THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 303/2020

In the matter between:

FEDERATION INTERNATIONALE
de FOOTBALL ASSOCIATION **APPELLANT**

and

KGOPOTSO LESLIE SEDIBE **FIRST RESPONDENT**

SOUTH AFRICAN FOOTBALL ASSOCIATION **SECOND RESPONDENT**

Neutral citation: *Federation Internationale de Football Association v Kgopotso Leslie Sedibe & Another* (303/2020) [2021] ZASCA 113 (08 September 2021)

Coram: NAVSA ADP, MBHA, MOCUMIE, GORVEN AND MABINDLA-BOQWANA JJA

Heard: 23 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be handed down on 08 September 2021.

Summary: Practice and procedure – attachment to found jurisdiction – property attached in relation to an envisaged review of an administrative body taken in Switzerland – attachment not permissible if claim is not a claim sounding in money nor an action *in rem* for movables – lack of jurisdiction cannot be cured by attachment.

ORDER

On appeal from: Gauteng Division of the High Court of South Africa, (Vorster AJ, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and substituted as follows:

'1. The order of Van der Westhuizen J dated 22 August 2018 is set aside.

2. The first respondent is to pay the costs of the application.'

JUDGMENT

Navsa ADP (Mbha, Mocumie, Gorven and Mabindla-Boqwana JJA concurring):

[1] The central question in this appeal is whether the first respondent, Mr Kgopotso Leslie Sedibe (Sedibe), a former Chief Executive Officer (CEO) of the second respondent, the South African Football Association (SAFA), was entitled to an order granted by the high court, attaching all the trademarks of the appellant, the Federation Internationale de Football Association (FIFA), to found jurisdiction in order to review a decision by the Adjudicatory Chamber of its Ethics Committee, suspending him from

participating in football for a period of five years and ordering him to pay a substantial fine, following findings of match-fixing against him by FIFA. The short answer is no. The reasons are provided later in this judgment. Coupled to the aforesaid attachment order was an order granting Sedibe leave to institute the envisaged review proceedings by way of edictal citation, which could only have been granted on the basis that the high court had jurisdiction by virtue of the attachment. The detailed background culminating in the present appeal appears immediately hereafter.

[2] This is an appeal against a decision of the Gauteng Division of the High Court, Pretoria (Vorster AJ), in terms of which an application by FIFA, to set aside an order granted against it *ex parte* at the instance of Sedibe, was dismissed with costs. The appeal is before us with the leave of this Court. FIFA is the body responsible for regulating football throughout the world. It is an association registered in the Commercial Register of the Canton of Zurich (Switzerland), in accordance with Article 60 of the Swiss Civil Code, with its headquarters at FIFA-Strasse 20, Zurich, Switzerland. Sedibe is a South African citizen, residing in Johannesburg. SAFA, cited as the second respondent in the high court, is an association incorporated in accordance with the laws of South Africa and is responsible for regulating football locally. It was cited for such interest as it might have, with no substantive relief sought against it. SAFA did not participate in the proceedings in the high court or in the present appeal. The background culminating in the appeal is set out hereafter.

[3] Sedibe, at some time in the past, also practiced as an attorney. During August 2018, professedly intending to launch an application for the review and setting aside of the aforesaid decision by the Adjudicatory Chamber of FIFA's Ethics Committee,

Sedibe approached the high court for the orders set out below. From his answering affidavit filed in the high court, in response to FIFA's application, it appears that this sanction followed on charges of match-fixing of friendly matches played during the run-up to the 2010 World Cup. The decision was taken more than five years ago on 2 March 2016 and was communicated to Sedibe on 11 March 2016. Subsequently, Sedibe, during July 2018, approached the high court, *ex parte*, and was granted orders in the following terms:

'1. PART A

1.1. Leave is hereby granted to the Applicant to institute review proceedings against the First Respondent by way of edictal citation wherein the relief referred to in the document annexed to the notice of motion marked "X" will, inter alia, be claimed.

1.2. The Applicant is authorized to serve this application upon the First Respondent in Zurich, Switzerland, at its business address being FIFA Strasse 20, Zurich, Switzerland and by email at its email address being Gianni.infantino@fifa.org; fatma.samoura@fifa.org: secretariat-adjudicatory-chambers@fifa.org; and octavian.bivolaru@fifa.org.

1.3. The First Respondent is granted a period of 30 days from date hereof to serve and file its notice of intention to oppose the application for review as set out in the founding affidavit, to be supplemented if need be.

1.4. The cost of the *Ex-Parte* application be costs in the main application.

2. PART B

2.1. The Applicant is authorized to attach the trademarks owned, and/or in which the First Respondent has a beneficial interest, and all trademarks controlled by the First Respondent in terms of the Section 41(2) of the Trademarks Act No. 194 of 1993 of the Republic of South Africa, in order to enable the Applicant to launch review proceedings as more fully referred to in the founding affidavit delivered by the Applicant;

2.2. The Sheriff of this Court is authorized to attach and cause to be attached all of the First Respondent's trademarks in the Republic of South Africa, wherever same may be found, and

to seize such trademarks and/or endorse the trademarks in accordance with the Section 41(2) of the Trademarks Act No. 194 of 1993, in order to enable the Applicant to launch an application for the review of the decision taken by the First Respondent against the Applicant, and whereby an order was made against the Applicant for his suspension for a period of 5 years, as well as a fine sounding in money;

2.3. The costs of Part B of this application shall be costs in the cause of the review application.'

[4] The orders were granted by the high court (Van Der Westhuizen J), on 22 August 2018, more than two years after the decision by FIFA. Peculiarly, in terms of the order under Part A, although a time of 30 days was afforded to FIFA, from the date of the order, to serve and file its notice of intention to oppose the application for review, no time had been set for the review application to be launched by Sedibe. Copies of the orders granted by the high court were subsequently sent to FIFA by email. The email included a draft review application, which, on Sedibe's own version, was incomplete as he sought further information from SAFA, which he was adamant was not provided. It is the communication of the orders by email that caused FIFA to launch an application in the high court seeking to have the orders set aside. That application by FIFA to set aside the order granted *ex parte* was dismissed with costs. The bases for FIFA's application, gleaned from its founding affidavit in the high court, are dealt with in the paragraphs that follow.

[5] First, FIFA contended that the order by the high court authorising service on it by email was unlawful. In that regard it pointed out that in terms of the laws of Switzerland, where its headquarters are located, international service of court process can only be effected by Swiss Government officials. In this regard, reliance was placed on the *Guidelines of the Federal Office of Justice on International Judicial Assistance*

in Civil Matters, page 2, para I.B (3rd ed) 2003, updated in January 2013. It was pointed out that in certain circumstances international service of process in Switzerland without interposing Swiss authorities may constitute a criminal offence in terms of the Swiss Criminal Code.

[6] FIFA submitted further, that South African Courts have no jurisdiction over FIFA to set aside decisions taken in Switzerland by its internal disciplinary bodies that are domiciled in Switzerland and are subject to judicial control by Swiss Courts. Sedibe, so FIFA asserted, had a right of appeal to the FIFA Appeals Committee, located in Zurich, Switzerland. Thereafter, there was a right of appeal to the Court of Arbitration for Sport, located in Lausanne, Switzerland. This lack of jurisdiction on the part of South Africa, so it was submitted, could not be cured by an attachment to found jurisdiction. FIFA went on to state that South African Courts have never recognised the attachment of assets to found jurisdiction in relation to an application for review of decisions taken outside of South Africa by foreign adjudicatory tribunals.

[7] Furthermore, so it was claimed on behalf of FIFA, since the repeal of s 19(1)*(c)*(ii) of the Supreme Court Act 59 of 1959 and its replacement with s 21(3) of the Superior Courts Act 10 of 2013 (Superior Courts Act), the high court no longer has any power to attach property to found jurisdiction over a foreign respondent, as opposed to attaching property to confirm jurisdiction where there is a jurisdictional link between the case and the high court and the high court hearing it. Consequently, and concomitantly, so FIFA submitted, s 41(2) of the Trade Marks Act 194 of 1993 (Trade Marks Act) should be treated as having been tacitly amended by s 21(3) of the Superior Courts Act so that it no longer provides for attachments of trade marks to

found jurisdiction. This is especially so since continuing to permit such attachments would amount to arbitrary deprivation of property in violation of s 25(1) of the Constitution. Thus, FIFA objected to the jurisdiction of South African Courts and insisted that there were no grounds on which our courts could exercise jurisdiction.

[8] Moreover, according to FIFA, a binding arbitration clause in the FIFA regulations, meant that Sedibe was obliged to follow the arbitration provisions. Consequently, a judgment by a South African Court would not be capable of enforcement in Switzerland. It would only be executable in the event that service had been effected by a Swiss Authority.

[9] Additionally, it was contended on behalf of FIFA, that the order obtained *ex parte* by Sedibe was liable to be set aside on the basis that, in any event, the founding affidavit in the review application had not been served on it. All that FIFA received was a draft affidavit, which Sedibe alleged would give a good idea of the basis of his review application. The attachments referred to in the draft were not sent to FIFA. For all these reasons, FIFA stated that it was entitled to have the order set aside.

[10] In opposing the application by FIFA, Sedibe noted that in all matters relating to edictal citation, and in relation to orders of attachment to found jurisdiction, it has always been high court practice to grants such orders ex *parte*. The following part of Sedibe's answering affidavit bears repeating:

'It cannot be disputed that this Honourable Court granted the *ex parte* Order for the sole *purpose* of enabling me to launch review proceedings against an administrative or quasi-

judicial decision . . . taken by the applicant's Adjudicatory Chamber on 2 March 2016.' (My emphasis.)

[11] In relation to not serving the review application in finalised form, Sedibe stated that he was still awaiting a host of documents that he had sought from SAFA, as well as FIFA's reasons for the decision he sought to have reviewed.

[12] In respect of FIFA's complaint that service by email was in contravention of Swiss law, which requires service of judicial process by court recognised officials, instead of by way of email as authorised by Van der Westhuizen J, Sedibe contended as follows. First, FIFA did not, for that assertion, rely on an expert in Swiss law. Second, that, in any event, his attorney is taking steps to ensure that the *ex parte* application would be served officially.

[13] Dealing with FIFA's claim that instead of seeking to review a decision taken in Switzerland, he ought to have followed the internal appeals procedure outlined above, Sedibe stated that he could not do so because SAFA and FIFA had denied him access to information and confiscated his laptop, which were essential to an internal appeal. He pointed out that the internal appeal had to be launched within 3 days, which, in the prevailing circumstances, effectively precluded him from prosecuting it. In his view, this amounted to a negation by FIFA of the *audi alteram partem* principle.

[14] Sedibe rejected the contention made on behalf of FIFA that s 21(3) of the Superior Courts Act tacitly repealed the Trade Marks Act. He pointed out that our courts routinely grant an *incola* leave to attach assets to found jurisdiction and that this

is to enable the institution of an action ‘at home’. This is done in terms of the common law, supplemented by legislation. Sedibe claimed that the review application he intended instituting was directed, *inter alia*, at setting aside the FIFA sanctions described earlier, including the payment of a fine, and additionally, the costs of the hearing by the Ethics Committee. He also envisaged instituting a damages claim against FIFA for tarnishing his reputation. He denied that the attachment of FIFA’s trademarks constituted an arbitrary deprivation of property, since FIFA retained ownership, subject to temporary control and custody by the Sheriff.

[15] Sedibe responded to the contention made on behalf of FIFA that there was no basis at all for a South African Court to exercise jurisdiction. He described how FIFA had delegated a certain Mr Eaton to investigate the match-fixing charges against him and to conduct the enquiry in South Africa. According to Sedibe, the investigation was conducted in violation of the Swiss Federal Act on Private International Law, on which FIFA presently relied.

[16] Sedibe claimed that he was not given a proper hearing in relation to the charges against him, more particularly, as indicated earlier, he had been denied access to critical information, including information on his laptop. This was vigorously denied by FIFA in its replying affidavit. Sedibe alleged that Eaton had relied principally on evidence obtained from SAFA officials, who sought to exonerate themselves by implicating him. This, he said, occurred at a time after he had already resigned from SAFA. Sedibe complained that Eaton had released a preliminary report without affording him an opportunity to respond. Eaton had recommended that Sedibe be investigated by the South African Police. The National Prosecuting Authority however

had declined to prosecute. It is unnecessary and beyond the scope of the present appeal to engage in a discussion of a dispute in relation to the propriety of FIFA's disciplinary process.

[17] Sedibe said FIFA's Ethics Committee, inexplicably, had not conducted a full enquiry in South Africa even though all the acts complained of had taken place in South Africa. Sedibe contended that FIFA, sitting in Switzerland, had no jurisdiction to try him and that it wrongly relied on Eaton's findings of wrongdoing on his part.

[18] In respect of the envisaged review application, Sedibe reiterated that the orders obtained by him, *ex parte,* were in contemplation of the application for a review of the Ethics Committee's findings and that he intended launching it as soon as possible. It is necessary to record that more than five years after the decision in question and more than three years after the order granted *ex parte*, the review application by Sedibe has not yet been launched.

[19] Sedibe complained that an undertaking by Eaton, that he would be afforded an opportunity to be heard, was reneged upon. The charges were never formally put to him and the first time he saw details about them was when he saw the final report prepared by investigators of FIFA's Adjudicatory Chamber.

[20] Sedibe rejected the contention made on behalf of FIFA that South African Courts have no jurisdiction in respect of its adjudicatory processes. He denied that he was bound to follow the arbitration route, as provided for in the FIFA agreement, particularly as he had raised fundamental irregularities in the adjudication process. He

contended vigorously that international agreements such as the one relied on by FIFA could not detract from the Constitution of South Africa, which guaranteed him certain fundamental rights, including the right to challenge the decision in court. In relation to the *ex parte* order, he pointed out that FIFA was permitted an opportunity to show cause why the relief sought by him, *ex parte* should not be granted.

[21] I now turn to deal with the decision of the high court. Vorster AJ handed down a judgment that comprised slightly less than three pages. The high court took the view that although Sedibe sought to review a decision of FIFA's Ethics Committee, it was clear that he also intended to 'claim the fine he had to pay and the costs he had to pay . . . and further elaborated that he intended to claim damages . . .'. This part of the judgment related to the contention by FIFA that an attachment to found jurisdiction could only be authorised in relation to a claim sounding in money. Additionally, he went on to state the following:

'It is clear to me that Sedibe not only seeks a review of the various decisions. He mentioned in his founding affidavit also damages. Logically the damages claim will follow the successful review as the *causa* for the damages must be the irregular decisions he wants to be reviewed and set aside.'

Vorster AJ concluded as follows:

'. . . I find that the review process that Sedibe is in the process of instituting does include as a consequence thereof a *possible* monetary claim or claims as stated above. Therefore the *ex parte* application and order to authorise the attachment is not irregular as argued and I find no reason to set it aside.' (My emphasis.)

It is against those conclusions and the resultant order that the present appeal is directed.

[22] It is true that in the *ex parte* application, Sedibe stated that he had instituted defamation actions against certain individuals who had maligned him. However, the *ex parte* approach to the court for the attachment order was never on the basis that it was sought in relation to any such action. Furthermore, given the vigorous and determined challenge by Sedibe to the FIFA decision, it is self-evident that the fine imposed was not paid. Before us counsel on his behalf conceded as much. Of course, the fine would be nullified were the review application to be successful. But the order for attachment was never sought for the purpose of recovering the fine, more especially since it had not been paid and its recovery was not the basis for the attachment order sought.

[23] An action for damages based on defamation or the like was never the basis for the attachment order sought and obtained by Sedibe. The high court's speculation concerning a possible monetary claim in the future is just that – speculation. If a costs order ultimately redounded to the benefit of Sedibe in the review application, assuming it were viable, and it remained unsatisfied and if FIFA refused to pay and Sedibe sought to institute an action to recover it and if it were to be considered by a court to be justified, then the argument for an attachment might be advanced. There are too many ifs, buts and maybes that pose an insurmountable obstacle. The framing of the second paragraph of Part B of the notice of motion in the *ex parte* application, tagging on the fine as part of the decision sought to be overturned on review, was clearly designed to pre-empt FIFA's argument that because the litigation envisaged by Sedibe was not one that sounded in money an attachment was thus unwarranted.

[24] The principles in relation to the attachment of property to found or confirm jurisdiction are well-settled. The purpose of an attachment *ad fundandam jurisdictionem* is two-fold. First, it is to found or create jurisdiction where no other ground of jurisdiction exists at all. Second, it is to provide an asset in respect of which execution can be levied in the event of a judgment in favour of a plaintiff.[1]

[25] The purpose of an attachment *ad confirmandam jurisdictionem* is to strengthen or confirm a jurisdiction that already exists.[2] There too, the object of the attachment is to provide an asset on which execution can be levied in total or partial satisfaction of a plaintiff's judgment.[3]

[26] It is important to appreciate that the privilege afforded *incola* plaintiffs to attach the property of *peregrini* defendants arose from considerations of commercial convenience.[4] As indicated above, attachments to found or confirm jurisdiction are associated with the principle of effectiveness. In *Thermo Radia*nt, this Court said the following:

'It appears to me therefore, that in the law of Holland already one of the purposes of the attachment of property to found jurisdiction was to enable the *incola* to execute on that

---

[1] See Van Loggerenberg *et al Erasmus Superior Court Practice* (Erasmus) at A2-107 and the many cases cited there, including *Thermo Radiant Oven Sales (Pty)Ltd v Nelspruit Bakeries (Pty) Ltd* 1969(2) SA 295 (A) at 305C-308F and more lately, *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA).

[2] See *Thermo Radiant Ovens* fn 1 above at 300C-D and *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 230 D-E and the discussion in *Erasmus* at A2-108

[3] See *Tsung* fn 1 above at 181A and *Erasmus* fn 1 at A-2 108.

[4] See Wessels *Roman Dutch Law* at 678 *et seq* and Van Leeuwen *Roman Dutch Law* vol II at 696-7.

property after judgment. In other words, the attachment of property served to found jurisdiction and thereby enabled the Court to pronounce a not altogether ineffective judgment.'

The authorities point out that this principle has been eroded by the long-standing practice of our courts to permit the attachment of property, the value of which does not bear a realistic comparison to that claimed in the litigation. However, the property attached must at least have a saleable value.[5]

[27] It is clear that the right of an *incola* to attach the property of a *peregrinus* to found or confirm jurisdiction does not apply to all cases but is limited to (a) actions in *personam* in contract, quasi contract, delict, quasi-delict or other like causes to give, do or make good something for an opponent, that is, in cases sounding in money and (b) actions *in rem* for movables.[6] After all, the rationale for an attachment is to ensure that the creditor's claim can be satisfied, either partially or altogether. In *Ex Parte Hay Management Consultants (Pty) Ltd,*[7] the court held, in relation to the interdict sought in that case against a *peregrinus*, preventing it from committing delicts outside the country, that it had no control over that defendant nor over the cessation of the acts in question and could not entertain an application for an interdict against it. It is thus hardly surprising that one cannot find authority and we were referred to none, where an attachment was justified in relation to an administrative decision of the kind in question.

---

[5] See *Thermo Radiant Ovens* fn 1 at 306H-307A.

[6] See *Erasmus* fn 1 above at A2-109.

[7] *Ex Parte Hay Management Consultants (Pty) Ltd* [2000] 2 All SA 592 (W); 2000 (3) SA 501 (W) at 507 F-I.

[28] It is to be noted that legislation in respect of attachments of property, whether in the form of the Superior Courts Act or the Trade Marks Act, must be read with the principles of the common law.[8]

[29] Faced with the authorities referred to in the preceding paragraphs, it is no wonder that there was an attempt to contort the relief sought against FIFA as one sounding in money, by reference to the fine that was not paid and a costs order, payment of which might or might not eventuate. That was not what was being claimed in the review litigation.

[30] FIFA's complaint about the method of service authorised by Van der Westhuizen J, namely that it was in contravention of Swiss law, appears justified and the assertion that it was not confirmed by an expert in Swiss law is unpersuasive in that the provisions of Swiss law referred to were not contested. However, having regard to the conclusions reached above, which are dispositive of the appeal, it is not necessary to come to a definitive finding in that regard. In light of the conclusions reached above, none of the other points raised on behalf of FIFA, referred to earlier in this judgment require consideration.

[31] In Sedibe's opposing affidavit, his heads of argument and in argument on his behalf before us, there was an impassioned plea for the Court to appreciate that a South African citizen was at the mercy of a global giant in the form of FIFA and was

---

[8] See *Erasmus* fn 1 above at A2-107.

being denied his rights. That, with reference to a footballing metaphor, ought to be seen as a call for a hometown decision. In this case, the away side is entitled to a win.

[32] Van der Westhuizen J and Vorster AJ ought to have considered that the application for an order to authorise service in the manner sought was unfounded, as was the application for attachment for want of jurisdiction. For the reasons aforesaid the appeal must succeed.

[33] The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and substituted as follows:

'1. The order of Van der Westhuizen J dated 22 August 2018 is set aside.

2. The first respondent is to pay the costs of the application'.

_____

M S NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

For appellant:	M Chaskalson SC, with C Robertson
Instructed by:	Edward Nathan Sonnenbergs, Sandton
	Webbers Attorneys, Bloemfontein
For first respondent:	G Meyer
Instructed by:	Fluxmans Inc Attorneys, Johannesburg
	Lovius Block Inc, Bloemfontein.