



Arbitration CAS 2008/A/1610 Samsunspor FC v. Fédération Internationale de Football Association (FIFA) & Dejan Maksic, award of 8 May 2009

Panel: Mr George Abela (Malta), President; Mr Efraim Barak (Israel); Mr Jacopo Tognon (Italy)

Football

Disciplinary sanction for failure to comply with the decision of a FIFA body

Object of an appeal against a disciplinary sanctions for failure to comply with a decision

Interpretation of Article 71 of the FIFA Disciplinary Code

Difficult financial and sporting situation

- 1. The object of an appeal against a disciplinary sanction for failure to comply with a decision cannot extend beyond the limits of a review of the disciplinary sanction imposed by the FIFA Disciplinary Committee (FDC). Hence, only submissions relating to the fine imposed by the FDC, such as its legal basis and quantum, can be considered. Any request by the appellant to have its debt towards one of the respondents cancelled, reduced, postponed, rescheduled, or divided in several deferred portions, is precluded.**
- 2. Article 71 of the FIFA Disciplinary Code allows a sanction to be imposed on a club that has failed to pay entirely its debts to another subject. The provision is intended to confirm that it is a disciplinary duty of clubs to fully comply with the decisions of the bodies of FIFA. In this respect, a different interpretation would be inconsistent not only with the text of the rule, but also with its aim. In addition, it would be odd to admit that the club's alleged good faith in not paying a large sum of debt allows it to escape its disciplinary responsibility: the effectiveness of the system, and the binding force of the disciplinary principle underlying it, i.e., that the decisions of the FIFA bodies have to be fully complied with, would be seriously impaired.**
- 3. The difficult financial and sporting situation alleged by a club is not a justification for its failure to pay its debt to a player. The lack of financial means, even though caused by sporting conditions, to satisfy an obligation of payment does not excuse the failure to make the required payment.**

Samsunspor Kulubu FC is a Turkish football club (hereinafter referred to as the Appellant). The Appellant is a member of the Turkish Football Association, which, in turn is affiliated to the Federation International de Football Association.

FIFA is the international federation governing the sport of football at worldwide level. FIFA is based in Zurich, Switzerland. It exercises regulatory, supervisory and disciplinary functions over continental

confederations, national associations, clubs, officials, players and players' agents worldwide. (hereinafter referred to as "FIFA" or "First Respondent").

Dejan Maksic is a professional football player of Serbian Nationality (hereinafter referred to as the Second Respondent).

On 21 July 2008 the Appellant filed a Statement of Appeal challenging the decision rendered by FIFA Disciplinary Committee (hereinafter also referred to as FDC) by means of which the Appellant was pronounced guilty of failing to comply with the decision of a FIFA body, and was ordered to pay a fine to the amount of CHF 15.000.

On 1 September 2008 the First Respondent filed its Answer stating, amongst others, that FDC imposed sanctions on the Appellant because he did not comply with the decision of the DRC. The decision of the DRC became final and binding as no appeal had been lodged against this decision with CAS. The First Respondent argues that the decision of the DRC could have been challenged before the CAS according to FIFA's regulations. However the Appellant failed to do so and as a result of that, the decision of the DRC became final and binding. As confirmed by the CAS, the CAS has full power to establish whether the challenged decision of a disciplinary body is lawful or not, if the sanctions are correct and whether they are fair and proportionate. On the other hand, the CAS cannot review or modify a previous decision which is final, because it has not been appealed or the appeal has been dismissed, and therefore has become enforceable. Consequently the claim made by the Appellant concerning the substance of this matter has to be rejected.

"In FIFA's understanding the main aim of the Appellant's appeal is to enter again in the substance of this matter, although a final and binding decision has already been passed. In this regard, the object of this appeal cannot extend beyond the limits of a review of the disciplinary to the fine imposed by the Committee, such as its legal basis and the quantum, can be heard. The CAS cannot consider requests concerning the debt owed by the Appellant to the player, the issues relating thereto having been decided by the DRC, which is final and binding. Any request by the Appellant to have its debt towards the player cancelled, reduced, postponed, rescheduled, or divided in several deferred portions, is precluded. It cannot be re-heard now at the stage of enforcement of the obligation to pay (...)"

By means of a Notice dated 2 February 2009, the Secretary General of the CAS, considering articles R33 and R40 of the Code of Sports-related Arbitration recorded that the Arbitral Panel called upon to resolve the litigation opposing Samsunspor Football Club to FIFA and Dejan Maksic is composed as follows:

- President: Dr George Abela, attorney-at-law in Valletta, Malta.
- Arbitrators: Mr Efraim Barak, attorney-at-law in Tel-Aviv, Israel
Mr Jacopo Tognon, attorney-at-law in Padova, Italy

On 31 July 2008 the Appellant filed its appeal brief with the Court of Arbitration for Sport (CAS) against FIFA and Dejan Maksic. In its Appeal Brief, the Appellant argues that:

"The Club relegated to the second division and due to the new circumstances the Club had difficulties paying the player salary. We underline that when the Club was in first division, there was no problem between the Club

and the player about the payments. The club had always the intention of paying the player's salary. Moreover the Club has submitted a payment schedule to the player and player's agent in the total amount of 138.000,00 USD end of July 2008, which was not accepted by the other party. Although the Club's financial conditions were not pleasant, the club found a way to negotiate and pay the credits it had towards other creditors with an open and amicable discussion, however this was not possible with the player in question. To be examined, it is clear that the amount of money and the payment modalities offered by the club were acceptable. So we claim that the Player's has no good intention.

According to the above mentioned facts and arguments we are respectfully requesting from the panel to:

- *Grant a permanent injunctive relief lifting the appealed decision and reject the claim of the Player;*
- *Condemn the respondent to pay the legal fees and the other expenses incurred in connection with the proceedings (...)*

By means of a letter dated 8 August 2008, the Respondents were invited to file an answer containing a statement of defence, any defence of lack of jurisdiction, any counter claim and any exhibits.

On 1 September 2008 the First Respondent filed its Answer to the appeal lodged by Appellant. The Second Respondent did not file an answer.

LAW

Jurisdiction

1. The jurisdiction of the Court of Arbitration for Sport in the present case is based on Article 62 and ff of the FIFA Statutes, and is re-confirmed by the signature of the parties to the order of procedure.
2. It follows that the CAS has jurisdiction to decide the present dispute.

Mission

3. Following the request for arbitration dated 21 July 2008 lodged by Samsunspor Football Club (the Appellant), represented by Ms Didem Sunna, against FIFA (the First Respondent), represented by Mr Marco Villiger & Mr Paolo Lombardi, and Dejan Maksic (the Second Respondent) represented by Mr Alfredo Maravic, the Panel designated is in charge of adjudging the appeal as a Court of Arbitration and to render an award in conformity with the Code of Sports-related arbitration (the Code) and the terms and conditions set out in the Order of Procedure.

Law applicable to the merits

4. In accordance with article R58 of the Code, the Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.
5. The FDC rules relevant to these proceedings are the following:

Article 71 of the FIFA's Disciplinary Code states:

"1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision) or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS:

- a) *Will be fined at least CHF 5,000 for failing to comply with a decision;*
- b) *Will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*
- c) *(only for clubs) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced".*

The merits of the dispute

6. On 1 January 2006, the Serbian player Dejan Maksic and the Turkish club Samsunspor Kulubu signed an employment contract, valid as from the date of signature until the end of the season 2006/2007. The employment contract provided for the amount of USD 375,000 to be paid to the Player.
7. On 25 August 2006 the player contacted FIFA and explained that at the end of the season 2005/2006, the Appellant had been relegated into the second Turkish division. Subsequently, the player had allegedly been informed that, due to financial problems, the club would not be able to pay his salary. The player had moreover not been licensed for the season 2006/2007, because the club could apparently not license more than three foreign players. The player explained that, in view of these circumstances, he had continued to train with a junior team of the club. Furthermore, the player maintained that his salaries for June, July and August 2006, as well as the instalment which according to his employment contract had fallen due on 1 August 2006 remained outstanding.
8. On 13 September 2006, the Club informed FIFA that it was suffering from financial difficulties, but that it was looking for financial sources to settle the matter. On 15 September 2006, FIFA was requested by the player to release him from his contractual obligations with the club due to

its failure to pay his salaries. Furthermore, the player claimed the remaining value of the contract totalling to USD 229,158.

9. On 29 September 2006, the Appellant informed FIFA that it had agreed with the player upon a “new payment plan”. The relevant payment plan was signed by the Vice President of the Administration Board of the Turkish Club. On 4 October 2006, the player confirmed that the parties had agreed on a settlement. Thereafter, FIFA was informed repeatedly by the player that the club failed to comply with its obligations according to the “new payment plan”, namely to pay the relevant instalments on time.
10. On 5 April 2007, the Turkish Football Federation informed FIFA that its affiliate Samsunspor Kulubu had requested an extension of the time limit granted by FIFA in order to present its explanations on the matter. According to the Club, the matter concerning the player Dejan Maksic and the club’s financial difficulties was to be discussed at the club’s extraordinary congress on 17 and 24 April 2007. On 13 April 2007, the requested extension of the time limit was granted by FIFA. However, even after the lapse of the extended time frame, the club omitted to provide FIFA with any further statement with regard to the player’s claim. According to the player, the club had made the following payments upon the agreement on the “new payment plan”:
 - 22 August 2006 – USD 5,000
 - 10 October 2006 – USD 26,264
 - 9 November 2006 – USD 20,832
 - 24 November 2006 – USD 10,000
 - 29 December 2006 – USD 30,000
 - 12 April 2007 – USD 3,650
 - Total paid by FC Samsunspor – USD 95,746
11. Consequently, the Player requested the Dispute Resolution Chamber that the Appellant be ordered to pay the allegedly outstanding amount of USD 128,424 as per the “new payment plan” agreed upon between the parties involved.
12. On 10 August 2007 the Dispute Resolution Chamber issued a decision holding that:
 - “1. *The claim lodged by the Claimant, the Serbian player Dejan Maksic, is accepted.*
 2. *The Respondent, the club Samsunspor Kulubu, has to pay the amount of USD 128,424 to the Claimant, Dejan Maksic, in accordance with the following payment schedule:*
 - *USD 28,424 within 30 days as from the date of notification of this decision;*
 - *USD 25,000 within 60 days as from the date of notification of this decision;*
 - *UD 25,000 within 90 days as from the date of notification of this decision;*
 - *USD 25,000 within 120 days as from the date of notification of this decision;*
 - *USD 25,000 within 150 days as from the date of notification of this decision.*

3. *In the event that the above-mentioned instalments are not paid within the indicated deadlines, interest at the rate of 5% per annum will apply as of expiry of the relevant time limits.*
 4. *In the event that any instalment is not paid within the stated time limits, the full amount will fall due immediately and the present matter will be submitted to the FIFA Disciplinary Committee for its consideration and decision.*
 5. *The Claimant is instructed to inform the Respondent directly and immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*
 6. *According to art. 61 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision and shall contain all the elements in accordance with point 2 of the directives issued by the CAS, a copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS (...)*
13. On 14 May 2008 the secretary to the Disciplinary Committee opened a disciplinary procedure against the Appellant and asked him to immediately pay the outstanding amount as well as to send a payment proof. On 27 May 2008 the secretary to the Disciplinary Committee sent a reminder and informed the parties that the case will be submitted to the next meeting of the FIFA Disciplinary Committee on 16 June 2008 if the amount is not paid by 6 June 2008 at the latest.
 14. By means of a decision of the FIFA Disciplinary Committee dated 16 June 2008, the Appellant was pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art. 71 FDC. The Appellant was ordered to pay a fine to the amount of CHF 15,000. The fine was to be paid within 30 days of notification of the decision. Moreover, the Appellant was granted a final period of grace of 30 days as from notification of the decision in which to settle its debt to the creditor.
 15. By means of the present proceedings, the Appellant is asking this Panel to:
 - i. Grant a permanent injunctive relief lifting the appealed decision of the FIFA Disciplinary Committee dated 16 June 2008;
 - ii. Reject the claim of the Player;
 - iii. Condemn the Respondent to pay the legal fees and the other expenses incurred in connection with the proceedings.
 16. The Appellant is therefore challenging the FDC Decision to sanction its failure to comply with the DRC Decision, which imposed on the Club the obligation to pay a given amount of money to the Player. Having failed to pay within the deadline specified in the DRC Decision, the Appellant was sanctioned by the First Respondent pursuant to Article 71 FDC.

In support of its request to lift the appealed decision the Appellant invokes four main reasons:

- (i) *the Club relegated to the second division and due to the new circumstances the Club had difficulties paying the player;*
- (ii) *the Club always had the intention of paying the player's salary;*
- (iii) *the Club has submitted a payment schedule to the player and player's agent in the total amount of 138.000,00 USD end of July 2008, which was not accepted by the other party;*
- (iv) *Although the club's financial conditions were not pleasant, the club found a way to negotiate and pay the credits it had towards other creditors with an open and amicable discussion, however this was not possible with the player in question since he has no good intention.*

On the other hand, the First Respondent reiterates that *"the imposed sanction is in line with the longstanding jurisprudence of the Committee. A fine of CHF 15,000 is appropriate in the light of the amount of the outstanding debt. A lower fine would not be proportionate and would thoroughly contradict the longstanding and stable jurisdiction of the Committee ... a meagre fine would contradict the principle of repression and prevention and would fail to encourage the prompt fulfilment of obligations"*.

This Panel points out that the fine imposed by the Committee was based on Article 71 (Section 8: Failure to respect decisions) of the FIFA Disciplinary Code which stipulates that:

"Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision) or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS:

- a) *Will be fined at least CHF 5,000 for failing to comply with a decision;*
- b) *Will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*
- c) *(only for clubs) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced"*.

17. With respect to the Appellant's submissions, the Panel wishes to underline two preliminary important points:

First, the Panel notes that it is undisputed that the decision of the DRC which was rendered on 10 August 2007 has become binding on the Club. According to FIFA rules, the decision could have been challenged before CAS, however the Club did not appeal from the decision of the DRC.

Second, the Panel underlines that the object of this appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed by the FIFA Disciplinary Committee, hence, only submissions relating to the fine imposed by the FDC, such as its legal basis and quantum, can be considered. The Panel cannot consider requests concerning the debt owed by the Appellant, the issues relating thereto having been decided by the FDC decision, which is final and binding.

Any request by the Appellant to have its debt towards the Second Respondent cancelled, reduced, postponed, rescheduled, or divided in several deferred portions, is precluded.

18. In the light of the above, the Panel finds that the request of the Appellant to “*reject the claim of the Player*” is untenable as a ground of appeal.
19. In addition, as to the request of a permanent injunctive relief lifting the appealed decision, the Panel notes that the only task of the FDC was that of determining whether the Club had complied with the final and binding DRC Decision dated 10 August 2007.
20. As a result, the Panel concludes that the conditions for a fine to be imposed on the Club, which breached its duty to make timely payment of the DRC Decision, and to settle its debt to the Second Respondent, have been met. Moreover, the amount of the fine appears to be proportionate.

As to the first aspect, the Panel confirms that Article 71 of the FDC allows a sanction to be imposed on a club that has failed to pay entirely its debts to another subject. The provision is intended to confirm that it is a disciplinary duty of clubs to fully comply with the decisions of the bodies of FIFA. In this respect, this Panel is of the opinion that a different interpretation would be inconsistent not only with the text of the rule, but also with its aim. In addition, it would be odd to admit that the Club’s alleged good faith in not paying a large sum of debt – allows a debtor to escape the disciplinary responsibility: the effectiveness of the system, and the binding force of the disciplinary principle underlying it, i.e., that the decisions of the FIFA bodies have to be fully complied with, would be seriously impaired. In its decision, the FIFA Disciplinary Committee rightly commented as follows:

“Even FIFA’s attempts to urge the debtor to fulfil its financial obligations failed to induce it to pay. Considering the facts, the amount due constitutes a serious offence. In the circumstances, the Disciplinary Committee regards a fine amounting to CHF 15,000 as appropriate”.

At the same time, the Panel confirms that the difficult financial and sporting situation alleged by the Appellant is not a justification for its failure to pay its debt to the Player. The lack of financial means, even though caused by sporting conditions, to satisfy an obligation of payment does not excuse the failure to make the required payment. The FIFA Disciplinary Committee, therefore, rightly considered the Appellant in breach of its financial obligation to the Player, irrespective of the financial situation of the debtor.

21. As to the amount of the fine, the Panel confirms that the FDC Decision is consistent with Article 71 FDC: the amount of the fine, set at CHF 15,000 does not seem to be oppressive, and appears to be justified by the attitude of the Appellant, which made no efforts to settle its debts after the DRC Decision had been rendered, and proportionate to the rather substantial amount owed to the Player.
22. In light of the foregoing, the Panel dismisses the appeal brought by the Club and the FDC Decision is confirmed.

The Court of Arbitration for Sport rules:

1. The Appeal filed by Samsunspor FC against the decision issued on 16 June 2008 by the FIFA Disciplinary Committee is dismissed.
2. The decision adopted on 16 June 2008 by the FIFA Disciplinary Committee is confirmed.
3. All other requests are dismissed.

(...).