



**Arbitration CAS 2013/A/3298 Chippa United FC v. South African Football Association (SAFA), The National Soccer League (NSL), Mpumalanga Black Aces FC, Santos FC, Polokwane City FC, Thanda Royal Zulu FC (Pty) Limited, Adv. P. Pretorius SC N.O., award of 27 June 2014**

Panel: Mr Fabio Iudica (Italy), President; Mr Marco Balmelli (Switzerland); Mr Ken Lalo (Israel)

*Football*

*Eligibility: reinstatement of a team in the South African Premier Soccer League (PSL)*

*CAS jurisdiction*

*Consequence of the violation by a private association of the ban to seek order from a civil State court*

*Absence of any valid reason to replay the matches*

1. The contradiction between Article 70.6 of the SAFA Constitution - which provides that any appeal against an arbitration award shall be heard by the CAS - and Article 72.1 of the SAFA Constitution - which implies that decisions passed by an independent and duly constituted Arbitration Tribunal of SAFA should not be appealable to CAS - shall be resolved in favour of the jurisdiction of CAS. Indeed, whereas Article 70 is a special provision describing in detail the arbitration procedures, Article 72.1 is a general provision which wording is, at least partially, taken directly from the FIFA Statutes, in particular its Article 67.1. Therefore, it must be concluded that SAFA, when drafting those provisions meant to provide for a last appeal before CAS against the arbitral award issued at the end of its domestic dispute resolution system.
2. Article 70.5 of the SAFA Constitution forbids members to seek orders from ordinary courts, in favour of the judicial system put in place by SAFA, including arbitration. The violation by any member of SAFA of Article 70.5 of the SAFA Constitution can only eventually lead to the imposition of a sanction on this member by SAFA for having breached a rule, but certainly not to the invalidity or inapplicability of the decision issued by a State court. In this regard, an order from an ordinary court shall be followed by a private association, as SAFA or the NSL, whether such order is right or wrong, and whether the ordinary court falsely considered that it had jurisdiction on the matter or whether it was actually competent in this regard.
3. Any possible impact on a club's players "mentality" deriving from the announcement made by the league of the provisional status of the play-off matches' result cannot be considered a valid reason to replay any of the matches. Moreover, in the absence of any indication to the contrary made by the State court, the league is correct in ordering that the play-off matches should continue as scheduled.

## **I. THE PARTIES**

1. The Appellant is Chippa United FC (hereinafter referred to as the “Appellant” or “Chippa”), a professional football club, which was competing at the time of the events, in the Premier Soccer League (hereinafter referred to as “PSL”), the top football division in South Africa. It is a member of the South African Football Association (hereinafter also referred to as “SAFA”).
2. The First Respondent is SAFA, which is the governing body for the sport of football in South Africa. It is a member of the Confédération Africaine de Football (hereinafter referred to as “CAF”), and of the Fédération Internationale de Football Association (hereinafter referred to as “FIFA”), being, respectively, the continental and world governing bodies for the sport of football.
3. The Second Respondent is the National Soccer League (hereinafter referred to as “NSL”), which is the entity in charge of organizing and managing, under the jurisdiction of SAFA, the higher football leagues in South Africa.
4. The Third Respondent is Mpumalanga Black Aces FC (hereinafter referred to as “Black Aces”), a professional football club, which is currently competing in the PSL.
5. The Fourth Respondent is Polokwane City FC (hereinafter referred to as “Polokwane”), a professional football club, which is currently competing in the PSL.
6. The Fifth Respondent is Santos FC (hereinafter referred to as “Santos”), a professional football club, which is currently competing in the National First Division (hereinafter referred to as “NFD”) of the NSL, the division immediately below the PSL.
7. The Sixth Respondent is Thanda Royal Zulu FC (Pty) Limited (hereinafter referred to as “Thanda”) a professional football club, which is currently competing in the NFD.
8. The Seventh Respondent is Adv Paul Pretorius SC N.O., a South African Senior Counsel, who was appointed as arbitrator to render the decision under appeal in the present proceedings.

## **II. FACTUAL BACKGROUND**

9. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
10. In the 2012/2013 sporting season, the Appellant competed in the PSL and finished the regular season on the 15<sup>th</sup> position, out of 16 teams in that league.

11. The PSL team placed at the 15<sup>th</sup> position at the end of the sporting season participates in play-off relegation matches against the 2<sup>nd</sup> and 3<sup>rd</sup> placed finishers in the NFD in order to determine who shall compete in the PSL during the following season. The team with the most points after home and away games in the play-off matches between the three teams is promoted to, or remains in the PSL for the following season.
12. On 28 May 2013, at about 6.00 pm, the Appellant received an application to be launched by Thanda in front of the South Gauteng High Court (hereinafter referred to as the “High Court”) wherein the Appellant was cited as respondent.
13. Essentially, the object of the urgent application launched by Thanda was to interdict the start of the play-off matches to be played between the Appellant, Black Aces and Santos (hereinafter referred to as the “Thanda case”). The Appellant opposed the application on the basis that it wished the play-off matches to proceed as scheduled.
14. The Appellant’s first play-off match was to be played on 29 May 2013 against Santos, and the second match against Black Aces on 1 June 2013.
15. The urgent application was heard on 29 May 2013, a few hours before the start of the first play-off match between the Appellant and Santos. The High Court rendered an order on the same day (hereinafter referred to as the “Court Order”), stating that the outcome of the first two matches to be played on 29 May and on 1 June 2013 were provisional and the hearing of the urgent application in the Thanda case was postponed to the 18 June 2013.
16. Pursuant to the Court Order, the relevant match commissioners made announcements before the first two play-off matches that the results of the matches will be provisional.
17. A few minutes before the kick-off of the match on 29 May 2013, the Appellant’s players were informed of the current situation.
18. The first game of the Appellant against Santos ended 0:0. In the second game, Black Aces defeated the Appellant with a score of 1:0.
19. On 18 June 2013, the High Court referred the Thanda case to arbitration, to be decided “*by an arbitrator or arbitrators appointed in terms of the constitution and rules of the National Soccer League, as read with those of the South African Football Association*”.
20. On 19 June 2013, the NSL issued a circular letter with regard to the “Promotion play-off matches”, which included the following or statement:

*“In the matter of Thanda Royal Zulu vs Advocate Mokoena and others, the court order handed down yesterday, 18 June 2013, did not deal with the question of whether or not matches in the Promotion Playoff should continue to be played, nor did it address the question of the status of such matches, should they be played.*”

*The League has therefore decided to continue with the matches as scheduled, according to the Rules of the PSL Playoff and the Rules and Constitution of the League”.*

21. On 20 June 2013, the Appellant made an urgent application to the Western Cape High Court to interdict the third play-off match between Black Aces and Santos on the same day, on the basis that the first two matches had only a provisional status and therefore were not finalised in terms of their outcome. The urgent application was denied by the Western Cape High Court.
22. On 24 June 2013, the Appellant filed a *“formal complaint against the provisional status of the relegation playoff matches played on 29 May and 1 June 2013 – request for arbitration in terms of rule 59 of the NSL rules read with rule 19 of the SAFA rules and regulations”* at the NSL. The Appellant’s prayer for relief was mainly that the matches played on 29 May and on 1 June 2013 be replayed, as well as the following prayer for relief:

*“4.1 THAT the Chief Executive Officer of the NSL exercise his powers in terms of Rule 59.1, 59.1.1 and 59.1.2 of the National Soccer League Rules and order that:*

*4.1.1 This complaint be referred directly to arbitration without delay;*

*4.1.2 Reduce the time periods allowed for a request for arbitration”.*
23. Following the Appellant’s complaint, the case was referred to arbitration by the NSL and Adv Pretorius was appointed by SAFA to resolve the dispute.
24. On 6 August 2013, Adv Pretorius rendered a decision dismissing the complaint filed by the Appellant (hereinafter referred to as the “Appealed Decision”).
25. Based on the outcome of all play-off matches, Black Aces was promoted to the PSL, the Appellant was relegated to the NFD and Santos remained in the NFD.

### **III. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS**

26. Following receipt of the Appealed Decision, the Appellant filed on 8 August 2013 a statement of appeal before the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter referred to as the “CAS Code”). The Appellant requested that the matter be expedited in accordance with Article R52 para. 3 of the CAS Code.
27. On 21 August 2013, the Appellant filed its appeal brief.
28. On 23 August 2013, the Parties were informed that the proceedings would continue under the usual procedural rules, as not all Parties agreed to the matter being expedited in accordance with Article R52 para. 3 of the CAS Code.
29. On 3 September 2013, Adv Pretorius sent a letter to the CAS Court Office, which reads as follows:

*“I have already notified the CAS that as the arbitrator whose decision is on appeal I am cited in my official capacity, that I will abide the decision of the Tribunal and that I will not take any part in the proceedings.*

*As I was appointed by SAFA to conduct the arbitration in my professional capacity I do not believe I can be held liable for costs, particularly at this stage or indeed at any stage”.*

30. In accordance with Article R55 of the CAS Code, Black Aces and Polokwane filed their answer on 5 September 2013 and SAFA and the NSL on 9 September 2013.
31. On 19 September 2013, the Parties were informed that Thanda, Santos and Adv Pretorius had not filed any answer and that the Panel may nevertheless proceed with the arbitration and deliver an award, in accordance with Article R55 para. 2 of the CAS Code.

#### **IV. THE CONSTITUTION OF THE PANEL**

32. On 21 October 2013, the CAS Court Office informed the Parties that the Panel to hear the appeal had been constituted as follows: Mr Fabio Iudica, as President of the Panel, Mr Marco Balmelli and Mr Ken Lalo, as Members of the Panel.
33. On 18 December 2013, the Parties were informed that the hearing in the case at hand would be held on 7 January 2013, in Johannesburg, South Africa.
34. Only the Third Respondent (Black Aces) signed the Order of Procedure and returned it to the CAS Court Office on 6 January 2014.

#### **V. HEARING**

35. On 7 January 2014, a hearing was duly held at the Sandton Convention Centre in Johannesburg, South Africa (hereinafter referred to as the “hearing”). All members of the Panel were present. The Parties did not raise any objection as to the constitution and composition of the Panel.
36. The following persons attended the hearing:
  - The Appellant was represented by the following Counsels: Mr Simon Mpengesi, Chairman, and Mr Bongari Dlodlo, legal Director, assisted by Counsels Mr Brook Stevens and Mr Andrew Boerner, attorneys-at-law in Johannesburg, South Africa.
  - For SAFA: Mr Poobalan Govindasamy, member of the National Executive Committee, and Mr Tebogo Motlanthe, legal officer.
  - For NSL: Mr Brand De Villiers, CEO, and Mr Derek Blanckensee, General Manager, assisted by Counsels Mr Jeremy Gauntlett, Senior Counsel, Mr Frank Peiser, Junior Counsel, Mr Sandile July, attorney-at-law, and Mrs Xolisile Beryl Shezi, candidate attorney.
  - Polokwane was represented by the following Counsels: Mr Claudio Bollo, Mr Angelo Christophorou and Mrs Corinne Berg, attorneys-at-law in Johannesburg, South Africa.

- For Black Aces: Mr Mario Morfou, Chairman, and Mr George Morfou, Chairman, assisted by Counsel Mr Michael Murphy, attorney-at-law in Johannesburg, South Africa.
37. Santos, Thanda and Adv Pretorius SC were neither present, nor represented, at the hearing.
38. Mr Fabien Cagneux, Counsel to the CAS, and Mr Serge Vittoz, *ad hoc* clerk, assisted the Panel at the hearing.
39. The hearing in the case at hand follows a hearing in another CAS case (CAS 2013/A/3276) involving mainly the same parties, concerning the Thanda case. A hearing was held in the latter case on 6 January 2014 in Johannesburg.
40. During the course of the hearing, the NSL proposed to file a new document named “*Second Respondent’s heads of argument*”, arguing that it was only a summary of its position, and that it could be used by the Parties present at the hearing and by the Panel to easier follow the NSL arguments. With the approval of the other Parties present, the Panel decided to accept the document, but stressed that it would be taken out of the file in case it contained any new requests, arguments, exhibits or evidences.
41. The Parties then submitted their oral arguments with regard to the jurisdiction of CAS in the present proceedings.
42. The Parties were also afforded the opportunity to present their case on the merits, to submit their arguments, and to answer the questions asked by the Panel. The Parties explicitly agreed at the end of the hearing that their right to be heard and their right to be treated equally in these arbitration proceedings have been fully observed.

## VI. OVERVIEW OF THE PARTIES’ SUBMISSIONS

43. The following outline of the Parties’ positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in this Award. The Parties’ written submissions and evidence, their verbal submissions and evidence at the hearing and the contents of the Appealed Decision were all taken into consideration.

### A. The Appellant’s position

44. The Appellant made a number of submissions, in its statement of appeal, in its appeal brief and at the hearing. These can be summarized as follows:

*i. CAS jurisdiction*

1. In accordance with Articles 70.6 and 72.1 of the SAFA Constitution, appeals against an arbitration award and against a final and binding decision by SAFA shall be heard by CAS.
2. Article 7 of the SAFA Constitution provides that the members and officials of SAFA must observe the Statutes, Regulations, directives, decisions and the Code of Ethics of FIFA, CAF and SAFA in their activities.
3. According to Article 10.3.1 of the SAFA Constitution, the NSL is a “*Special Member*” of SAFA.
4. In terms of Article 13.1 of the SAFA Constitution, members of SAFA are obliged in terms of Article 13.1.1 “*to comply with the Statutes, regulations, directives and decisions of FIFA, CAF and SAFA at all times and to ensure that these are also respected by its members [...]*”.
5. In accordance with Article 13.1.6 of the SAFA Constitution, members of SAFA are obliged “*to adopt a clause in its constitution specifying that any dispute requiring adjudication involving itself or one of its members and relating to the Statutes, regulations, directives and decisions of the Member, SAFA, CAF and FIFA shall come solely under the jurisdiction of the appropriate dispute resolution Tribunal of the Member, SAFA, CAF or FIFA and that any recourse to the ordinary Courts is prohibited subject to Article 70.5*”.
6. Article 70.1 of the SAFA Constitution provides that “*SAFA shall establish an Arbitration Tribunal, which shall deal with all further appeals from the decision of the National Appeals Board and the decision of an arbitrator shall be final and binding*”.
7. Article 70.6 provides that, in accordance with Articles 59 and 60 of the FIFA Statutes, any appeal against an arbitration award shall be heard by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.
8. The Appellant is a “club” as defined in Article 1.9 of the Constitution of the NSL, and is registered with it.
9. The Appellant submits that the SAFA Constitution, read together with the NSL Constitution and Rules and together with the FIFA Statutes, confers jurisdiction upon CAS to hear this appeal, and to provide the relief sought in accordance with Article R47, R52 and R57 of the CAS Code.

*ii. Merits*

1. A few minutes before the very important play-off match against Santos on 29 May 2013, the players were informed that the results of the match on the same day and those of the match on 1 June 2013 would be provisional, as a result of the Court Order.
2. This announcement severely impacted the mental state and performance of the Appellant’s players prior to kick-off of two of the Appellant’s four play-off

matches, namely the ones played on 29 May 2013 and on 1 June 2013, and that without such a Court Order and/or an announcement, which should never have been ordered and announced, the results of the matches could have been quite different.

3. When the Appellant played the two remaining matches, it was still not sure of the status of the two “provisional matches” played on 29 May and on 1 June 2013.
4. There is no provision, in the Constitutions, Rules and Regulations of any of the governing bodies for football in South Africa and internationally regarding the grant of a provisional status to a football match to be played.
5. The two provisional matches played by the Appellant cannot be construed as being official matches considering the influence of the Court Order on these matches.
6. Furthermore, Thanda was prohibited from approaching a Court relief on a matter that can properly be served before an arbitrator, in accordance with Article 70.5 of the SAFA Constitution. Similar provisions can be found in the CAF and FIFA Statutes.
7. The NSL should have therefore ordered the replay of the matches played under a provisional status.
8. The Appellant should be reinstated as a 17th team in the current PSL Championship or in the event this was no longer possible, the Appellant should be awarded an amount as compensation.

## **B. SAFA’s position (First Respondent)**

45. SAFA made a number of submissions, in its answer and at the hearing. These can be summarized as follows:
  87. According to Article 13.1 of the SAFA Constitution, members of SAFA (including the NSL) are obliged in terms of Article 13.1.1 *“to comply with the Statutes, regulations, directives and decisions of FIFA, CAF and SAFA at all times and to ensure that these are respected by its members [...]”*.
  88. SAFA frowns upon any of its members and/or any of the clubs and other bodies of its members approaching any state courts for any relief before they exhaust their internal remedies in terms of the SAFA Constitution and its Rules and Regulations.
  89. The award issued by Adv Pretorius is fundamentally flawed, in that his interpretation (also shared by the NSL) of SAFA’s rules to appoint an arbitrator is incorrect.
  90. The arbitration before Adv Pretorius was conducted under the auspices and according to the rules of SAFA, and that therefore, the Appealed Decision is appealable before CAS, in accordance with Article 70.6 of the SAFA Statutes.
  91. SAFA did not have any position with regard to the merits of the case.



### C. NSL's position (Second Respondent)

46. The NSL made a number of submissions, in its answer and at the hearing. These can be summarized as follows:

#### *i. CAS jurisdiction*

1. The arbitral proceedings before Adv Pretorius were conducted under the rules of the NSL, following the Appellant formal complaint dated 24 June 2013.
2. The Appealed Decision shall be considered as “*a decision against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of [the NSL] may be made*”, as contemplated by Article 67.3 (c) of the FIFA Statutes. Thus, Article 67.3(c) applies, and excludes CAS's appeal jurisdiction, especially when read with Rule 59 of the NSL Rules.
3. In the case of the NSL Rules, as in CAS 2004/A/676, no provision is made for CAS arbitration. Appeals against decisions of the NSL [DC – we did not define] are governed by Article 21 of the NSL Rules, which makes no provision for an appeal to CAS. Furthermore, Rule 59.1.1. of the NSL Rules explicitly states that the decision of an arbitrator shall be final. This excludes an appeal to CAS, as in the above-mentioned CAS case law.

#### *ii. Merits*

1. The NSL first notes that it is not the matches that were considered as provisional in accordance with the Court Order, but the results of those matches.
2. Both of the other teams taking part in the play-off against relegation found out about the provisional nature of the results in the same manner. In fact, the Appellant was in a better position than its competitors, because it was present at the High Court and had an opportunity to prepare its players prior to kick-off. There is accordingly no reason to contend that the Appellant's players “mentality” was adversely impacted compared with its competitors.
3. By its letter dated 19 June 2013, the NSL made clear that the remaining matches of the play-off would continue in the normal course, which clarified definitively the situation. The Appellant's contention that it was left in a limbo is therefore wrong.
4. The Appellant's relief necessarily interferes with the organisation and continuation of two tournaments, both of which are already at an advanced stage. Such relief can therefore not be granted, in accordance with case law.
5. There is no basis on which CAS should rewrite the rules of the PSL – which permits a maximum of sixteen teams to participate in that league.

#### **D. The other Respondents' positions**

47. Black Aces (Third Respondent) and Polokwane (Fourth Respondent) filed an answer to the appeal brief and presented oral arguments at the hearing. As their positions are very similar to the NSL's one, their positions will not be detailed in the present section of the award. However, their positions have been duly taken into consideration, and the Panel will directly refer to certain elements further in the award, when appropriate.
48. Santos (Fifth Respondent), Thanda (Sixth Respondent) and Adv Pretorius (Seventh Respondent) did not file any written submissions, and were neither present, nor represented at the hearing.

#### **VII. THE PARTIES' REQUESTS FOR RELIEF**

49. The Appellant's requests for relief are the following:
- 3.1 *"The Appellant seeks its appeal in terms of Rule 47 of the CAS Code to proceed in an expedited manner as contemplated and provided for in Rule 52 of the CAS Code;*
  - 3.2 *The Appellant in its Appeal under Rule 47 of the CAS Code seeks an order setting aside the SAFA Arbitration Award issued by the Seventh Respondent on 6 August 2013;*
  - 3.3 *Subsequent to the setting aside of the SAFA Arbitration Award as contemplated in paragraph 3.2 supra, the Appellant requests for CAS to exercise its discretion as contemplated in Rule 57 in issuing a new decision replacing the decision appealed against with the effect that the Appellant be reinstated into the South African Premier Soccer League as a 17<sup>th</sup> team with immediate effect and that the First Respondent and Second Respondent be directed to take all necessary steps to facilitate the reinstatement of the Appellant into the Premier Soccer League".*
50. In the course of the hearing, the Appellant declared that in view of the fact that the new sporting season had begun and was already well advanced, the above-mentioned relief was materially difficult to grant. The Appellant therefore maintained its original relief, but subsidiarily requested that the NSL, or the NSL's CEO, to exercise its discretion and reschedule the matches in question and order a replay of these matches.
51. SAFA did not take any formal request for relief as such, but concluded its answer as follows:
- "SAFA is an interested party in the Appeal launched by the Appellant and would like to see that justice is done, particularly in the correct interpretation of our Rules insofar as SAFA's status is concerned, the appointment of independent and impartial arbitrators, their powers arising from Rule 8 of the SAFA Statutes and the awarding of costs which must of necessity include all the administrative costs of SAFA in facilitation the arbitration under Adv Pretorius".*
52. The NSL's requests for relief are the following:
- "21.1 For the reasons set out above, NSL submits that the relief sought is legally misconceived and factually unfounded. Even were the CAS to entertain the appeal on its merits (contrary to NSL's*

*submissions), there is no proper basis to interfere with the arbitrator's exercise of his discretion to refuse the extraordinary relief Chippa sought. Were the premise for the appeal (i.e. the "mentality" of Chippa's players) to be endorsed by CAS, it would set a standard which contradicts sportsmanship and prejudices the administration of events like the PSL, the NFD and similar tournaments around the world.*

21.2 *Therefore NSL asks that the appeal to be dismissed with costs".*

53. Black Aces' requests for relief are the following:

*"ACES asks that the referral be dismissed with costs on the highest punitive scales available".*

54. Polokwane's conclusions are the following:

*"Accordingly, the Fourth Respondent seeks an Order that the Appellant pays all of the Fourth Respondent's costs incurred in opposing the Appeal, upon the presentation of invoices by the Fourth Respondent's legal representatives, without deduction, set-off or retention".*

## VIII. CAS JURISDICTION

55. The Panel observes that the present arbitration is seated (as are all CAS proceedings) in Lausanne, Switzerland and involves parties that are neither domiciled, nor habitually resident in Switzerland. The present arbitration procedure is therefore governed by Chapter 12 of the Swiss Private International Law ("PILA").

56. Article 186 PILA reads as follows:

*"1) The arbitral tribunal shall rule on its own jurisdiction.*

*2) The objection of lack of jurisdiction must be raised prior to any defence on the merits.*

*3) In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision".*

57. According to Swiss legal scholars, this provision *"is the embodiment of the widely recognized principle in international arbitration of „Kompetenz-Kompetenz“. This principle is also regarded as corollary to the principle of the autonomy of the arbitration agreement"* [ABDULLA Z., *The Arbitration Agreement*, in: KAUFMANN-KOHLER/STUCKI (eds.), *International Arbitration in Switzerland – A Handbook for Practitioners*, The Hague 2004, p. 29]. *"Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it (...). It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement"* [MÜLLER C., *International Arbitration – A Guide to the Complete Swiss Case Law*, Zurich et al. 2004, pp. 115-116]. *"It is the arbitral tribunal itself, and not the state court, which decides on its jurisdiction in the first place ... The arbitral tribunal thus has priority, the so-called own competence"* [WENGER W., n. 2 ad Article 186, in: BERTI S. V., (ed.), *International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute*, Basel et al.

2000]. The provisions of Article 186 are applicable to CAS arbitration [RIGOZZI A, L'arbitrage international en matière de sport, Basel 2005, p. 524].

58. Furthermore, the Parties have expressly accepted at the hearing the competence of the Panel to rule on its own jurisdiction in the present case. The Appellant has repeatedly recognised, in correspondence and submissions, the competence of the CAS to decide both the issue of jurisdiction as well as the substantive issues in question.
59. The admissibility of an appeal before CAS shall be examined in light of Article R47 of the CAS Code, which reads as follows:

*“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body”.*
60. The jurisdiction of the CAS is supported mainly by the Appellant and SAFA, and is contested *inter alia* by the NSL, Black Aces and Polokwane.
61. There is a dispute in the case at hand whether the arbitral award rendered by Adv Pretorius, the Appealed Decision, shall be considered as a decision of the NSL, or of SAFA.
62. The NSL, supported by Black Aces and Polokwane, considers in substance that the Appealed Decision was rendered in accordance with Article 59 of the NSL Rules, and shall therefore be considered as a decision of the NSL.
63. As to the Appellant and SAFA, they consider, in substance, that Adv Pretorius was appointed in accordance with the provisions of the SAFA Constitution, and that therefore its decision shall be considered as a decision of SAFA.
64. The relevant provisions of the SAFA Constitution with regard to arbitration are the following:

***“Arbitration     Article 70***

*70.1 SAFA shall establish an Arbitration Tribunal, which shall deal with all further appeals from the decision of the National Appeals Board and the decision of an arbitrator shall be final and binding.*

*[...]*

*70.2 The National Executive Committee shall draw up special regulations regarding the composition, jurisdiction and procedural rules of this Arbitration Tribunal.*

*70.3 Everybody or individual falling under the jurisdiction of SAFA shall ensure that any disputes that it has with a body or individual falling under the jurisdiction of SAFA is resolved in accordance with the dispute prevention and resolution procedures set out in the Constitution, Rules and Regulations.*

*70.4 Where no specific dispute prevention or resolution procedures are set in the Constitution, or where any member or an affiliate of a member, or individual prefers to, dispute may be referred directly to arbitration for resolution. It is specifically provided that where Regional members or its affiliates or individual opt for arbitration, such arbitration may be conducted by a senior lawyer in the Province consented to by the parties.*

*[...]”.*

65. Article 59 of the NSL Rules reads as follows:

*“59.1 In any league or other competition under the auspices of the League, the Chief Executive Officer will have the power to do any or all of the following if he is of the opinion that the application of the normal procedures will result in a delay of such nature that the League and/or the sponsor/s may be brought into disrepute:*

*59.1.1 Order that a disciplinary matter, protest, complaint or appeal be referred directly to arbitration. In such event the decision of the arbitrator will be final;*

*59.1.2 Reduce the time periods allowed for an appeal or a request for arbitration”.*

66. In the case at hand, following the complaint filed by the Appellant on 24 June 2013, the NSL CEO decided to refer the case to arbitration and Adv Pretorius was appointed by SAFA to resolve the matter.

67. As seen above, Article 70.4 of the SAFA Constitution reads as follows: *“where any member or an affiliate of a member, or individual prefers to, dispute may be referred directly to arbitration for resolution”*. According to the definition included at the beginning of the SAFA Constitution, a member means a *“Regional Member, Associate Member or the Special Member”*, the latter being the NSL according to the same list of definitions.

68. It therefore appears that the NSL, as a member of SAFA, has the right, if it prefers to and in certain circumstances, to refer *“disputes”* directly to arbitration.

69. The Panel is of the opinion that this is exactly the purpose of Article 59 of the NSL Rules. Indeed, by adopting this provision, the NSL decided that in certain circumstances, disputes *“may be referred directly to arbitration”*, which is the exact same wording as in Article 70.4 of the SAFA Constitution.

70. The Panel considers that this position is confirmed by Article 9.3. of the SAFA Rules relating to misconduct and disciplinary proceedings which states the following:

*“[...] Competition Rules may contain any provisions designed to facilitate the speedy resolution of disputes affecting the outcome of competitions, provided only that such provisions are consistent with the requirements of procedural fairness, including, but not limited to provisions for*

*9.3.1 the direct referral to final arbitration of the disputes in question;*  
*[...]”.*

71. The Panel considers that the decision taken by the NSL CEO to refer the case directly to arbitration was rendered, in view of the particular circumstances of the case, in accordance with Article 59 of the NSL Rules.
72. Furthermore, in the absence of any particular provisions with regard to the procedure to be followed in case of an arbitration in the NSL Rules, in particular with regard to the designation of the arbitrator(s), the Panel is of the opinion that Article 59 cannot be applied by itself, but shall be applied together with the provisions of the SAFA Constitution with regard to arbitration.
73. This position is supported by Adv Pretorius himself, who stated in the head of the Appealed Decision that the arbitration was a “*SAFA Arbitration*”.
74. In view of the above, the Panel considers that the arbitration conducted before Adv Pretorius, which led to the Appealed Decision, was an arbitration conducted under the auspices of SAFA and, therefore, the Appealed Decision shall be considered as a decision of SAFA. Furthermore, in accordance with Article 70.1 *in fine* of the SAFA Constitution, the decision of an arbitrator shall be final and binding.
75. It remains to be examined whether the Constitution or the Rules of SAFA provide for an appeal to CAS against SAFA’s final and binding decisions.
76. In this regard, Article 70.6 of the SAFA Constitution reads as follows:

*“In accordance with Article 59 and 60 of the FIFA Statutes, any final appeal against an arbitration award shall be heard by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland”.*
77. Furthermore, Article 72.1 of the SAFA Constitution states the following:

*“In accordance with the relevant provisions of the FIFA Statutes, any appeal against a final and binding SAFA decision shall be heard by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. CAS shall not, however, hear appeals on violations of the Laws of the Game, suspensions of up to four matches or up to three months, or decisions passed by an independent and duly constituted Arbitration Tribunal of an Association or Confederation”.*
78. The Panel is of the opinion that Article 70.6 of the SAFA Constitution is clear: any appeal against an arbitration award shall be heard by the CAS. Furthermore, it results from the rationale of Article 70 (Arbitration) of the SAFA Constitution, that a final and binding decision (Art. 70.1) rendered by the arbitrator is appealable to the CAS.
79. However, Article 70.6 seems to be in contradiction with Article 72.1 of the SAFA Constitution. According to SAFA, the term “*Association*” should be substituted by “SAFA” in Article 72.1 *in fine*. This would mean that decisions passed by an independent and duly constituted Arbitration Tribunal of SAFA should not be appealable to CAS. This is in clear contradiction with SAFA’s own position that an award rendered by an arbitral tribunal appointed by SAFA in accordance with Article 70 shall be appealable to CAS.

80. The Panel considers that the contradiction between Article 70.6 and 72.1 of the SAFA Constitution shall be resolved in favour of the jurisdiction of CAS. Indeed, whereas Article 70 is a special provision describing in detail the arbitration procedures, Article 72.1 is a general provision which wording is, at least partially, taken directly from the FIFA Statutes, in particular its Article 67.1. Therefore, it must be concluded that SAFA, when drafting those provisions meant to provide for a last appeal before CAS against the arbitral award issued at the end of its domestic dispute resolution system.
81. In view of the above, the Panel considers that CAS has jurisdiction in the case at hand.

## **IX. APPLICABLE LAW**

82. Article R58 of the CAS Code provides the following:
- “The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*
83. The “*applicable regulations*” in the case at hand are the SAFA rules and regulations and the NSL rules and regulations.
84. The Parties have not expressly or impliedly agreed on a choice of law applicable to these proceedings before CAS. Therefore, the rules and regulations of both SAFA and the NSL shall apply primarily, and South African law, as SAFA and the NSL are domiciled in South Africa, shall apply subsidiarily.

## **X. ADMISSIBILITY OF THE APPEAL**

85. The Appealed Decision was notified to the Appellant on 6 August 2013.
86. There is no provision in the applicable regulations with regard to the time limit to file an appeal before CAS. Therefore, Article R49 of the CAS Code applies, *i.e.* the appeal shall be filed within 21 days after the notification of the Appealed Decision, which was done in the case at hand. The present appeal further complies with the other requirements of Article R48 of the CAS Code.
87. It follows that the appeal, filed on 8 August 2013, is admissible, which is also undisputed.

## **XI. MERITS**

88. The Appellant considers that Thanda was not allowed, in particular in view of Article 70.5 of the SAFA Constitution, to seek a Court order with regard to a dispute it had with the NSL. The NSL's commissioner should therefore not have complied with it, by announcing that the match on 29 May 2013 would have a provisional status. This announcement had an important impact on the Appellant's players, which led them to play poorly and, ultimately, to the draw (0:0) against Santos. The Appellant further asserts that the NSL or SAFA rules and regulations do not contain provisions with regard to provisional matches and that, therefore, the NSL should have ordered a replay of the matches. As the NSL did not order such replays, the Appellant considers that it should be reinstated in the PSL, as a 17<sup>th</sup> team.
89. The Panel first acknowledges that Article 70.5 of the SAFA Constitution forbids members to seek orders from ordinary courts, in favour of the judicial system put in place by SAFA, including arbitration. However, the NSL commissioner, on 29 May 2013, had no other choice but to comply with the Court Order, and proceed with the announcement ordered by the High Court. The Panel notes that the Appellant took part in the proceedings before the High Court and never raised any issue with regard to its jurisdiction to decide on Thanda's application. Furthermore, the Appellant also instituted its own application in the Western Cape High Court to interdict the continuation of the play-off matches, in vain. In any circumstance, the Panel considers that the violation by any member of SAFA of Article 70.5 of the SAFA Constitution can only eventually lead to the imposition of a sanction on this member by SAFA for having breached a rule, but certainly not to the invalidity or inapplicability of the decision issued by a State court in this context.
90. In this regard, the Panel agrees with Adv Pretorius in the Appealed Decision and considers that an order from an ordinary court shall be followed by a private association, as SAFA or the NSL, whether such order is right or wrong, and whether the ordinary court falsely considers that it had jurisdiction on the matter or whether it was actually competent in this regard.
91. Considering all this, the Panel notes that the NSL did not take appropriate action against Thanda when the latter addressed the High Court in violation of the SAFA Constitution. It should have taken the necessary steps to remove the case from the High Court to arbitration right away – namely before any decision or preliminary measures by the High Court were issued. Despite this failure of the NSL, the Panel notes that the conclusion of Adv Pretorius in the Appealed Decision was correct that once the High Court issued its decision, the NSL commissioner, on 29 May 2013, had no other choice but to comply with the High Court Order, and proceed with the announcement ordered by the High Court.
92. Furthermore, the High Court Order did not state that the play-off matches were provisional in their status, but only that the results shall be considered provisional, which means that there was a possibility, depending on the outcome of the proceedings initiated by Thanda, that the results might be annulled at a later stage. The Panel considers that this mere possibility should not have affected the Appellant's players "mentality", if the situation was explained to them properly by the Appellant's officials. The Panel notes that, as the Appellant was involved in the



proceedings before the High Court, it had to be aware that a decision would be taken on this day, and was therefore not caught by surprise by the Court Order. The Panel also considers that the situation of the Appellant was no different than the one of its direct opponents, Black Aces and Santos, as both of them, as well as their players, were also informed, at the same time, of the fact that the results of the play-off matches would be considered provisional.

93. The Panel therefore rejects the Appellant's contention that the announcement of the provisional status of the play-off matches' results had an undue impact on the players, which led them to play poorly during these matches.
94. Furthermore, the Appellant asserts that the NSL did not have the right to consider the matches of the play-offs played after the 18 June 2013 as final in status, as decided by the NSL in its letter dated 19 June 2013.
95. In this regard the Panel first notes that in the Court Order, the High Court decided the following:

*"4. At the commencement of the play-offs scheduled to be played on 29 May 2013 and 1 June 2013 and convened to determine which clubs, if any, shall be promoted to the Premier League and which club, if any, shall be relegated to the National First Division, the Third Respondent shall ensure that at least one announcement is made before the commencement of the match informing the spectators and other interested parties that the outcome of the game is provisional and depends on the finalisation of the review/appeal proceedings instituted by the Applicant".*
96. In its order dated 18 June 2013 in the Thanda case, the High Court did not address the question of the remaining matches to be played in the play-offs, whether they should be played or whether their results should be considered as final or provisional.
97. In this context, the NSL decided, in its letter dated 19 June 2013, *"to continue with the matches as scheduled, according to the Rules of the PSL Playoff and the Rules and Constitution of the League"*.
98. The Panel first notes that the NSL did not consider that the remaining matches shall be considered *"as final in status"*, as asserted by the Appellant, but merely decided that the play-off matches shall continue as scheduled. This decision was not contrary to the position of the High Court, neither in the Court Order (ordering the public announcement of the provisional results of the two first play-off matches), nor in its order dated 18 June 2013 (referring the Thanda case to arbitration).
99. Considering the above, it is the Panel's opinion that the NSL correctly ordered, in its letter dated 19 June 2013, following the High Court decision to refer the Thanda case to arbitration, that the play-offs should continue as scheduled, in the absence of any indication to the contrary made by the High Court.
100. The Panel, therefore, concludes that no irregularities can be reproached to the NSL in the present case and that, therefore, it was right not to order a replay of the play-off matches as

requested by the Appellant. As a consequence, the Panel considers that the Appellant cannot be reinstated in the PSL as a 17<sup>th</sup> team to the PSL.

101. This conclusion is sufficient in itself to dismiss the Appellant's case and the Panel therefore considers that all other issues at stake, in particular the question whether a 17<sup>th</sup> team be added to the PSL in the course of an on-going championship, can be left open.

## **XII. CONCLUSION**

102. In view of all the above, the Panel concludes first that the Appealed Decision shall be considered as being the final decision within the SAFA system of dispute resolution, and as SAFA's Constitution set forth an appeal to CAS against its final decisions, the appeal shall be declared admissible.
103. As to the merits, the Panel concludes that the Appellant's case shall be rejected for the following reasons:
- the NSL commissioner had to follow the Court Order, even though Thanda was not authorized by either the SAFA Constitution or the NSL Constitution to seek such order;
  - any possible impact on the Appellant's players "mentality" deriving from the announcement made by the NSL Commissioner on 29 May 2013 cannot be considered a valid reason to replay any of the matches;
  - the NSL was entitled to order the continuation of the scheduled play-off matches after the decision of the High Court to refer the Thanda case to arbitration;
  - Although the NSL failed to intervene in the procedure before the High Court, there were no such irregularities relating to the playoff games that would have allowed to ignore the results or to replay the matches. Neither the SAFA Rules nor the SAFA Constitution contain a legal ground to allow the Appellant's prayer for relief. The NSL therefore did not have to order the replay of the concerned play-off matches. Therefore, the Appealed Decision is confirmed.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport hereby rules:**

1. The CAS does have jurisdiction to rule on the appeal filed on 8 August 2013 by Chippa United against the decision rendered in the SAFA Arbitration by Adv Pretorius on 6 August 2013.
2. The appeal filed on 8 August 2013 by Chippa United FC against the decision rendered in the SAFA Arbitration by Adv Pretorius on 6 August 2013 is dismissed.
3. The decision rendered in the SAFA Arbitration by Adv Pretorius on 6 August 2013 is confirmed.
4. (...).
5. (...).
6. All other motions and prayers for relief are dismissed.