish national club licencing regulations and the decision making bodies required in terms of the CAF Club Licencing Regulations. MAs that fail to comply with the said deadline risk the exclusion of their clubs from CAF continental competitions. The ultimatum sent massive tremors in many countries across the continent. Most of CAF’s MAs had done little – at that point – to ensure that the CAF Club Licencing Regulations are implemented and fully complied with by clubs within their jurisdictions. It is therefore no surprise that there was a rush by MAs to implement the CAF Club Licencing Regulations.<sup>2</sup> Newspapers in various countries<sup>3</sup> reported that various clubs in these countries particularly their premier leagues’ champions face the possibility of not participating the CAF Orange Champions League due to non-compliance with the CAF Club Licencing Regulations<sup>4</sup>.

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\* 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](mailto:frazano@ensafrica.com)

\*\* Attorney-at-law, Nairobi, Kenya. International Sports Law and Arbitration Consultant at Coelho Ribeiro e Associados law firm, LLM in International Sports Law at the ISDE and ad hoc clerk at the Court of Arbitration for Sport.

<sup>1</sup> See for example BNL Times - ‘Caf gets tough on club licencing... set December as deadline’ <http://timesmediamw.com/caf-gets-tough-on-club-licencing-sets-december-as-deadline/> (accessed 19 December 2013); see also Modern Ghana - ‘Caf issues club licencing system ultimatum’ <http://www.modernghana.com/sports/491805/2/caf-issues-club-licensing-system-ultimatum.html> (accessed 19 December 2013).

<sup>2</sup> For instance Nigeria there were reports that GLO Premier League would not commence until clubs had complied with club licencing regulations : see This Day Live – ‘Club Licencing to Determine Kick-off Date for New Season’ <http://www.thisdaylive.com/articles/club-licencing-to-determine-kick-off-date-for-new-season/164970/> (accessed 19 December 2013). Similarly, in the Namibia, the Namibian Football Association moved swiftly to establish club licencing regulations that have, in some circles, been regarded as ambitious very ambitious: <http://allafrica.com/stories/201311281322.html> (accessed 19 December 2013).

<sup>3</sup> For instance Zimbabwe, Nigeria, Liberia, Ghana and many others.

<sup>4</sup> For an in-depth discussion of the state of compliance with the CAF Club Licencing Regulations and the impact of the CAF ultimatum on Nigerian football see KC Omuojine “Understanding club licencing regulation and its impact on Nigerian Football” [https://www.academia.edu/5105595/Understanding\\_FIFA\\_Club\\_Licencing\\_Regulations\\_and\\_its\\_Impact\\_on\\_Nigerian\\_Football](https://www.academia.edu/5105595/Understanding_FIFA_Club_Licencing_Regulations_and_its_Impact_on_Nigerian_Football) (accessed 7 January 2014).

The CAF Club Licencing Regulations were established in 2012<sup>5</sup> in compliance with the obligation imposed on confederations by the *Fédération Internationale de Football Association* (FIFA) Club Licencing Regulations. The process of the implementation the FIFA Club Licencing Regulations was kick-started by the CAF Executive Committee around March 2011. CAF set a timeframe for the adoption of CAF Club Licencing Regulations, the adoption of a clause in the CAF Statutes for the implementation of the CAF Club Licencing Regulations by December 2011. Further deadlines were set for MAs to establish their own club licencing regulations by December 2011 and establish decision making bodies by May 2012. All these ambitious targets and the deadline imposed by FIFA were not met. It is worrisome that CAF took so long to implement the guiding principles set out in the FIFA Club Licencing Regulations. In view of well recorded problems perennially encountered by CAF, one would have expected CAF to have been at the forefront of implementing the general guidelines or the minimum requirements set out in the FIFA Club Licencing Regulations. For instance, there are many horrendous stories that are reported frequently in the media relating to CAF tournaments, including repeated stories about clubs having poor resources or resorting to 'dirty tricks' such as using horrible pitches or in-appropriate accommodation and training facilities to frustrate their opponents during their home matches. This coupled with the reported poor management of clubs and MAs across Africa present a good breeding ground for corruption, match fixing, legal betting and gambling and exploitation of footballers by unscrupulous individuals. These various challenges should therefore have been motivation for CAF to move swiftly and implement the CAF Club Licencing Regulations within the 2009/10 season deadline set by FIFA. The swift implementation of the minimum standards set in the FIFA Club Licencing Regulations would have been a very good opportunity to harmonise rules and safeguard the credibility and integrity of football in Africa.

This paper looks at the state of the implementation of the CAF Club Licencing Regulations. It commences by giving a brief overview of the FIFA Club Licencing Regulations – the framework regulations that all FIFA members are required to establish. The FIFA Club Licencing Regulations are not discussed in detail as they are almost on all fours with the CAF Club Licencing Regulations that will be discussed in much greater detail in this paper. The papers then looks at the framework of the CAF Club Licencing Regulations, assesses the implementation of the CAF Club Licencing regulations, compliance by MAs and football clubs falling under the jurisdiction of the various CAF MAs. It concludes by identifying challenges faced by CAF, MAs and clubs and suggests ways in which the implementation of the FIFA Club Licencing Regulations can be improved in Africa through the CAF Club Licencing Regulations.

## 2 Overview of the FIFA Club Licencing Regulations

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<sup>5</sup><http://www.cafonline.com/competition/.../news/9860-caf-executive-committee-decision-on-club-licencing.html> (accessed - 20 December 2013).

Football around the world has – like any other sport – had its fair share of successes and controversies both on and off the field. Controversies seem to be making up the larger share of off the field challenges faced by football. These challenges include corruption, poor administration, match fixing, illegal gambling and betting and the list goes on. As a result, FIFA has constantly been looking at innovative ways to strengthen regulations governing the sport – both on and off the field. Apart from attempts to deal with challenges presented by the exponential growth of football as a sport and business, FIFA and many of its affiliates have also been focusing on how to better exploit the huge commercial opportunities that have developed in tandem with the success and commercialisation of football. In order to fully utilise the opportunities available in football, and curb the potential risks facing football - FIFA has put in place measures aimed at creating uniformity and preserving the integrity of football. The FIFA Club Licencing Regulations are a good example of these measures. They are aimed at preserving the integrity of football and creating uniformity across the football spectrum. The FIFA Club Licencing Regulations call upon its affiliates – confederations – to adopt these regulations and establish club licencing systems.

The FIFA Club Licencing Regulations came into force on 1 January 2008. They were accepted by the 57<sup>th</sup> Congress of FIFA and Zurich in May 2007 and were approved by the Executive Committee of FIFA in the same year on 29 October. The FIFA Club Licencing Regulations are meant to be “a basic working document for the club licencing system through the different members of the football family and to promote common principles in the world of football such as sporting values, transparency in the finances, ownership and control of clubs and the credibility and integrity of club competitions”<sup>6</sup>. Implicit in the above statement is that the growth of football has also brought along threats to the integrity of the game, credibility of the game as well as other concerns relating to finances and ownership of clubs. It is with these problems in mind that FIFA deemed it necessary to regulate the manner in which clubs are accredited to participate in FIFA competitions.

The aims and purposes of the FIFA Club Licencing Regulations are clearly articulated in Article 1 of the FIFA Club Licencing Regulations. As a basic document, the FIFA Club Licencing Regulations comprise the minimum requirements and guidelines that have to be developed by various confederations and MAs in order to create uniformity in football. The FIFA Club Licencing Regulations were established with the following objectives:<sup>7</sup>

- (i) to safeguard the credibility and integrity of club competitions;
- (ii) to improve the level of professionalism within the football family;
- (ii) to promote sporting values in accordance with principles of fair play as well as safe and secure match environments;

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<sup>6</sup> FIFA circular number 1128 dated 28 December 2007.

<sup>7</sup> Article 1.1.

- (iii) to promote transparency in the finances of clubs;
- (iv) to promote transparency in the ownership of clubs and
- (v) to promote transparency in the control of clubs.

The FIFA Club Licencing Regulations speak to the authorities or regulators and clubs that will seek licences or accreditation. They are divided into two main sections. The first section deals with the confederations and MAs - the licensor. The section explains the tasks for the confederations and MAs, defines the licence applicant and the licencing bodies as well as the core processes to be applied in dealing with applications. The second section on the other hand is directed at clubs that are members of the MAs and therefore affiliating confederations and FIFA. The FIFA Club Licencing Regulations distinguish between licence applicants (clubs applying for licences) and licensees (clubs that have been granted licences). For the purposes of this paper – licence applicants and licensees will be collectively referred to as clubs. The second section creates five categories of minimum criteria that are elaborated in five separate chapters. These are sporting criteria; infrastructure criteria; personnel and administrative criteria; legal criteria and financial criteria. These criteria's are further divided into three different grades namely, A, B and C. Categories A and B are mandatory and category C is deemed 'best practice'. The criteria and categories will not be discussed in details here. They will be discussed in more detail below when we look at the CAF Club Licencing Regulations as they are on all fours with the FIFA Club Licencing Regulations. The FIFA Club Licencing Regulations serve as a guiding document and confederations and MAs are required to transform the FIFA Club Licencing Regulations into their regulations stating minimum criteria to be met by clubs. Confederations were required to establish club licencing systems in compliance with the FIFA Club Licencing Regulations by the 2009 / 2010 season. Various confederations have established Club Licencing Regulations in compliance with the duties imposed on them by the FIFA Club Licencing Regulations.

### 3 CAF and Club Licencing Regulations

Article 60 of the CAF Statutes empowers the Executive Committee of CAF to define a club licencing system that deals with minimum criteria to be met by clubs to be eligible to participate in CAF tournaments; club licencing procedures and the minimum requirements to be applied by the licensors. The CAF Club Licencing Regulations are a mirror version of the FIFA Club Licencing Regulations with the exception of a few minor modifications. The aims and purposes of the CAF Club Licencing Regulations are similar to the aims and purposes of the FIFA Club Licencing Regulations. Like the FIFA Club Licencing Regulations, the CAF Club Licencing Regulations are also divided into 2 sections dealing with the licensor (MAs responsible for implementing and monitoring the issuing and enforcement of licences) and the clubs (licence applicants and licensees). The objectives of the CAF Club Licencing Regulations, as is the case with the FIFA Club Licencing Regulations, are to promote and improve the quality and the level of football in

Africa; ensure that clubs have appropriate infrastructure, knowledge and application in respect of management and organisation; adapt and improve the clubs' sporting infrastructure; improve economical and financial capacity of clubs through proper corporate governance and control; and ensure and guarantee the continuity of international competitions of clubs; and allow the parallel development and comparison amongst clubs by ensuring compliance with financial, sporting, legal, administrative and infrastructure criteria.

Like the FIFA Club Licencing Regulations, the five criteria are further divided into three separate categories i.e. A, B and C. Category A and B are compulsory or mandatory. Every club must meet the requirements of the A and B requirements before it can be granted a licence. Failure to comply with the conditions of the licence will result in the licence being withdrawn or the club being sanctioned. The C category on the other hand is simply best practice standards and clubs are encouraged to implement the recommendations made pursuant to category C. Non-compliance with the recommendations will not lead to the refusal of the licence, withdrawal or imposition of the sanction.

The CAF MAs are mandated with the implementation and enforcement of club licencing regulations. They are required to establish two separate bodies i.e. the first instance body and the appeals body. The first instance body is responsible for deciding whether or not a licence should be granted to a club. The appeals body on the other hand is responsible for dealing with written appeals and making final and binding decisions on whether or not a licence should be granted. Appeals may be lodged by clubs or by an MA were such MA is not satisfied with the decision of the first instance body. These two bodies i.e. first instance body and appeal body are required to be fully independent and have certain minimum procedural standards<sup>8</sup>.

Only legal entities are eligible to apply for a licence. The legal entities bear the full responsibility for the football team participating in the CAF interclub tournaments. Licences can be granted to any club regardless of the club's status (professional, semi-professional or amateur). Article 5.2 of the CAF Club Licencing regulations imposes various obligations on the clubs. In particular the clubs required to ensure that all players registered with the MA or its affiliated league, have a written employment contract (if they are professional players; that the club is fully responsible for the football team composed of registered players participating in national and international competitions; that the MA is provided with all information and documents relevant and necessary to proving that the licencing obligations have been fulfilled; that any compensation to players or payments in terms of legal obligations and revenues from gate receipts are properly accounted for in their books of accounting and that the MA is provided with information on the five criteria set out in the regulations<sup>9</sup>.

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<sup>8</sup> See for instance Article 4.3 of the CAF Club Licencing regulations which deals with the decision making procedure.

<sup>9</sup> In the five criteria are sporting; infrastructure; personnel and administrative; legal and financial.

Over and above the mandatory provisions set out in the CAF Club Licencing Regulations – in particular categories A and B – recommendations may be made from time to time for adoption and implementation by MAs and their affiliates in their respective leagues. These additional recommendations are not mandatory. They are regarded as good practice provisions. They mainly relate to clubs being legally based in the territory of the MA and play their home matches only in that territory; clubs using the name and brands of the club and not changing the name of the club for advertising or promotional purposes. Clubs are encouraged not to have clauses in their contracts with television sponsors or other commercial partners that may affect the clubs' autonomy or affect its management i.e. the so called third party influence.

Licences issued in terms of the club licencing regulations may be valid for one or more seasons. However, the licence will expire without the need for prior notice at the end of the last season for which it was issued. A licence may be withdrawn by the MA if the club becomes insolvent and enters into liquidation during the season as determined by the relevant national laws of the country within which the MA operates or if the club breaches any of the conditions of the licence and violates its obligations under the national club licencing regulations. In order to cater for extraordinary circumstances, the CAF Club Licencing Regulations make provision for extra-ordinary licence applications. Typically an extra-ordinary licence application may be made in the case of a club that would not normally require a licence to compete in a national competition but has now qualified for a CAF tournament.

### 3.1 The five criteria and minimum requirements

In order to fully understand and evaluate the impact of the CAF Club Licencing Regulations on African football and compliance by MAs, it is important to give an outline of the five criteria in detail. The five criteria are sporting criteria; infrastructure criteria; personnel and administrative criteria; legal criteria and financial criteria.

#### 3.1.1 Sporting Criteria

The sporting criteria are mainly aimed at ensuring that the clubs invest in proper youth development programs; place a significant value in young players' training and contribute to their education; promote medical care for the youth players and encourage the practice of fair play on and off the pitch. Clubs are enjoined to have their youth development programs approved by their respective MAs. Each youth development program must comply with certain minimum requirements<sup>10</sup> and include the philosophy of the programme, minimum qualifications for personnel to be recruited for the youth development programme, set out infrastructure available for the youth training programme, outline financial resources for the youth development programme, set out football education programmes for different age groups as well as education programmes on the

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<sup>10</sup> These are well set out in Article 8.1.

laws of the game and set out medical support plans for young players. Each club is required to have at least one good team affiliated to it within the ages 10 – 14 and 15 – 21.

Clearly the sporting criteria are aimed at fostering a grassroots policy intended at the early development of footballers and proper transition from youth development to senior teams. The importance of the sporting criteria cannot be overstated. This is one area that Africa needs to pay a lot of attention to as there is a lot of undiscovered and thus untapped talent across the continent. Without proper youth development training programs this talent will simply go to waste.

### 3.1.2 Infrastructure criteria

The infrastructure criteria focus mainly on long term investments by clubs. Clubs are required to have approved stadia available for playing inter-clubs competitions matches that provide comfortable spaces for spectators, media representatives and the clubs. The clubs are also required to have suitable training facilities to help them improve on their technical skills. Again, the importance of these criteria cannot be overstated. There are always frequent reports about stadia and facilities that are very poor that are used by clubs across the continent in some of the continent's prestigious tournaments. They create a serious challenge particularly if the opponents involved in those tournaments have a completely different set up where one has proper facilities and the other does not have and are normally regarded as sabotaging techniques by the home team. In addition to promoting fair competition, it is also an issue of safety and security of the spectators and the clubs as well as other stake holders. It is therefore important that compliance with these be encouraged to ensure that football matches are a worthwhile experience for all stake holders.

### 3.1.3 Personnel and Administrative criteria

The objectives of the personnel and administrative criteria are to ensure that clubs are managed professionally, clubs have well educated, qualified and skilled specialists with a certain know how and experience and that players of the clubs are trained but qualified personal i.e. coaches and the necessary medical staff. Again, the importance of these criteria cannot be overstated considering the many challenges, ranging from mal-administration in general to rampant corruption – faced by football in Africa on and off the field. While most football clubs perform well on the field, their performance off the field cannot be said to be the same and leaves a lot to be desired. There are frequent media reports about some clubs being run unprofessionally. Some of the – arguably – most prestigious and most successful clubs in the CAF tournaments are said not to have offices despite having massive budgets and attracting a lot of attention continentally. For example, recently the Chief Executive Officer of the Premier Soccer League in Zimbabwe was reported to have said “we have a team spending offer of US\$400,000.00 a year in running a club that they do

not have offices which is misnomer. Investigating those running clubs will also ensure that clubs are not used for money laundering purposes”<sup>11</sup>. Clearly proper administration of clubs is a serious challenge for Africa if there still are professional leagues that have clubs that do not have offices. Apart from being unprofessional, the lack of proper management or governance structures exposes the sport to all sorts of challenges and undermines the integrity and credibility of the sport.

#### 3.1.4 Legal criteria

The legal criteria like all the other criteria listed in the CAF Club Licencing Regulations also aim at protecting the integrity and credibility of the sport. The main area of focus is to ensure that clubs subject themselves to the legally binding statutes, rules and regulations and decisions of FIFA and CAF and their member associations. The legal criteria also pay particular attention to the issue of ownership and control of clubs. They aim to alleviate the problem of third party influence and multiple ownerships of clubs. Thus, the ownership of, or involvement in, more than one club by a single person or entity and participation of those clubs in the same competition is strictly prohibited. Clubs are required to have clear and transparent ownership structures to avoid the ever-present threat of third party influence in the management of clubs. One simply has to look at the massive match fixing scandal in Zimbabwe (dubbed the Asiagate Scandal) in which clubs were allegedly manipulated by betting syndicates and administrators to pose as the Zimbabwe national team.<sup>12</sup> This could only have been possible as a result of a lack of proper and clear organisational and management structures in these clubs and the national team as well. Decisions were allegedly made by make-shift management structures. In some instances the ‘correct’ administrators professed ignorance of what was going on with these clubs and the illegal tours. Most importantly, even the MA itself – the Zimbabwe Football Association (ZIFA) – did not have a proper administration structure and had too much power vested in certain individuals.

#### 3.1.5 Financial criteria

The financial criteria are very important insofar as illicit conduct relating to football is concerned. The lack of transparency, proper management structures and professionalism in football management often exposes football clubs and footballers to match fixing, sport fixing and illegal betting and gambling syndicates. It also opens up clubs to money laundering and looting of club resources. Therefore, the CAF Club Licencing Regulations aim to eradicate these by ensuring that the economic and financial capability of clubs is improved, that clubs increase transparency and credibility and that necessary importance is placed on the protection of creditors. Every MA is required to ensure that clubs meet the minimum financial criteria set out in the CAF Club Licencing Regulations. These include the submission of annual statements that have been audited setting

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<sup>11</sup> See Sunday News ‘CAF seeks club licencing’ [http://www.sundaynews.co.zw/index.php?option=com\\_content&view=article&id=30893:caf-seeks-club-licensing&catid=50:sport&Itemid=142](http://www.sundaynews.co.zw/index.php?option=com_content&view=article&id=30893:caf-seeks-club-licensing&catid=50:sport&Itemid=142) (accessed 22 December 2013).

<sup>12</sup> Ebrahim Commission, 11 October 2012, “Asiagate Report” p. 83.

out minimum information such the current assets, non-current assets, current liabilities, non-current liabilities, net assets or liabilities and equity of the clubs. In addition, clubs must clearly declare their revenue and expenses and these must be kept in proper accounting records.

#### 4 Implementation of Club Licencing by CAF's Member Associations (MAs)

While CAF may argue that a lot has been done to comply with the FIFA Club Licencing Regulations, a lot still needs to be done in respect of African football club licencing. The ultimatum issued by CAF and the panic that followed are clear evidence of this. Football is probably the most popular sport in Africa. But it is not the most advanced in terms of regulation. In some countries the regulation of football is virtually non-existent – while in some it is well managed and meets the world standards imposed by FIFA. This is notwithstanding the fact that Article 60(2) of the CAF Statutes prescribes that MAs shall apply club licencing systems in line with the CAF Club Licencing Regulations and shall incorporate these requirements in their statutes. The CAF Club Licencing Regulations have to some extent been reduced to a paper tiger.. CAF and its MAs are still experiencing problems with regards to some of the basic issues that are addressed by the CAF Club Licencing Regulations.

A lot of MAs (and clubs) in African football are yet to fully comply with the CAF Club Licencing Regulations. These regulations are the basic minimum requirement as set out in the FIFA Club Licencing Regulations. Yet the CAF MAs and clubs are failing to comply with them. It has to be noted that in terms of the FIFA Club Licencing Regulations confederations and MAs are empowered to raise the bar and set more stringent requirements compared to those set out in the FIFA Club Licencing Regulations. CAF has not made use of this opportunity and has stuck to the bare minimum requirements.

The enforcement of the CAF Club Licencing Regulations is also problematic. A lot of MAs did not meet the May 2012 deadline set by CAF. While club licencing and enforcement of licence conditions are a responsibility of MAs, CAF is empowered to implement spot checks on the compliance with the CAF Club Licencing Regulations by MAs.<sup>13</sup> CAF should therefore use this to ensure that it is fully acquainted with the status on the ground if club licencing is to become a reality.

It must also be borne in mind that club licensing is a dual relationship. It is a relationship that entails binding obligations on both the licensors (MAs) and the licensees (clubs). Therefore, MAs must exercise care and caution in fulfilling their duties in terms of the CAF Club Licensing Regulations and any national club licensing regulations. MAs must be diligent and ensure full compliance with the CAF Club Licensing Regulations and any national club licensing regulations. Before issuing licenses to clubs, MAs should ensure that all the requirements have been met and

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<sup>13</sup> Article 14.

all the necessary documents have been submitted. MAs that issue licenses in contravention of the CAF Club Licensing Regulations and any applicable national club licensing regulations should be held liable and sanctioned by the CAF. The CAF Club Licensing Regulations are clear on this. Article 14.2 of the CAF Club Licensing Regulations states that "... if CAF realises that a licensor issued a licence in breach of the national licensing regulations, the relevant association shall be sanctioned by CAF disciplinary committee..."

Article 14.2 of the CAF Club Licensing Regulations is in line with the standards applied by other confederations such as the Union of European Football Associations ("UEFA"). The UEFA has, on several occasions, dealt with the issue of non-compliance with club licensing regulations by various association affiliated to it. For instance, the UEFA Control and Disciplinary Body fined the Hungarian Football Federation<sup>14</sup> EUR 100,000, half of which was suspended for a probationary period of 2 years. This Body was of the view that the Hungarian Football Federation had to be liable for failing to undertake due diligence, and for granting Gyori a license despite the latter's failure to meet the criteria.

## 5 Conclusion and the way forward for African football club licencing

The FIFA Club Licencing Regulations and the subsequent club licencing regulations by Confederations and MAs have noble aims. The most notable of these aims is the need to ensure that the credibility, integrity and transparency of football are protected. In addition, they seek to create minimum standards that apply across the footballing world and thereby creating consistency and ensuring the smooth administration of football. The FIFA Club Licencing Regulations have been complied with and implemented successfully by various confederations. The Confederation of African Football – however – still has a long way to go. While CAF established club licencing regulations in 2012, the impact of these in terms of football administration in Africa remains to be seen. Much debate is still around what these are, whether they are necessary for and what good (or harm) they will bring to football. From the initial deadline for the implementation of the FIFA Club Licencing Regulations (2009 / 2010 season), these should not be the debates that those in football should be having at the moment. These issues should have been addressed immediately after the FIFA Club Licencing Regulations came into force. Focus should now be on implementation and a lot more can be done to ensure that the CAF Club Licencing Regulations are fully implemented by the MAs.

That clubs have failed to comply with the CAF Club Licencing Regulations is no secret. The recent ultimatum by CAF is clear testimony of this. The ultimatum seems to have worked in some countries. In Nigeria for instance, the League Management Company ("LMC") rejected applications for registration and participation in the Nigeria Professional Football League ("NPFL") by two clubs

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<sup>14</sup> See CAS 2012/A/2702 Györi ETO v. UEFA.

due to the clubs' failure to comply with minimum registration requirements.<sup>15</sup> Another concern that arises is CAF's focus on the non-compliance rather than the causes of the non-compliance. One has to appreciate the diverse social, political and economic set up in different countries that the clubs operate from. Some of the regulations may be easily enforceable in politically and economically stable countries. But these may not be enforceable in war torn countries or countries that are undergoing severe economic meltdown.

Perhaps CAF should be rechanneling its energy towards proper education and information of the concerned MAs and clubs to understand the need for the regulations and gradually how to comply. MAs and clubs need to be fully informed and educated about the benefits of compliance and the dangers of noncompliance. The dangers of non-compliance should also be stressed in relation to the consequences for the MAs and clubs concerned *vis a vis* the FIFA Club Licencing Regulations. An important aspect to note is that the FIFA Club Licencing Regulations emphasise that the adoption and establishment of club licencing regulations should be done taking into account national laws. CAF should also look into partnering with various MAs to ensure that the CAF Club Licencing Regulations and the FIFA Club Licencing Regulations are adopted taking into account the various differences in territory and laws.

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<sup>15</sup> For a full discussion of the LMC's decision and reasons for barring the two clubs from the completion, see KC Omuojine. *The only two privately-owned clubs fail to make the NPFL cut*. <http://sportsissuesonline.com/the-only-two-privately-owned-clubs-fail-to-make-the-npfl-cut/> (accessed 11 March 2014).

## Doping, are there only a few good apples in the barrel?

By Ntokozo Ayanda Majazi\*

SUMMARY: 1 Introduction; 2 The History of Doping in Sports; 3 The Definition of Doping; 4 Strict Liability; 5 Standard of Proof; 6 The Varying Degrees of Doping; 7 The African Problem; 8 Sanctions; 9 Conclusion.

### 1. Introduction

The use of performance enhancing drugs (doping) in sport is a world-wide phenomenon. Chuck Yesalis, opined that *“You’ve got to be a moron not to connect the dots. Doping is everywhere. There are only a few good apples in the barrel, and they’re not winning any medals.”*<sup>1</sup> With the number of doping incidents that have surfaced over the years worldwide, and the 2012 doping scandal involving Lance Armstrong, these words have to some extent proved to be true. After years of speculation, cycling ‘god’, Armstrong who had risen to the apex of the sports world and became an inspiration to cancer sufferers, was exposed as a cheat by United States Anti-Doping Agency (“USADA”).<sup>2</sup> Armstrong was once revered for his sportsmanship but he is now detested by many for his lies. He was stripped of his seven Tour de France titles and banned from sport for life. For years, Armstrong stubbornly and ferociously denied that he used performance enhancing drugs. It is now common knowledge that he lied.<sup>3</sup> Armstrong did not only lie, he attacked those who spoke out against his use of performance enhancing drugs and was prepared to sue these individuals. The individuals included the likes of Betsy and Frankie Andreu, Floyd Landis and Tyler Hamilton amongst others. Armstrong’s former teammates, including George Hincapie, Levi Leipheime and Michael Barry also confessed to doping during their careers as well as witnessing Armstrong using performance enhancing drugs.<sup>4</sup>

The controversy surrounding Armstrong has to some extent reinforced the perception that many elite athletes intentionally violate anti-doping regulations so as to gain an unfair advantage in sport. The Armstrong saga also – to some extent – lessened public sympathy for those athletes who unintentionally find themselves on the wrong side of the anti-doping regulations. These athletes are also regarded as cheats, despite a lack of the intention to cheat on their part. In some instances anti-doping rule violations occur as a result of a lack of knowledge and understanding of what doping actually is and a lack of understanding of the responsibilities placed on athletes by the

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\* Associate at Edward Nathan Sonnenbergs: Admitted Attorney of the High Court of South Africa; LLB (University of KwaZulu-Natal, South Africa).

<sup>1</sup> Cora Burnett (2013): *Deviance in sport: is it out of control?: Think Sport: A Journal on Sport & Recreation Volume 2 No.3 page 13.*

<sup>2</sup> In October 2012, the United States Anti-Doping Agency published the details of its findings against Lance Armstrong. see *United States Anti – Doping Agency v Lance Armstrong, Reasoned Decision of the United States Anti-Doping Agency on Disqualification and Ineligibility.*

<sup>3</sup> *Ibid see United States Anti – Doping Agency v Lance Armstrong, Reasoned Decision of the United States Anti-Doping Agency on Disqualification and Ineligibility.*

<sup>4</sup> *Ibid see United States Anti – Doping Agency v Lance Armstrong, Reasoned Decision of the United States Anti-Doping Agency on Disqualification and Ineligibility.*

regulations. This lack of knowledge is especially prevalent in the so-called 'less developed' countries, such as most of the countries in Africa.

This paper argues that doping has varying degrees, consequently that the 'one size fits all' approach is not the most appropriate way of tackling doping in sport. More specifically, this paper will look at, on the one hand those athletes who set out to intentionally cheat and actively take part in doping programs and (the likes of Armstrong have been successful for many years) and on the other hand, those athletes who unwittingly contravene the anti-doping regulations.

## 2. The history of doping in sports

### 2.1. The ancient times

Doping in sport is rooted in ancient history.<sup>5</sup> Athletes have been searching for substances to improve their athletic performances from as far back as 776 BC, the days of the ancient Greek athletes.<sup>6</sup> These athletes are believed to have eaten the hearts, brains and the livers of animals in the belief that they would become more intelligent, swifter and stronger.<sup>7</sup> In 1904, mixtures of strychnine, heroin, cocaine and caffeine became very popular and were widely used by cyclists and lacrosse players in order to prevent fatigue and hunger.<sup>8</sup> By the 1920's, doping by athletes was so out of hand that it became abundantly clear for sporting authorities that boundaries needed to be set in place in order to prohibit doping.<sup>9</sup> As a result, in 1928 the International Amateur Athletics Federation (IAAF) attempted to set these boundaries and became the first international sport federation to prohibit doping.<sup>10</sup> In 1966 the *Union Cycliste Internationale* ("UCI") and *Fédération Internationale de Football Association* ("FIFA") followed suit. However the prohibitions put in place by the aforementioned Federations were in vain as no tests were performed on athletes.<sup>11</sup> The dreadful dangers and threats to athletes' lives and physical welfare caused by doping arose in 1960 when Danish cyclist Knut Jensen became the first known athlete to die as a result of doping.<sup>12</sup> It is recorded that Jensen's death increased the pressure on sporting authorities to introduce drug testing in sports.<sup>13</sup>

Consequently, in 1966, the UCI and FIFA introduced doping tests in their respective World Championships.<sup>14</sup> The doping tests however, seemingly did not prevent athletes from their quest to improve their athletic performances by using performance enhancing drugs. In 1967, the tragic death of another cyclist, Tommy Simpson, whose alleged motto was "*if it takes ten to kill you, take*

<sup>5</sup>This analysis of the history of doping in sport is necessarily brief. For an in depth discussion of the history of doping in sport, see further D Rosen, *Dope: A history of Performance Enhancement in Sport from the Nineteenth Century to Today* (2008).

<sup>6</sup>*Historical Timeline – Sports and Drugs - ProCon.org* (accessed 10 July 2013).

<sup>7</sup>*Ibid Historical Timeline – Sports and Drugs - ProCon.org.*

<sup>8</sup>*Ibid Historical Timeline – Sports and Drugs - ProCon.org.*

<sup>9</sup>*Ibid Historical Timeline – Sports and Drugs – ProCon.org.*

<sup>10</sup><http://www.wada-ama.org> (accessed 3 January 2014).

<sup>11</sup>*Ibid* <http://www.wada-ama.org>.

<sup>12</sup>*Ibid Historical Timeline – Sports and Drugs – ProCon.org.*

<sup>13</sup>*Ibid Historical Timeline – Sports and Drugs – ProCon.org.*

<sup>14</sup>*Ibid* <http://www.wada-ama.org>.

*nine and win*" heightened the urgency of anti-doping work and triggered renewed efforts by sporting agencies to take action against doping.<sup>15</sup> As a result, the International Olympic Committee (IOC) instituted its Medical Commission and set up its first list of prohibited substances.<sup>16</sup>

## 2.2. The birth of the IOC

The IOC was established with three guiding principles, namely; the protection of the health of athletes, respect for medical and sports ethics, and equality for all competing athletes.<sup>17</sup> As mentioned above, the IOC established a Medical Commission and set up the first list of prohibited substances in response to the rise of doping by athletes. The IOC's first doping tests were introduced at the Olympic Winter Games in Grenoble and at the Olympic Games in Mexico in 1968, where Hans-Gunnar Lijjenwall who tested positive for doping was stripped of his bronze medal and became the first athlete to be disqualified as a result of doping.<sup>18</sup> By the 1970's, most International Sporting Federations had introduced drug testing. Athletes however attempted to outsmart the Federations by using steroids, as there was no way of detecting the steroids through the then available testing processes.<sup>19</sup> In 1975, a test considered to be reliable in detecting steroids was developed.<sup>20</sup> The development of the test resulted in the IOC including steroids to its list of prohibited substances. In the 1970s and 1980s, anti-doping work was apparently complicated by suspicions of state-sponsored doping practices in some countries.<sup>21</sup> Although the fight against stimulants and steroids was producing some results, the main front in the anti-doping war rapidly started to shift towards blood doping.<sup>22</sup> Blood doping was banned by the IOC in 1986.

The number of athletes who failed doping tests increased over the years. As a result of increased incidents of doping, the IOC became more stringent in dealing with athletes caught doping. Accordingly, in 1988, Ben Johnson a Canadian sprinter was stripped of his gold medal after he too tested positive for doping.<sup>23</sup> Johnson was not only stripped of his gold medal but he was also later banned from sports for life. Johnson claimed that his herbal drink was spiked, but the officials declined his explanations. Johnson did later admit to doping through using steroids.<sup>24</sup> Even years after Johnson's ban, he feels he was unfairly picked out for vilification at a time of widespread drug use in athletics.<sup>25</sup>

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<sup>15</sup> *Ibid* Historical Timeline – Sports and Drugs – ProCon.org.

<sup>16</sup> *Ibid* <http://wada.wada-ama.org>.

<sup>17</sup> *Ibid* <http://wada.wada-ama.org>.

<sup>18</sup> *Ibid* Historical Timeline – Sports and Drugs – ProCon.org.

<sup>19</sup> <http://wada.wada-ama.org>.

<sup>20</sup> <http://wada.wada-ama.org>.

<sup>21</sup> <http://wada.wada-ama.org>.

<sup>22</sup> "Blood doping" refers to any illicit method of boosting an athlete's red blood-cell supply in advance of competition. The red blood cells carry oxygen through the bloodstream. Increasing the number of the blood cells allows an athlete's blood to deliver oxygen to muscles more efficiently, reducing fatigue and giving the athlete an edge.

<sup>23</sup> <http://www.telegraph.co.uk/sport/othersports/athletics/10329995/Ben-Johnson-I-was-nailed-on-a-cross-for-taking-steroids-at-Seoul-Olympics-25-years-later-Im-still-being-punished.html>

<sup>24</sup> <http://www.telegraph.co.uk/sport/othersports/athletics/10329995/Ben-Johnson-I-was-nailed-on-a-cross-for-taking-steroids-at-Seoul-Olympics-25-years-later-Im-still-being-punished.html>

<sup>25</sup> <http://www.telegraph.co.uk/sport/othersports/athletics/10329995/Ben-Johnson-I-was-nailed-on-a-cross-for-taking-steroids-at-Seoul-Olympics-25-years-later-Im-still-being-punished.html> (accessed on 3 January 2014)

### 2.3. The rise of WADA

After Johnson's ban from sport for life, one would have expected athletes to stop doping, but they continued. In 1998 a large number of prohibited medical substances were found by police in a raid during the *Tour de France*.<sup>26</sup> The scandal led to a major review of the role of public authorities in anti-doping affairs.<sup>27</sup> The *Tour de France* scandal highlighted the need for an independent international agency, which would put in place unified standards for anti-doping work and coordinate the efforts of sports organizations and public authorities.<sup>28</sup> The IOC took the initiative and convened the First World Conference on Doping in Sport in Lausanne in February 1999. Following the proposal of the Conference, the World Anti-Doping Agency (WADA) was established on 10 November 1999.<sup>29</sup> WADA was established as an independent doping control body to fulfill the functions of education and testing worldwide. WADA's mission is to promote and co-ordinate at international level the fight against doping in sport in all forms.

Even years after the establishment of WADA, some athletes have not stopped doping. In recent times, doping has however become more sophisticated and increasingly more difficult to detect. What might have been impossible back then, using genetically engineered artificial hormones such as EPO to stimulate the production of red blood cells, is not only possible today but is said to be a popular method for athletes to improve their endurance results.<sup>30</sup> Revelations of Armstrong's doping program and that of his team is proof of how sophisticated doping programmes have become in recent times. Richard Poplak remarked that Armstrong's doping programme "*was not schoolboy cribbing. It was a sophisticated conspiracy that involved secret payments in the millions, the intimidation of witnesses, and cat and mouse tactics with testing agencies.*"<sup>31</sup> Hopes that athletes would err on the side of caution after Armstrong's bust have also proved ill founded. In June 2013, Armstrong's long-time rival, Jan Ullrich, also confessed to doping. Sprinters Tyson Gay of the United States, Asafa Powell and Sheroine Simpson of Jamaica all tested positive of prohibited substances before the athletics Worlds Championship in August 2013.<sup>32</sup> Doping practises can be attributed to what Eric Chwang terms the 'prisoners' dilemma'. In Eric Chwang's terms, "*elite athletes are trapped in something like the 'prisoners dilemma' when it comes to the use of performance –enhancing drugs: they realise they would be better off if they did not use them, but the strategic dynamics of the sporting contest mean they cannot help but use them.*"<sup>33</sup> In my view if the sophisticated methods of doping available today had been available in the past, athletes would have unquestionably put them to use.

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<sup>26</sup> J Anderson "Morden sports law: A textbook" (2010) at page 116.

<sup>27</sup> *Ibid* 25 at page 116.

<sup>28</sup> *Ibid* 25 at page 116.

<sup>29</sup> <http://www.wada-ama.org>.

<sup>30</sup> *Ibid* D Rosen, *Dope: A history of Performance Enhancement in Sport from the Nineteenth Century to Today*, preface ix.

<sup>31</sup> Rickard Poplak is an author and journalist, who was born in Johannesburg, South Africa. He published a book on Lance Armstrong in 2010 titled, *Braking Bad: Chasing Lance Armstrong and the Cancer of Corruption*.

<sup>32</sup> J Savulescu, B Froddy and M Clayton (2004) "Why we should allow performance drugs in sport", *British Journal of Sports, Medicine, British Medical Journal Volume 38 no 6*.

<sup>33</sup> *Ibid* Savulescu, J, Froddy, B and Clayton M (2004). "Why we should allow performance drugs in sport", *British Journal of Sports Medicine, British Medical Journal Volume 38 no. 6*.

## 2.4. The WADA Code

Following the establishment of WADA, various rules and regulations have been developed to combat doping. These rules and regulations are constantly under review and are occasionally changed as a result of new technologies, methods and drugs that enter the doping marketplace.<sup>34</sup> The stated aim of these rules and regulations is to uphold and preserve the ethics of sport, safeguard the physical health and mental integrity of sportspersons, offer protection to the innocent competitor from cheats and to penalise those that transgress the regulations.<sup>35</sup> As mentioned above, WADA was established as an independent doping control body to fulfill the functions of education and testing worldwide. Consequently, the fight against doping is organised internationally under WADA. WADA is governed by a board which includes representatives from the major stakeholders in international sport, such as the IOC, International Federations and Governments.<sup>36</sup> After extensive consultations with the relevant stakeholders, the World Anti-Doping Agency Code (Code) was adopted in 2005 as the core document which provides the framework for harmonized anti-doping policies, rules and regulations. The Code oversees the promotion, coordination and monitoring of doping in sports on an international level. The signatories to the Code, such as the IOC and other International Sport Federations, have undertaken to implement the Code and to adopt the regulations for their specific sports.<sup>37</sup>

Various countries across the world have established their own rules and regulations in accordance with the WADA Code and in order to regulate doping.<sup>38</sup> In South Africa, for example, the South African Institute of Drug-Free Sport Act 14 of 1997 (“the Act”) was enacted to regulate doping. The purpose of the Act is to “*promote the participation in sport free from the use of prohibited substances or methods intended to artificially enhance performance, thereby rendering impermissible doping practices which are contrary to the principles of fair play and medical ethics, in the interest of the health and well-being of sportspersons.*” The South African Institution for Drug-free Sports (SAIDS), an independent statutory body was established in accordance to the Act. The purpose of SAIDS is to promote drug free sports by overseeing testing and educations of matter relating to drugs and doping in sport in South Africa. SAIDS is required to conduct effective, documented, national drug testing programmes, that are independent, reliable, and secure and that conform to the highest international standard. SAIDS carries out a number of doping tests on elite athletes each year. These tests are carried out at events which include provincial, national or international events.<sup>39</sup>

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<sup>34</sup> Cloete R (ed). (2005). *Introduction to Sports Law in South Africa* at page 185.

<sup>35</sup> *Ibid* 34 at page 185.

<sup>36</sup> *Ibid* 34 at page 186.

<sup>37</sup> *Ibid* 34 at page 186

<sup>38</sup> These countries include countries such as France and South Africa.

<sup>39</sup> *Ibid* 34 at 187

In order to facilitate the doping tests conducted on athletes, WADA also makes provision for Anti-doping laboratories which are dedicated to the analysis of sports doping control tests. Laboratories that wish to perform the analysis of doping controls for sports under the Code must achieve and maintain accreditation from WADA.<sup>40</sup> The International Standard for Laboratories and its related technical documents specify the criteria that must be met for accreditation and re-accreditation, as well as standards that must be met for the production of valid test results and evidentiary data.<sup>41</sup> There are currently 32 laboratories around the world accredited to conduct human doping control sample analyses. There is however only one accredited Doping Control Laboratory in Africa.<sup>42</sup> This Doping Control Laboratory is set up in South Africa, Bloemfontein.

### 3. The definition of doping

Doping simply put – is cheating. The Code however broadly defines doping as the occurrence of at least one of the eight anti – doping violations set out in article 2 of the Wada Code.<sup>43</sup> The eight anti-doping violations in the Code are the following; the presence of a prohibited substance or its metabolites or markers in an athlete's bodily sample<sup>44</sup>; the use or attempted use of a prohibited substance or a prohibited method<sup>45</sup>; refusing, or failing, without compelling justification, to submit to sample collection or otherwise evading sample collection;<sup>46</sup> violating applicable requirements regarding an athlete's availability for out of-competition testing including failure to provide required information on the whereabouts of an athlete;<sup>47</sup> tampering or attempting to tamper with any part of a doping control test;<sup>48</sup> possessing prohibited substances or methods;<sup>49</sup> trafficking in any prohibited substance or prohibited method;<sup>50</sup> or administering or attempting to administer a prohibited substance or prohibited method to any athlete or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.<sup>51</sup> These substances or methods are prohibited either because they potentially enhance performance thereby rendering competition unfair, they are potential health hazards or their possession and supply may be illegal. Clearly, some of the doping offences listed above such as administering prohibited methods, assisting, encouraging, aiding, abetting, covering up (mainly through the use of masking agents) require the active involvement of the athlete in committing the offence. Some however require knowledge that the substance is prohibited. Although unfortunate, ignorance can easily lead to a transgression of the anti-doping regulations and punishment.

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<sup>40</sup> <http://www.wada-ama.org>

<sup>41</sup> <http://www.wada-ama.org>

<sup>42</sup> <http://www.wada-ama.org/en/Science-Medicine/Anti-Doping-Laboratories>.

<sup>43</sup> article 1 of the Wada Code.

<sup>44</sup> article 2.1 of the Wada Code.

<sup>45</sup> article 2.2 of the Wada Code.

<sup>46</sup> article 2.3 of the Wada Code.

<sup>47</sup> article 2.4 of the Wada Code.

<sup>48</sup> article 2.5 of the Wada Code.

<sup>49</sup> article 2.6 of the Wada Code.

<sup>50</sup> article 2.7 of the Wada Code.

<sup>51</sup> article 2.8 of the Wada Code.

#### 4. Strict Liability

In contrast to the commonly applied principle of presumption of innocence, i.e. an accused is innocent until proven guilty, when an athlete is accused of violating the doping provisions, they are instantly vilified as guilty until they can prove their innocence. Consequently, doping regulations apply the principle of strict liability. The strict liability principle holds that for example, an athlete is strictly liable for the prohibited substances which are found in and revealed by, the testing of their bodily specimen and that an anti-doping violation occurs whether or not the athlete intentionally or unintentionally used a prohibited substance.<sup>52</sup> It is unnecessary that fault (intent or negligence) be demonstrated in order to establish guilt. Ignorance, unfortunately, is not a valid defense on the part of the athlete. The thrust of this principle is said to be that “*athletes must take responsibility, in the context of anti-doping, for what they ingest and use*”.<sup>53</sup> The application of the principle is acceptable on two grounds. Firstly, the strict liability approach is said to operate to the benefit of all ‘clean’ athletes that is ‘when an athlete wins a gold medal with a prohibited substance in his or her system that is unfair to the other athletes in that competition regardless of whether the gold medalist was at fault in any way.’<sup>54</sup> Only a ‘clean’ athlete should be allowed to benefit from his or her competitive results.<sup>55</sup> Secondly, the strict liability approach, it is argued, is counterbalanced by the fact that an athlete has the opportunity to avoid or reduce the applicable sanction if they can demonstrate how the substance in question was not taken with the intention to enhance performance or was ingested negligently or through no fault or no significant fault of that athlete<sup>56</sup>.

The burden of proof often lies with the accusing party – generally the sport’s governing body. Proof of a doping offence is adequate for the disqualification of an athlete.<sup>57</sup> After the establishment of a doping offence, the burden of proof shifts from the sport’s governing body to the athlete accused of having committed a doping offence. Proving innocence in a doping case by an athlete is a strenuous task. It is very common, for athletes to claim that they have no explanation for testing positive. Athletes will typically, claim that their positive tests are influenced by things such as food additives, manipulation of samples, mistakes in analysis, coaches and doctors amongst other such excuses. Most of these alleged facts are often difficult to prove and will in most probability require the athlete to be backed up by a strong legal team, in order to receive a reduced sanction or to be cleared of the doping charges preferred against them.

An athlete can be discharged of doping charges by proving that the testing process was flawed and failed to comply with a number of international sampling processes and anti – doping procedures. As mentioned above, proving this may require the athlete to be assisted by strong

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<sup>52</sup> article 2.1.1 of the Wada Code.

<sup>53</sup> article 21.1.3 of the Wad Code.

<sup>54</sup> *Ibid.* See also J Anderson (2010) *Modern Sports Law: a textbook* at page 123.

<sup>55</sup> Article 9 of the WADA Code.

<sup>56</sup> Article 10 of the WADA Code.

<sup>57</sup> *Ibid.* Se Cloete R (ed). (2005). *Introduction to Sports Law in South Africa* at page 189.

legal team, such as in the case of Mamabolo, the winner of the 2012 Comrades Marathon. Mamabolo tested positive for *methyhexaneamine* and was provisionally stripped of the title and denied access to the winner's prize money for almost a year.<sup>58</sup> After a marathon hearing however, Mamabolo was cleared of all doping charges preferred against him and was confirmed as the 2012 Comrades Marathon winner. In Mamabolo's case the committee that presided over his case found that SAIDS had failed to comply with a number of international sampling processes and anti – doping procedures.<sup>59</sup>

## 5. The Standard of Proof

According to the Code, the standard of proof required of the sports body or anti-doping agency, is “whether the [sports body or anti-doping agency] has established an anti-doping rule violation to the *comfortable satisfaction*’ of the panel bearing in mind the seriousness of the allegation which is made.<sup>60</sup> This standard of proof is greater than a mere balance of probabilities, which is the ordinary civil standard of proof, but less than proof of beyond a reasonable doubt, which is the criminal standard of proof.<sup>61</sup>

## 6. The varying degrees of doping

As mentioned above, doping has various degrees. The ‘one size fits all’ approach is therefore not the most appropriate way of tackling doping in sport. On the one hand there are those athletes who set out to intentionally cheat and actively take part in doping programs and on the other hand, there are those athletes who unwittingly contravene the anti-doping regulations.

The Code itself does not distinguish between outright cheats who intentionally set out to violate anti-doping rules and unwitting offenders. As a result of this one size fits all approach all athletes found on the wrong side of anti-doping rules, even the unwitting offenders end up being labeled cheats when they actually do not set out to cheat. There are those athletes who intentionally set out to violate the doping regulations and actively take part in doping programs, such as Lance Armstrong, in order to gain money (massive financial incentives are available for winners in the world of sport) fame and power. Within the same category of dopers are those athletes who dope in desperate attempts to save their sporting careers such as Nate Jackson.<sup>62</sup> Just approaching the age of 30, Jackson was not ready to ‘taste the death of his football dreams’, so he chose to save his career the only way he knew how: doping.<sup>63</sup>

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<sup>58</sup> <http://www.sport24.co.za/OtherSport/Athletics/Mamabolo-failed-by-process> (accessed 2 May 2013)

<sup>59</sup> <http://www.sport24.co.za/OtherSport/Athletics/Mamabolo-failed-by-process> (accessed 2 May 2013)

<sup>60</sup> Article 3.1 of the Wada Code.

<sup>61</sup> Jack Anderson (2010) *Morden sport Law: a textbook* at page128.

Another example of a suspected 'intentional cheater' is Wilson Erupe Loyanai, a well-known Kenyan athlete, caused international stir when he won the Seoul International Marathon in a course record of 2:05:37 hours. Not only did he beat his more favoured compatriots, but he bettered his personal best time and set a course record in the process. That feat placed him among the top 100 marathoners of all time. An out-of-competition test done on him by officials from WADA revealed that he was using EPO. Loyanai was then banned in January 2013 for two years from sports. He is one of the 17 Kenyan athletes currently serving out bans for doping, a vice that seems to be taking root in Kenya even though the Kenyan officials concerned are reported to be downplaying the doping scandal. Kenyan athletes are currently on top of the world; they win almost all the important middle and long distance races with 'ease'. This has obviously attracted attention and resulted in suspicion from friends and foes. It is believed that the athletes are powered by a potent drug. These Kenyan athletes have been on the spot since allegations surfaced that there could be extensive doping amongst them. Investigations are however currently underway. Mathew Kisorio, is another example. He is amongst the 17 Kenyan athletes who tested positive for doping. He tested positive for a prohibited steroid after completing the 10,000 meter race in the 2012 Kenya Athletic Championships. He later admitted to using blood-boosting drugs saying the practice was fairly common in Kenya as it was encouraged by foreign athletics agents and doctors.

In Zimbabwe, the Zimbabwe national football team midfielder Devon Taitamba Chafa was suspended by FIFA, from playing in all matches for six months after he was found using prohibited drugs in a World Cup preliminary match between Zimbabwe and Egypt in Harare in June 2013.<sup>64</sup>

On the opposite end of the spectrum, are those athletes who are innocently caught on the wrong side of doping regulations; innocently because they are unwitting offenders. These athletes do not set out to contravene the anti-doping regulations, such as the South African National Rugby Team ("Springbok") duo of Chiliboy Ralepelle and Bjorn Basson. Ralepelle and Basson were charged and provisionally suspended after they tested positive for methylhexanamine ("MHA"). In their case it was confirmed that the MHA was contained in supplements provided to them by the Springboks medical team in a warm-up before a game. Although Chiliboy and Basson, unknowingly took the substance they were condemned for returning positive drug tests, and both found guilty of doping. They did however successfully argue for a reduced sanction as they managed to show how the MHA entered their bodies and that they did not ingest it for cheating purposes.

Forming part of the 'unwitting offenders' category and arguably most of the African athletes prosecuted for doping, are those athletes who are uneducated and unaware about doping and what it actually is. These athletes are also regarded as cheats despite a lack of the intention to

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<sup>64</sup><http://news.xinhuanet.com/english/sports/201310/15/c> (accessed 4 January 2014).

cheat on their part. An example of an unwitting offenders is Hezekiel Sepeng<sup>65</sup> who was South Africa's first black Olympic medalist to win a silver medal in the 800-meter race at the 1996 Olympics in Atlanta, Georgia, but with one positive test result in 2005, he went from being a hero to being strongly criticized. He was banned from competition in 2005 after he failed a test for a banned substance. He argued that the testing laboratory made a mistake. Officials however disagreed and banned him from competition for two years. The ban ended his athletic career. Today, Sepeng works with the South African athletics federation, and operates an organization that helps needy children. He has opined that many poor athletes in Africa eat foods that could cause them to fail some tests for banned substances. He says that anti-doping officials should create a strong campaign to help such athletes understand the doping dangers caused by some of the foods they grew up eating.

## 7. The African Problem

In Africa, only a few doping incidents, in comparison to the rest of the world, are reported. These few doping cases can arguably be attributed to the fact that there is only one Doping laboratory serving 55 African countries. As a result of the lack of laboratories in Africa, a great number of athletes are therefore never exposed to doping tests. Doping is a worldwide phenomenon and it is certainly happening amongst African athletes as we have seen in South Africa, Kenya and Zimbabwe. Even though doping appears to be less prevalent in African countries compared to other parts of the world, because of the few doping cases which have surfaced, doping is still a concern in Africa.

The lack of resources and the lack of education on doping are common issues which affect the 'less developed' countries, such as most of the countries in Africa. Although a number of African athletes are never exposed to doping tests, the few African athletes that are tested and who return positive tests are likely to be less informed about doping and what it actually is. These athletes have been labelled as cheats when they are in some instances unwitting users of prohibited substances as a result of being un-informed about what doping is. Mamabolo the winner of the 2012 Comrades Marathon commented on the education of athletes on doping and said the following, "*Black people – I'm sorry to say it – do not have computers where we can log in. We wake up, eat pap, and train. But we have the right to be informed and it's important to us.*"<sup>66</sup>

In what appears to be an effort to educate and test African athletes, Kenyan officials and its government has been partnering with the officials of the world's athletics governing body, the IAAF, to set up another testing centre in Nairobi. Kenya conducts almost 700 tests on athletes every year but the samples from these tests are analysed in South Africa since it is the only country on the continent with a WADA accredited laboratory. Athletics Kenya President Isaiah Kiplagat, remarked

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<sup>65</sup> <http://learningenglish.voanews.com/content/sports-doping-conference-wada-accidental-doping-hezekiel-sepeng/1811290.html>

<sup>66</sup> <http://www.iol.co.za/sport/athletics/ludwick-runners-not-educated-about-doping> (accessed 3 January 2014).

that it makes a lot of sense that being the nation with most athletes, Kenya should have a centre that will also serve neighbouring countries such as, Ethiopia and Uganda.<sup>67</sup>

It is also important for authorities to realise that they too need to support athletes by providing them with access to information on anti-doping in sport. The authorities should also advise athletes about their rights and obligations in relation to the doping test processes. The responsibility is, to some extent, a shared one between the authorities and those involved in sport. The ultimate responsibility, however, lies with athletes and it is they who have the most to lose if they transgress the doping regulations – however innocently. In South Africa for example, a lot has been done by SAIDS in education about doping. It must be made clear and emphasized that it is however each and every athlete's duty to ensure that no performance enhancing drug enters their bodies.

All athletes, as well as their doctors, should be well informed of the WADA Code's List of Prohibited Substances which is updated from time to time and they should keep a record of what they eat. Athletes should also be very wary of herbal remedies, health products, nutritional supplements, energy tonics and slimming agents<sup>68</sup> These products are not regulated and their purity is not guaranteed. It is therefore difficult to accurately determine all their ingredients and these are not always properly depicted on the packaging. These products should be regarded as high risk products as they may contain prohibited substances or they may be converted into prohibited substances in the body. While the ultimate responsibility lies with the athlete, sports clubs and regulating bodies are also recommended not to encourage the use or be actively involved in promoting particular supplements. If the promoted substance contains a prohibited substance, like the Chiliboy and Basson case, the sport club too may be sanctioned.

International sports federations have made some exceptions in order to accommodate athletes with medical conditions requiring the use of prohibited substances in treating their medical conditions. These athletes may apply for a therapeutic use exemption (TUE)<sup>69</sup> Under the Code, WADA is assigned to harmonise the international standards and criteria that surround the granting of TUE and also reserves the right to review at any time the granting of TUE to athletes. The underlying idea of the process is to accommodate athletes who would, without using the prohibited substance, otherwise experience serious health problems. A classic example of this process is where an athlete suffering from asthma uses medication containing a prohibited substance. Some of them take certain medications for their health, but do not get TUEs due to ignorance.

## 8. Sanctions

Massive financial incentives are available for winners in the world of sport. It is therefore essential that where winners are revealed as cheats the consequences sufficiently serious to act as a

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<sup>67</sup> Ibid 66

<sup>68</sup> Ibid. See Cloete R (ed). (2005). *Introduction to Sports Law in South Africa* at page 186.

<sup>69</sup> Article 4.4 of the Code

counterweight to the incentives of cheating. If that is the case that might also be a valuable message to prospective drug cheats. Sanctions are decided according to the rules and regulations of the various sports federations. Sanctions are usually set at the level of the International Sports Federation, and followed by the National Sports federations. All sports federations should have doping policies, and the sanctions related to offences should be included in these policies. Such policies and details should be available to all parties, involved including coaches, athletes, administrators and relevant others. Sanctions for a positive test may also include suspensions up to a maximum four years.

If an athlete cannot prove his innocence, by showing that the testing process was flawed and failed to comply with a number of international sampling processes, such as in the case of Mamabolo, a sanction will be imposed. In cases where the athlete lacks the intention to cheat, such as the Ralepelle and Basson case, the sanction can be the minimum possible (a warning) but the athlete will still be guilty of doping. In cases where the athlete intended to cheat, such as in the case of Armstrong the sanction imposed can be a life ban. Normally the sanction for a doping offence in sport is not a criminal punishment in line with criminal law, it is a disciplinary sanction, except in countries such as Belgium, Greece, Italy and Sweden, which have by legislation made doping a criminal offence.

In September 2013, a WADA committee approved changes to the Wada Code. The new World Anti-Doping Code will take effect in January 2015, more than a year before the 2016 Olympics in Rio de Janeiro, Brazil. Anti-doping officials say they hope the new rules will help make that event the cleanest Olympics ever. The changes include a four-year suspension from competition for athletes who knowingly take banned substances to improve their performance. Coaches and trainers who help athletes break the rules will also be punished. The Code also punishes athletes who refuse to cooperate in doping investigations. However, those who cooperate may be punished less than those who do not.

## 9. Conclusion

Doping is not a new phenomenon. It is rooted in ancient history. It has however evolved over the years. The market for doping substances has grown and the doping methods dedicated to “beating the system” with “designer drugs”, undetectable substances and masking agents have become more sophisticated. Certain rules and regulations are in place however to assist with the fight against doping. The rewards on offer for those athletes who win medals these today are enormous and with success comes fame, wealth and power. Most athletes are willing to risk losing their sporting careers, if they are caught, in order to secure these rewards on offer. Lance Armstrong is an example of such an athlete. Other athletes are not ready to ‘taste the death of their sporting dreams’, so they choose to save their careers, by doping. The Code, unfortunately does not distinguish between outright cheats and “unwitting offenders” innocently caught on the wrong side of the anti-doping regulations. Unwitting offenders include many African athletes who are

uneducated about what doping actually is. As a result of this one size fits all approach of the WADA Code explained above all athletes' found on the wrong side of anti-doping rules end up being labelled cheats to their detriment when some are clearly not. African sport (and sport around the world) is losing great talent as a result of the lack of education about doping when a little more education by the authorities and vigilance by the athletes could curb the rampant problem of doping. With the abovementioned varying degrees of doping, the one size fits all approach should apply to doping, but sadly for the unwitting offender, it does. Although there are only a few good apples in the barrel, they are not winning any medals.

## The case against strengthening the home grown player rule.

Thomas Martin<sup>1</sup>

SUMMARY: 1 Introduction – 2 The home grown player rule under EU law – 2.1 Restriction indirect discrimination – 2.2 Legitimate aims - 2.3 The proportionality of the home grown player rule with the legitimate aims invoked – 3 Strengthening the home grown player rule -

### 1. Introduction

The training of young players is regarded as a legitimate aim under European Union law and has subsequently been a clear incentive for football clubs and football federations to engage in the home grown player rule. The move was initially initiated by the Union of European Football Association (hereafter, UEFA) which imposes that 8 players over the age of 25 engaged in the competition (Europa League or UEFA Champions League) fulfil the '*home grown*' condition. In short, there are two groups of 4 players each that must qualify as home grown: those trained by the club for three years between 15 and 21 years old; and those trained by a club within the same federation as the one they play for during three years between 15 and 21 years old. This is a key difference with the nationality clauses prohibited by the European Court of Justice (hereafter, ECJ) in 1995 given the fact that there is no obligation to field any of these 8 players in the starting line-up or during the game<sup>2</sup>. Since then, national federations have created similar rules for their national championship with a view to guarantee a *pool of young talents* which would be locally trained.

This article will focus on the recent developments regarding the strengthening of the home grown player rule. It has been suggested that the rule did not go far enough to the extent that locally trained players were sometimes not given a chance to play a single game for their team because clubs relied more heavily on transfers than on their own formation system. Some national federations<sup>3</sup> have identified the key role of the home grown player rule in that process. In that respect, football federations have issued recommendations that would oblige football clubs to field locally trained players amongst the 11 players of the starting line-up. Here, it is submitted that strengthening the home grown player rule in such a way is contrary to European Union law. That argument is not limited to players coming from the European Union. As shall be described below, it is also of crucial importance for African players willing to begin their football career within the European Union. This article is divided into two parts. It will first briefly remind how the existing home grown player rule is currently assessed under EU law. It will then discuss the proposed

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<sup>1</sup> LL.M. Student at the London School of Economics (LSE). Comments may be sent to [T.Martin2@lse.ac.uk](mailto:T.Martin2@lse.ac.uk).

<sup>2</sup> The nationality clauses in *Bosman* allowed for a maximum of three foreign players only on the match sheet. This amounted to a restriction incompatible with the EU Treaty. ECJ, 15 December 1995, *Bosman*, C-415/93.

<sup>3</sup> France and the United Kingdom are the most prominent ones. See for instance the recent declarations of Greg Dyke, FA Chairman Elect, in the Guardian, <http://www.theguardian.com/football/2013/mar/21/greg-dyke-fa-chairman-david-bernstein>, 21 March 2014.

amendment to the rule following the Court of Arbitration for Sport (hereafter, CAS) decision of 28 June 2013<sup>4</sup>.

## 2. The home grown player rule under EU law

Since the introduction of the rule by the UEFA, it is fair to say that scholars and academics<sup>5</sup> have been rather sceptical towards this rule which seems to be an elaborated way to reintroduce nationality clauses prohibited by the *Bosman* judgment. However, the European institutions were the first to publicly welcome the introduction of this rule in the European sporting landscape. The European Parliament resolution of 8 May 2008 on the White Paper on Sport explicitly acknowledged that “*investment in young talented sportsmen and sportswomen is crucial for the sustainable development of sport*”. It further added that it “*believes that the UEFA home-grown player rule can serve as an example to other federations, leagues and clubs*”<sup>6</sup>. In a similar fashion, the European Commission recognized that “*rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued*”<sup>7</sup>.

The effects of this rule are discussed below and have been addressed comprehensively in a report ordered by the European Commission on the proportionality of this rule in football, basketball and waterpolo<sup>8</sup>.

### 2.1. Restriction : indirect discrimination

On the face of it, the rule seems to primarily affect professional sportsmen insofar as they may be deterred from using their right to free movement given the fact that places are obviously limited in favour of locally trained players in clubs from other Member States. A similar restriction had already been identified in the *Lehtonen* judgment where the ECJ found that the rules at issue “*are nevertheless liable to restrict the freedom of movement of players who wish to pursue their activity in another Member State*”<sup>9</sup>. Similarly, it may be the case that clubs are deterred from recruiting another foreign EU player if the latter was not trained in the country for three years between 15 and 21 years old, even though there is no obligation to field those players on the match sheet. As the ECJ recalled in *Bosman*, “*in so far as participation in such matches is the essential purpose of a*

<sup>4</sup> CAS decision of 28 June 2013, CAS 2012/A/2852 Football Club Cluj v. Romanian Football Federation.

<sup>5</sup> F. MAJANI, « One Step Forward, Two Hops Backwards : Quotas – The return. An excavation into the Legal Deficiencies of the FIFA 6+5 Rule and the UEFA Home-Grown Players Rule in the Eyes of European Union Law », *International Sports Law Journal*, vol. 1-2, January 2009, pp. 20 et seq.; S. MIETTINEN, R. PARRISH, « Nationality Discrimination in Community Law: an assessment of UEFA Regulations governing player eligibility for European club competitions », *Entertainment and Sports Law Journal*, vol. 5, n°2.

<sup>6</sup> European Parliament resolution of 8 May 2008 on the White Paper on Sport, 2007/2261(INI), §§34-38.

<sup>7</sup> White Paper on Sport of the European Commission of 11 July 2007, COM(2007) 391 final, para. 2.3(9).

<sup>8</sup> M. DALZIEL, R. PARRISH, G. PEARSON, A. SEMENS, *Study on the Assessment of UEFA's 'Home Grown Player Rule*, study report ordered by the European Commission, 11 March 2013.

<sup>9</sup> ECJ, 13 April 2000, *Lehtonen*, C-176/96, para. 49.

*professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned*<sup>10</sup>.

In stark contrast with the FIFA "6+5" rule<sup>11</sup>, the UEFA home grown player rule does not rely (at least openly) on any nationality criteria to establish who is locally trained and who is not. The sole condition is that the player must have been trained by the club or at least by a club of the same federation for three years between 15 and 21 years old. It is therefore possible that a Belgian player qualifies as a *local* player in the United Kingdom as long as he was effectively trained in the United Kingdom for three years between 15 and 21 years old. However, if that very same Belgian player came back in Belgium in the latter days of his career, he would not however qualify as home grown given the fact that nationality is not the criteria to determine who is home grown and who is not.

Despite being neutral in terms of nationality, it is nonetheless clear that the *national* players are being favoured by the mere existence of such rule. The mere fact of resorting to the geographic criteria of *local training* is likely to put foreign sportsmen living in other Member States at a disadvantage. As highlighted by the European Commission in its White Paper on sport, such restriction therefore amounts to an indirect discrimination on the grounds of nationality, contrary to Article 45 TFEU. However, such indirect discrimination is not in itself prohibited as the rule may be justified by a legitimate aim and that the means to achieve it satisfy the conditions of the proportionality test.

## 2.2. Legitimate aims

Indirect discrimination may be justified by imperative requirements in the general interest<sup>12</sup>. Over the last few years, three distinct objectives have been put forward. First and foremost, it seems only reasonable to assume that the rule promotes the formation and training of young players within the European Union. This has already been recognized as a legitimate aims by political documents as well as judgments of the European Court of Justice. Second, the rule is also deemed to promote and guarantee the conditions for a fair competition. The rule indeed limits and constraints the ability of big clubs to take up players at a young age to the expense of financially less capable clubs.

The third reason is a more controversial one. It has been suggested that the win of Greece in the Euro Championship in 2004, to the expense of Italy, Spain, Germany or Portugal was a less than glamorous win that few people would have predicted. Commentators described this tournament as

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<sup>10</sup> ECJ, 15 December 1995, *Bosman*, C-415/93, para. 120.

<sup>11</sup> Which imposes that each club fields at least 6 players eligible for the national team of the club they play for. Such rule, which amounts to a direct discrimination based on nationality, was never given much consideration in EU Law.

<sup>12</sup> On indirect discriminations and their justification, see the long established case-law of the ECJ : ECJ, 12 February 1974, *Sotgiu*, C-152/73; ECJ, 18 May 1996, *O'Flynn*, C-237/94; ECJ, 3 December 1974, *Van Binsbergen*, C-33/74; ECJ, 5 December 1989, *Commission v. Italy*, C-3/88.

a total surprise and came as a huge disappointment for the 'Big 4' engaged in the competition. This is where the link between the home grown player rule and the performance of national teams lies. Indeed the home grown player rule has the effect of investing money in the training of *local* players who in most cases are *national* players. In that particular case, the rule does not serve the interests of local training of young players but merely the strengthening of the performances of the national team for the future. Using the rule as a way to strengthen the performance of the national team has become critical for the recent propositions towards the strengthening of the home grown player rule. The legitimacy of such aim is discussed in the second part of this article.

### 2.3. The proportionality of the home grown player rule with the legitimate aims invoked

Even though the measure may be justified by legitimate aims that would be compatible with the ECJ's case-law, it remains to be seen whether the means put forward to achieve those aims are proportionate, that is to say that they are both suitable and necessary. It is indeed acknowledged that the potential negative effects of such rule on the right to the free movement of sportsmen within the European Union may be outweighed by the potential advantages of such rule since its introduction in 2006.

Stakeholders tend to agree that it is reasonable to assume that the obligation to register at least 8 locally trained players is suitable to achieve the development and promotion of the education of young sportsmen. However, in terms of encouraging the formation of young players, it seems that the home grown player rule "*is neutral or at best marginally positive*"<sup>13</sup>. It is indeed claimed that the most significant effects on the training of local players was witnessed between 2001 and 2006<sup>14</sup>, before the introduction of the rule in Europe. Similarly, the need to ensure a fair competition must be tempered. Even though the rule applies equally to any club engaged into a European competition, it would seem that the effects of the rule do not last beyond a certain stage of the competition<sup>15</sup>.

One may argue that the rule is nonetheless still suitable to achieve the legitimate aims invoked above. It remains to be seen whether it is necessary to achieve them. The necessity of the rule could be examined in light of the intensity of the restriction that it entails. Contrary to the nationality clauses dealt with in *Bosman*, there is no obligation to field any of the local players during a football game. It could also be argued that the rule *merely* affects 8 players over the 25 registered to participate in the competition. In other words, one could still argue that the home grown player rule strikes a fair balance between the need to ensure that money is put in the education of young players, and the need to respect the free movement provisions.

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<sup>13</sup> M. DALZIEL, R. PARRISH, G. PEARSON, A. SEMENS, quoted above, page 100.

<sup>14</sup> A study performed by the European Club Association in 2012 reveals that increases in spending in youth academies were not a result of the UEFA rule and rather that such investments would have taken place anyway. For more information on this study, see <http://www.ecaeurope.com>, accessed on 22 March 2014.

<sup>15</sup> Simply put, the winning clubs seem to always come from three or four different countries only, namely Spain, Germany, Italy and the UK.

### 3. Strengthening the home grown player rule

This article suggests that the home grown player rule seeks to ensure that performances of national teams are enhanced as a result. This is due to the fact that encouraging the formation of locally young players would guarantee that the benefits of such training are passed on the performances of the national team. Several propositions have been put forward in recent times to enhance the effect of the home grown player rule on the national team. In France for instance, an information report on the financial fair-play has been sent to the *Assemblée Nationale* in which the issue of promoting local talents has been addressed. Imposing the presence of locally trained players on the match sheet is one of the recommendations put forward by this report<sup>16</sup>. It is submitted in this article that such strengthening of the home grown player rule would be contrary to EU Law.

The ECJ's reasoning in *Bosman* is not only relevant for players of the European Union. African players willing to engage with European clubs would be equally affected by a strengthening of the home grown player rule. Indeed, the mere existence of the rule limits the careers' opportunities of young player willing to export their talent abroad. It is our view that a strengthening of the rule serves no other purpose than improving the performance of national teams to the expense of foreign players. Therefore, African players would also benefit from a strong challenge under European Union law against any attempt to protect national players.

First, it must be noted that strengthening the home grown player rule with a view to guarantee that benefits of this training are passed on the national team would not be a legitimate aim under European Union law. It is indeed quite striking that such objective is not motivated by purely sporting interests only. It could be argued that this entails objectives of an economic nature<sup>17</sup> which are incompatible with the case-law of the ECJ. In particular, an economic aim cannot "*constitute a reason relating to the general interest that justifies a restriction of a fundamental freedom guaranteed by the Treaty*"<sup>18</sup>.

Second, assuming that a strengthening of the home grown player rule would be justified by legitimate aims compatible with the Treaty freedoms, it seems highly unlikely that such strengthening would be proportionate. This is best exemplified by the CAS decision of 28 June 2013<sup>19</sup> in which the arbitral tribunal addressed the Romanian Football Federation rules implementing the UEFA home grown player rule. In particular, the Romanian Football Federation was willing to increase the minimum number of "*players trained at national level*" who must be

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<sup>16</sup> See, in French, the "Rapport d'information déposé par la Commission des affaires culturelles et de l'éducation sur le fair-play financier européen et son application au modèle économique des clubs de football professionnel français", by Thierry Braillard on the 3rd July 2013. Available here: <http://www.assemblee-nationale.fr/14/rap-info/i1215.asp>.

<sup>17</sup> Taking part in international games has an economic impact on the value of the player, on the sponsoring partnerships of the national team, on the prizes that go with winning, etc. In a similar fashion, see the ECJ judgment in *Deliège*, ECJ, 11 April 2000, *Deliège*, C-51/96, para. 57.

<sup>18</sup> ECJ, 5 June 1997, *Ypourgos Ergasias*, C-398/95, para. 23.

<sup>19</sup> Cited above, CAS decision of 28 June 2013, CAS 2012/A/2852 Football Club Cluj v. Romanian Football Federation.

registered on the referee's report of each official match. This was challenged before the CAS which based the merits of the case on an interpretation of EU Law.

The first question examined by the CAS on the interpretation of EU law was whether the Treaty freedoms were applicable in that particular case. In that respect, the Romanian Football Federation made a last-ditch attempt to revive the *sporting exemption* by relying on its autonomy to self-regulate football without EU intervention<sup>20</sup>. Taking into account the ECJ case-law<sup>21</sup> on that matter, the CAS correctly answered that "*sporting activities were subject to the same guarantees under Community law as were other economic activities*"<sup>22</sup>.

The CAS then went on to discuss the differences between the Romanian Football Federation rules on the local training of players and the UEFA rule as well as the FIFA "6+5" rule. The principal argument is the following: assuming that the UEFA home grown player rule is compatible with EU law and that the FIFA rule is incompatible with EU law, to which extent is it possible for the Romanian Football Federation to depart from the legal framework established by the home grown player rule?

The CAS answers the question with a table which compares the conditions of application of each method<sup>23</sup>. The relevant parts are reproduced below:

	<b>FIFA 6+5 Rule</b>	<b>UEFA HGP rule</b>	<b>RFF rule</b>
Players registered on the match sheet		25	18
Players who can be fielded	11	11	11
Players who must be locally trained/eligible	6	8	8
Minimum number of locally trained players in the starting	6	0	1

<sup>20</sup> CAS Decision of 28 June 2013, *Cluj v. Romanian Football Federation*, para. 72.

<sup>21</sup> It is now established that sporting federations cannot longer rely on a sporting exemption to avoid the application of EU law. Instead, the Court values the concept of *specificity of sport* which guarantees that the characteristics of Sport will be taken into account when assessing the compatibility of sporting rules with EU law. It has since been formally transcribed in the Article 165 TFEU. See the relevant case-law: ECJ, 12 December 1974, *Walrave*, C-36/74; ECJ, 14 July 1976, *Donà*, C-13/76; ECJ, 18 July 2006, *Meca-Medina*, C-519/04.

<sup>22</sup> CAS Decision of 28 June 2013, *Cluj v. Romanian Football Federation*, para. 77.

<sup>23</sup> *Ibidem*, para. 105.

XI			
Minimum number of locally trained players fielded if the three substitutes are used	3	0	4

Following this table, it appears quite clear for the CAS that the Romanian Football Federation rules have striking similarities with the FIFA rule, deemed *incompatible* with EU law<sup>24</sup>.

In our view, this is where the strengthening of the home grown player rule would clearly affect its proportionality according to EU law. It has been submitted above that the home grown player rule could be assessed in relation to the intensity of its effects on the chances of employment of a player. By doing so the rule does strike a balance between the need to promote the local training of young players and the obligation to respect the free movement right of professional sportsmen across Europe. In that respect, it could be that the rule is not overly restrictive or disproportionate given the fact that it only affects 8 players and that there is no obligation to field them in the starting XI.

However, the Romanian Football Federation goes far beyond than what is required by the UEFA rule in imposing that a minimum of local players are registered in the starting line-up<sup>25</sup>. It must be recalled that the UEFA rule is, at the very least, still a *restriction* to the freedom of movement of workers guaranteed by Article 45 TFEU. In that sense, it is not contested that it could nevertheless be compatible with EU law provided that it is justified and proportionate. Yet, strengthening and reinforcing the effects of the measure on the freedom of movement of sportsmen across the European Union could have damaging consequences on its already fragile compatibility with EU law. In particular, the proportionality of the measure would be affected and it seems highly unlikely that such requirement would be deemed suitable or necessary by the European Court of Justice.

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<sup>24</sup> *Ibidem*, para. 106.

<sup>25</sup> The conclusion of the CAS is that one: the Romanian Football Federation could not legitimately argue that it is merely implementing the UEFA rule and it failed to demonstrate how the challenged rules could be proportionate by exceeding the UEFA requirements.

## **The Union of European Football Associations (“UEFA”) Financial Fair Play.**

By Juan de Dios Crespo and Santiago Santorcuato<sup>1</sup>

SUMMARY: 1 Introduction – 2 How the FFP System Works? – 3 Pros and Cons of the UEFA FFP – 4 Conclusion

### 1. Introduction

European football clubs' incomes have increased in the last five years. However, in the same period of time, personnel and transfer costs have also increased significantly. In a report published by the Union of European Football Associations (“UEFA”), it has been estimated that about half of the major European clubs are losing money and most of them are set to continue recording significant deficits.

On average, it has been reported that European clubs spend almost 65% of their income on staff; a large number of these clubs especially major football clubs for which players' wages are the biggest expense, spending is more than earnings. There is certainly little doubt, that if this trend of recording losses continues, professional football is headed for bankruptcy, at least in relation to major football clubs.

According to said report published by the UEFA, the average growth of the football industry was 5.6%. This equated to an income increase of up to 13,200 million euros, while losses of clubs have experienced a significant increase from 600 million euros in 2007 to € 1,700 million in 2011.

With an inability to impose sporting sanctions, Spain is at the head of Europe's clubs for bankruptcy. In 2011 out of a total of 24 European clubs in this situation, 22 were Spanish.

For this reason, it could be argued that the crisis of football is not the lack of income, but it is the incurring of excessive expenditures leading to clubs spending more than what they actually earn as revenues every year. Based on these conclusions and after a thorough study of the matters at stake, UEFA designed a new system in order to try to stop the economic crisis of European football by creating the "Financial Fair Play" Regulations (hereinafter FFP).

### 2. How the FFP System Works?

This system was implemented as early as 2010 in order to avoid clubs from spending more money than they earn. The attempt was therefore to impose a certain balance on club's respective financial accounts. The UEFA Financial Fair Play (FFP or Financial Fair Play) is thus a new system developed in order to end this situation and prevent the disappearance or relegation to lower

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<sup>1</sup> Juan de Dios CRESPO and Santiago SANTORCUATO, Head and Associate of RUIZ-HUERTA & CRESPO SPORTS LAWERS - [www.ruizcrespo.com](http://www.ruizcrespo.com)

divisions of iconic teams in Europe. The FFP purpose had to be implemented gradually in order to be fully operational by 2014.

In this way, the new regulations are directed towards the improvement of the financial capacity of European clubs, who shall only be entitled to incur a certain level of expenses which shall in any case be measured with their corresponding incomes. Basically, the regulation is a compilation of rules whose premise is stabilizing the losses in the football market. Thus, Financial Fair Play (FFP) makes up part of an extensive set of criteria that clubs must comply with in order to be licensed to take part in UEFA's club competitions, primarily the Champions League and Europa League. This requirement imposes on clubs the obligation of avoiding to exceed a certain quantity in their budget and if they do that, they may be punished with the maximum penalty being disqualification from European competitions. An example of this was the recent case of Spanish club, Malaga CF that was banned from taking part in the UEFA Champions League due to its debts to fiscal authorities. It should be borne in mind that UEFA's FFP rules only apply to clubs who wish to compete in the Champions League or the Europa League. Clubs have to apply to UEFA to take part and will only get a license if they meet the FFP rules.

By adopting this system, UEFA tries to ensure the financial control of European clubs, using the Financial Control Panel (FCP), as a control body which has been active since June 2012. This body is responsible for delivering the concessions so that teams can participate in UEFA competitions. However this body is responsible one for punishing and in worst case scenarios, banning from UEFA competitions those clubs that fail to comply. The latest and most famous cases are the ones involving Manchester City FC and Paris Saint Germain, which have been fined EUR 60 million each in the past season for breach of FFP.

It is clear therefore that the implementation of the licensing system has as its main objectives, the following:

- a) Increase economic and financial capacity of clubs, by finding new sources of wealth, such as the efficient exploitation of the commercial rights.
- b) Introduce more discipline and rationality in the finances of football clubs, increasing their transparency and credibility.
- c) Ensure clubs to settle their liabilities to other clubs, players and social / tax authorities.
- d) Encourage clubs to compete with their own income ("Break-Even").
- e) Reduce pressure on wages and transfers of players, in order to limit the inflationary effect.
- f) Encourage long-term investment in the youth sector and own infrastructure, fixed assets like stadia or training camps in order to generate income and avoid short-term speculation.

- g) Control the entry of "patron" in football (Sheikh Abdullah Bin Nasser Al-Thani, Málaga Ali Syed at Racing Santander, Sulaiman Al Fahim, Manchester City, etc.). UEFA considers that the kind of income that generates this type of investment is volatile and creates distortions.
- h) More discipline and rationality in club football finances (decreasing pressure on salaries and transfer fees and limitation of the inflationary effect);

Among the principal objectives of the UEFA FFP is the rule known as the "Break-Even" Rule. This rule is the backbone of the FFP system and is meant to provide a certain degree of stability to European Clubs and rationalize their economic activity in the long-term through evaluation of clubs on a renewable period of three years. UEFA believes that it would be unfair to assess a club's Break Even results over just one season and has therefore introduced the concept of Monitoring Periods. Initially the clubs were assessed over two seasons (2011/12 and 2012/13) combined in order to see an acceptable level of loss.

Thus, Article 60 of the UEFA Club Licensing and Financial Fair Play Regulations (hereinafter the "CLFFP") defines this notion of break-even result as *"the difference between relevant income and relevant expenses"* and adds: *"If a licensee's relevant expenses are less than relevant income for a reporting period, then the club has a break-even surplus. If a club's relevant expenses are greater than relevant income for a reporting period, then the club has a breakeven deficit"*.

Thus, this rule of the UEFA FFP regulations is an obligation for clubs over a fixed period of time to achieve a break-even situation when expenditures are measured in relation with incomes deriving from football-related activities. However, the UEFA FFP rules cover much more than what is in principle necessary in order to achieve said 'Break Even' situation. Thus, for example, it is therein specified that clubs shall keep up-to-date with their taxes, their transfer fees and pay players' wages on time.

Although the balance means that spending must be equal to incomes, there is a certain deviation (or margin) of accepted losses. Nevertheless, UEFA does not consider all expenses as losses. On the negative side, UEFA takes into account particularly players' transfers and salaries, but the expenses related to the training and education provided to their young players, clubs infrastructure, youth sector, investment and social projects will not be considered as losses. Furthermore, UEFA permits the exclusion of certain expenditures from the overall calculations, taking into consideration the development of the game and the FFP rules without interfering, for example, the investments and developing of the clubs that would be hit by an FFP penalty.

Consequently, clubs can therefore exclude infrastructure development costs and youth development/community development costs. Under this plan, Manchester City FC announced that

they should be able to exclude around £10m per year as a result of the youth/community exclusion.

There is also another factor subject to exclusion: clubs can exclude certain wages for their long-standing players. This is because when the rules were first proposed, some clubs were already committed to paying high wage bills for some players on existing contracts and for that reason, they would fail the Break Even test as a result. As per the above, UEFA therefore allowed clubs who had failed the Break Even test to run the test again, but deducting this time wages paid to players as per employment contracts in force prior to June 2010 contracts. However clubs can only deduct the wages paid to their long-standing players and can only use the exclusion if they can show their Break Even deficit is being reduced each year.

Thus, the sources for relevant income are revenues from gate receipts, broadcasting rights, sponsorship and advertising deals plus profit made from the transfer of players while, on the other hand, for the expenditure are the cost of transferring players, salaries and employee benefits expenses and other operating expenses. At the end of the day, big clubs are just as big brands and will always find ways to make money, whether an endorsement deal with a pre-season tour of new partners or investment, the options are there to be exploited.

The regulations take into account players' transfers too. As we all know, when a club wants to hire some player who is contracted with another club, the buying club should pay a transfer fee to the selling club in order to acquire the services of the said player. However, from a Break Even perspective the financial cost of acquiring a player has to be written-off over the entire duration of the contract.

Accordingly, when a club signs a player, it has to pay certain sums of money, via an immediate bank transfer. From a "Break Even test" perspective, the purchase price would be amortized evenly according to the duration of the contract, i.e. amortized on a yearly basis through an equivalent percentage of the total transfer fee.

On the other hand, UEFA is aware that club owners can inflate artificially their profitability, for instance, through artificial commercial deals. For this reason the UEFA FFP rules require any transaction from a 'related part' (i.e. a company or body connected to the club owners) to be assessed to ensure a genuine transaction at a 'fair value'. Thus, UEFA has the power to adjust any artificial 'mates rates' deals and apply a lower value to the Break Even calculation.

Finally, a further requirement of the FFP is that no club is entitled to have overdue amounts owed to football clubs, employees or tax authorities.

Notwithstanding the foregoing, it should be pointed out that even if clubs have losses, they may pass the Break Even test. UEFA understands that because players are often under long contracts, clubs cannot reduce their spending quickly. For this reason, UEFA appreciates that it would be

unfair to fail clubs who make a small loss; consequently they have introduced a concept called the 'permitted Break-Even deficit'.

As a result, clubs can make a loss up to a certain level but if they go over the permitted thresholds, they will fail the FFP Break Even test. In this regard, the permitted Break Even deficit is set at a fairly high level (€ 45m) for the first Monitoring Period, and is then progressively reduced in subsequent periods. The permitted loss falls to €30m for the three year period that covers 2013/14, 2014/15, 2015/16 (that works out to as an average loss of €10m per season). In summary, under the new rules, if the club owners exceed the permissible thresholds between the different monitoring periods and consequently, their clubs incur losses in excess during a period of three years, they must be subject to penalties and even exclusion from the Champions League and Europa League.

UEFA is keen to ensure that clubs have no debts and for this reason insists that any club losses over € 5m during a single Monitoring Period are fully funded by their owner. In practice this means that clubs can only lose up to the maximum € 45m during the first Monitoring Period if their owner is able to spend their own money for any loss over € 5m and, in UEFA's terminology, 'convert the loss into equity'. This equation can be exemplified using the equation of an owner of a club with a loss of € 25 m during the first Monitoring Period. However the club would be able to still pass the Break-Even test due to the fact that the loss is below the € 45 threshold. However as the € 25m loss is above the €5m figure it will be the club's duty to design a financial plan, for example by means of finding additional shares and/or getting new sponsorships in order to cover this difference between € 25m and € 5m.

Nevertheless, it can be asked FFP, who is in charge of controlling the system? For a rigorous application of the FFP regulations a body called the Financial Control Panel to the Club was created, which since 2012 is a UEFA disciplinary body and has a bicameral system. The Chamber is responsible for conducting investigations on European clubs, adopting provisional measures and referring any case whenever necessary to the Court Chamber, which will be entitled to decide who will be subject to the corresponding disciplinary measures envisaged and accept or reject the clubs' request for registration to European competitions. This independent board assesses whether clubs have broken the FFP rules, including the Break Even rules. Between December 2013 and April 2014 this body will advise clubs of the outcome of their assessment and any punishments. The most serious punishment would be a ban from UEFA competitions.

### 3. Pros and Cons of the UEFA FFP

As stated above, it can be concluded that the UEFA Financial Fair Play has its benefits as well as its evils.

Among the benefits are the following:

- there is decreased risk of default for players and employees.
- There is benefit for taxpayers.
- There is assistance provided in the detection of management problems.
- There is protection of clubs from incompetent managers
- The system contributes to a healthier football industry.

On the other hand, the evils include:

- the system motivates people to enter the football industry at all costs
- Some players will have their fixed wages decreased and variable payments will increase.
- The sporting merit may not be sufficient to qualify for a competition

#### 4. Conclusion

With the implementation of this system, UEFA shows that there has been a significant reduction in losses of first division clubs in Europe and this demonstrates that the financial fair play might be working. This proposal tends to equalize the revenue with expenses, allowing a fair market with equal economic conditions. Thus, clubs must accurately choose where they will spend their money demonstrating that the financial control of football clubs was necessary.

The controlling mechanism should adjust the system with the arrival of rich tycoons in the football market. But, the Financial Fair Play does not prohibit the "state aid" for clubs. It is believed that it would require a strict prohibition of receiving this kind of aid for professional sports companies.

So far, the proposal seems to be working well and UEFA will have to correct and update the regulations as drawbacks arise in its application. It must, however, be observed that UEFA took the first and fundamental step and must be commended for financial regulation of European football.

