Arbitration CAS 2009/A/1958 Ngassam Nana Falemi v. Football Club Gaz Metan Medias, award of 14 April 2009

Panel: Mr Efraim Barak (Israel), Sole Arbitrator

Football
Interpretation of a contractual clause included in a contract of employment
Determination of the law applicable to the interpretation of a contract
Interpretation of a contractual bonus clause

1. **A dispute relating to the interpretation of a contact of employment between a club and a player requires the application of basic principles of interpretation of contracts. In this respect, the appropriate applicable rules of interpretation to be implemented should be the basic rules of *lex sportiva*. Furthermore, if the necessary evidence in order to try the case according to national law is lacking and since both the national law system and Swiss law system are civil law systems, based on the presumption of equality of laws Swiss law can be applied complementary in order to interpret a contractual clause.**

2. **A contractual clause should be interpreted taking into account the common and true intent of the parties (*"the plain meaning clause"*), what the parties reasonably in good faith could understand of the clause and circumstances such as preliminary negotiations and customary practice between the parties. While doing so, the intention is examined in light of the environment of sport in general and of football in particular. In this regard, the true intent of the parties when inserting a bonus clause into an employment contract might be to incentivize the player's performance in order to achieve a ranking in the 1st League. In such context, the player could not reasonably in good faith have understood that he would be entitled to a bonus if the objective was not achieved by his incentivized performance. The same is true, if the objective was achieved, but not due to the very essence of the reasoning that led to the inclusion of the bonus clause.**

Mr Ngassam Nana Falemi (the "Player" or the "Appellant") is a professional football player with his domicile in Bucharest, Romania.

Football Club Gaz Metan Medias (the "Club" or the "Respondent") is a Romanian football club with its seat in Medias. It is a member of the Romanian Football Federation (RFF).

On 25 June 2008 the Player and the Club signed an employment contract called *"Sports Civil Convention no. 441/25.06.08"* (the "Agreement") for the employment of the Player by the Club during the

2008/2009 Romanian Football Season/Championship. The Agreement was for a fixed term of one year, from 1 July 2008 until 30 June, 2009.

The Agreement contained, amongst others, a bonus clause that stipulated the following: *"If the team manages to avoid relegation during this championship, the player will be awarded an additional net amount of 8.000 €"* (Art. 5 (b) of the Agreement).

After the last match of the 2008/2009 season, which took place on 10 June, 2009, the Club was ranked 15th in the final ranking of the 1st League of the Romanian Football Competition, a position that – under the Regulations of the RFF – automatically lead to the relegation of the Club to the 2nd League.

In July 2009, the team ranked 10th in the 1st League, FC Arges, was sanctioned with relegation due to circumstances described by the Appeal Commission of the Romanian Professional Football League as *"not concerning the competition itself"* (according to the Appellants' submission, which was not contested in his regard to its merits, the sanctioning of FC Arges was a result of bribing referees). As a consequence, the team with the best classification among the relegated teams, *in casu* the Respondent, was reinstated into the 1st League.

On 31 July, 2009, the Appellant submitted a claim before the Commission for Disputes Resolution of the Romanian Professional Football League (in file No. 61/CDL/2009) ordering the Respondent to pay the amount of €12.150 to the Appellant. The €12.150 were composed out of €4000 for the contractual instalments of May and June 2009, €8000 as the bonus for the avoidance of relegation, €150 as rent fees, 800 Lei as travel expenses and €455 as court fees.

Through Decision no. 37/11.08.2009, the Commission for Disputes Resolution founded that the amounts representing contractual instalments, rent fees and court fees were paid by the Respondent. Therefore this part of the claim was dismissed. However, the Commission for Disputes Resolution also found that the *"Club plays in the 1st League"* and therefore accepted the claim submitted by the Player with regard to the amount of €8000 as a bonus for the avoidance of relegation.

The Club filed an appeal against Decision no. 37/11.08.2009 before the Appeal Commission of the Romanian Professional Football League (File No.9/CR/2009). Briefly, the Club requested that Decision no. 37/11.08.2009 would be set aside since the team was ranked on a relegation position at the end of the season and its remaining in the 1st League was a consequence of FC Arges' relegation.

On 27 August, 2009, the Appeal Commission delivered its award, which was communicated to the parties on 10 September, 2009, in which it accepted the appeal submitted by the Club. The Appeal Commission supported its decision by asserting that it was obvious that the bonus set by the parties referred to a non-relegation position in the rankings, obtained according to the results of the team and due to the number of points accumulated, in order to stimulate the Player to perform better and to award him in case the objective set is accomplished. Hence, the conditions for the accomplishment of the convention between the parties, regarding the €8000, have not been met now the stay in the 1st League was based on a disciplinary decision.

On 25 September 2009 the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decision rendered by the Appeal Commission of the Romanian Professional Football League. It submitted the following request for relief:

> *"We respectfully ask the Court to rebut the Decision no. 16/August 27th, 2009 issued by the Appeal Committee of the Romanian professional Football League and oblige the Respondent to pay to the Appellant the amount of 8000 (eight thousand) Euro as well as the legal expenses incurred and to establish that the costs of the arbitration procedure shall be borne by the Respondent".*

On 1 October 2009, the Appellant filed its Appeal Brief with the CAS, which, in essence, did not differ from its Statement of Appeal.

On 14 October 2009, the Respondent filed its Answer with the CAS to the Appeal lodged by the Appellant. The Answer of the Respondent contained the following request for relief:

> *"We respectfully request that you dismiss the appeal declared against the Decision no. 16/27.09.2009 issued by the Appeal Commission of the Romanian Professional Football League in file no 9/CR/2009, as unsubstantiated and essentially groundless, and abide by Decision no. 16/27.09.2009".*

The Respondent, by letter dated 10 October 2009 and the Appellant, by letter dated 12 October 2009, both agreed with the proposal to submit the dispute to a Sole Arbitrator.

On 17 December 2009, the Counsel to the CAS sent to the parties a copy of the Notice of Formation of a Panel, appointing Mr Efraim Barak, attorney-at-law in Tel-Aviv, Israel, as the Sole Arbitrator for the present matter, pursuant to Articles R33, R52, R53 and R54 of the Code for Sports-related Arbitrations (hereinafter the "Code").

By letters dated 11 January 2010, both parties agreed that the award will be issued on the basis of the written submissions.

On 18 January 2010, pursuant to an extension of time that was duly requested and granted, the Appellant submitted the English translation of the Romanian Law of Physical Education and Sport No. 69/2000, the GEO No. 205/2005 and article 20 to 29 of the Romanian Football Federation Regulations.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from article R47 of the CAS Code in conjunction with article 26 par. 1(c) and article 57 par. 3 of the Regulations on The Status and Transfer of Football Players of the RFF.

2. According to Article R47 of the Code:

"An appeal against a decision by a federation, association or other sporting body may be filed with CAS insofar as the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him in accordance with the statutes and regulations of the said sports-related body".

3. Article 57 par. 3 of the Regulations on The Status and Transfer of Football Players adopted by the RFF, (in its English translation provided by the Appellant) stipulates:

"The Sports Arbitration Court (CAS) from Lausanne is competent in resolving any dispute between FIFA, UEFA, regional confederation, national federations, leagues, clubs, players, officials, players' agents or licensed match agents, if the statutes of FIFA/UEFA/RFF do not provide otherwise".

4. Article 26 par. 1(c) of the said Regulations stipulates:

"The decisions issued by the Appeal Commission of RFF/PFL/AJF can be contested at the Court of Arbitration for Sport, under the conditions stipulated by the RFF Statute".

5. It follows that the CAS has jurisdiction to decide on the present dispute, according to Art. 57 par. 3 in conjunction with article 26 par. 1(c) of the Regulations on The Status and Transfer of Football Players adopted by the RFF, and by virtue of Art. R47 of the Code.

6. Under Art. R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law. The Sole Arbitrator did not therefore examine only the formal aspects of the appealed decision but held a case *de novo*, evaluating all facts and legal issues involved in the dispute, based on the written submissions produced by the Appellant.

Applicable law

7. Article R58 of the Code provides the following:

"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 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".

8. A likewise approach can be founded in Article 187 of the Swiss Private International Law Act of 1989 (PIL), which - inter alia - provides that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected".*

9. In the current proceedings the main question on which the Sole Arbitrator has to decide deals with the interpretation of an article of an employment contract ("the Agreement") which, according to article 12 of the said Agreement is governed and construed in compliance with the Law of Physical Education and Sport no. 69/2000, GEO no. 205/2005 and the RFF's Regulations.

10. Neither of the parties made in its submission any reference to the above mentioned Law or regulations as a possible legal source to rely on in order to support its interpretation of the Agreement, nor did they submit on their own initiative same legal documents. Pursuant to the request of the Sole Arbitrator these documents were submitted to the file translated into English. Revising carefully these documents, the Sole Arbitrator noted that none of them contain any guideline or any article that may support or back up any one of the two different interpretations as alleged by the parties.

11. Therefore, taking into account that the Agreement is concluded in Romania and that, according to article 12 of the Agreement, the Agreement is governed by different Romanian documents and regulations, it is evident and in line with R58 of the Code, that for the interpretation of the Agreement Romanian law (including Romanian Jurisdiction on principals of contracts interpretations) should apply.

12. Hence again, the parties did not present any submission or evidence with regard to the applicable law on the interpretation of the contractual provisions under Romanian Law or Romanian Jurisdiction as would have been expected (since Romanian Law, being a foreign applicable law, should have been proven as a matter of evidence), and have not even pleaded that Romanian law should be applied. In consequence, the Sole Arbitrator lacks the necessary evidence in order to try the case according to Romanian law.

13. Since the current dispute requires the application of basic principles of interpretation of contracts, the Sole Arbitrator is of the opinion that appropriate applicable rules of interpretation to be implemented in this case should be the basic rules of *lex sportiva*, and finds furthermore that, since both the Romanian Law system and Swiss Law system are Civil Law systems and based on the presumption of equality of laws; Swiss law can be applied complementary in order to interpret the contractual clause.

14. This was also in line with previous CAS case law: *"Due to this lack of evidence, the Sole Arbitrator is of the opinion that it is appropriate to decide the dispute according to the general rules of the Lex Sportiva and complementarily, to the rules of Swiss law, which are applied generally in the disputes concerning the transfer of football players decided by the bodies of FIFA. This approach is also conversant with Art. 16 par. 2 of the Swiss Statutes on Private International Law, which provides that Swiss law shall be applicable if the content of foreign law cannot be evidenced. Therefore, the rules and regulations RFF shall apply primarily, and the principles of Lex Sportiva and Swiss law shall apply complementarily"* (CAS 2008/A/1477-1567).

Merits

15. The sole issue to be resolved by the Sole Arbitrator is whether or not the Respondent is compelled to pay the Appellant €8.000 as agreed upon in the Agreement if the team would avoid relegation during the championship.

16. In the current proceedings it is evident that the core of the dispute lies down in the interpretation of a provision of an employment contract and that thus for the interpretation of

the said contract, contractual principles of interpretation apply. As mentioned above, the Sole Arbitrator deems it appropriate to apply general principals of *lex sportiva* and Swiss law in order to interpret the contractual bonus clause.

17. In the circumstances of this dispute, a general rule of *lex sportiva* will address us to interpret the clause in dispute taking into consideration the environment of sport in general and football in particular as regard to the question of the reason or logic lying behind the plain words of the agreement dealing with the payment of the bonus in case of non-relegation. Furthermore, if we are to look at the intention of the parties as an interpretation tool, this intention should be understood within the framework of employment agreements in the world of football, and again this is part of the *lex sportiva.* As will be further explained, this examination brings the Sole Arbitrator to the opinion that the clause in dispute cannot be, and should not be, interpreted only based on the plain wording as the Commission for Disputes Resolution of the RFF (the first instance) did in its decision. Rather should it be interpreted in a way which is consisted with the intention of the parties when signing the Agreement. In order to address to this intention as an interpretation tool, the Sole Arbitrator must first raise the barrier of the *"Plain Meaning Rule"*, and only then move ahead and find what was indeed the interpretation of the parties.

18. The *"Plain Meaning Rule"* which is common in most legal system as an interpretation rule, is also a principle of Swiss law. Under same rule, no interpretation is necessary when the true and common intent of the party is clearly expressed in the words of a contract. However, the governing principle of the interpretation of any declaration of intent is the so-called *"principle of good faith"* (*"Vertrauensgrundsatz", "principe de la confiance")* under which a seemingly clear wording may be shown not to convey the true intent of the parties.

19. The Swiss Federal Tribunal has held that even if the wording of a contractual clause *"clearly"* supports a certain interpretation, it must be examined whether this interpretation is not e*xcluded and superseded by* other means and rules of interpretations (BGE 127 III 444,445, 2001). A contract will be interpreted according to the common intent of the parties at the moment the contract was concluded. The specific factual and contractual context, such as preliminary negotiations or customary practice between the parties, must be taken into account (GAUCH/ SCHLUEP/SCHMID/REY, Schweizerisches Obligationenrecht, Allgemeiner Teil, Vol 1, 7th edition, Zurich 1998, par 1200 & 1212). The principle of good faith in conjunction with the interpretation of contractual clauses means that a declaration is neither understood in the sense of what the declaring party may have had in mind nor in accordance with the literal meaning of the wording, but in the meaning the addressee could in good faith attribute to it. (BUCHER E., Chapter 8:"Law of contracts, General remarks on the Swiss law of obligations", in DESSEMONTET/ANSAY (eds), Introduction to Swiss Law, 3rd edition, 2004, p. 116 & 117).

20. The appliance of the *"principle of good faith"* to the interpretation of contractual provisions is also underlined in previous CAS case law: *"the contractual principle of interpretation developed by the Swiss Tribunal fédéral whereby a declaration or an action must be interpreted in accordance with what a reasonable recipient thereof could and should have understood in good faith in the circumstances (the "principe de la confiance" hereinafter translated as the "principle of good faith")"* (CAS 2006/A/1164).

21. Therefore, the Sole Arbitrator is of the opinion that the contractual clause should be interpreted taking into account the common and true intent of the parties, what the parties reasonably in good faith could understood of the clause and circumstances such as preliminary negotiations and customary practice between the parties. While doing so, the intention is examined in light of the fact that we are dealing with a football player employment agreement and the idea behind bonuses in sport in general.

22. As mentioned before, the employment contract literally stipulates the following provision: *"If the teams manage to avoid relegation during this championship, the player will be awarded an additional net amount of 8.000 €"*. The Sole Arbitrator notes that in the Statement of Appeal and in the Appeal Brief the Appellant wrongly cited the Agreement by writing *"the team shall not relegate in this championship"*. Although the difference is indeed meaningful, especially in light of the dispute, still the Sole Arbitrator considers it only as a mistake since the Appellant was the one who also submitted the translated Agreement.

23. It is the Sole Arbitrator's opinion that the very essence of this bonus clause was to incentivize a good performance by the Player and that, because of such performance, an objective would be achieved, i.e. the incentivized performance would lead to a position on the ranking of the 1st league which would not lead to relegation. Therefore, undeniably, the true intent of the parties when inserting this clause into the employment contract was to incentivize the Player's performance in order to achieve a ranking between 1 and 15 in the 1st League.

24. This was also clearly explained in the decision of the RFF Professional Football League Appeal Commission, in the appealed decision of 27 August 2009:

"Now therefore, under the circumstances that the rankings homologated at the end of the season established the relegation of Gaz Metan Medias team, the article 5, letter b of the convention signed between the club and the player, regarding the granting of a bonus of 8.000 Euros in case the team avoids relegation is no longer applicable.

Furthermore, it is obvious that the bonus set by the parties referred to a non- relegation position in the ranking, obtained according to the results of the team and due to the nimbler of points accumulated, being meant to stimulate the player to perform better and to award him n case the objective set is accomplished.

Or, since according to the competition rankings the team placed on one of the relegation positions, remaining in the League based on a disciplinary decision issued by the jurisdictional commission, the conditions for the accomplishment of the convention between the parties, regarding the 8.000 Euros bonus, have not been met".

25. These clear and reasonable explanations of the Appeal Commission of the RFF are to be fully embraced. The sole reason why the Respondent maintained playing in the 1st League was because a third club was sanctioned for bribing referees. The Respondent had no influence at all on this unforeseeable and unexpected event, let alone, the Appellant. The Appellant could not reasonably in good faith have understood that he would be entitled to a bonus clause if the objective was not achieved by his incentivized performance. In other words, the incentivized objective was achieved, but not due to the very essence of the reasoning that led to the inclusion of the bonus clause.

26. Therefore, the Sole Arbitrator is of the opinion that both the Player and the Club, when signing the employment contract, had the intention and understanding that the bonus clause would only be awarded if, due to the incentivized performance of the Player (as part of the squad of the Club), the team would avoid relegation through the accumulation of points gained during the playing season. Any reasonable addressee could not have understood in good faith that he would receive a bonus when the initial performance, as such, would not have entitled him to a bonus.

27. In addition, the Sole Arbitrator points out that also a plain literal interpretation of the bonus clause would not have entitled the Player to the said bonus. The last game of the 2008/2009 season in the Romanian 1st League was played on 10 June, 2009 and FC Arges was only sanctioned, and thus relegated, in July, 2009. In principle, the Club did formally relegate during the championship but only for a limited period of time i.e. initially the Club did not avoid relegation. This is even pointed out in the Appeal Brief of the Player himself which states that *"The Respondent was reinstated in the 1st League"*. The use of the word *"reinstate"* is a correct definition of the facts. The reinstatement implies that the Respondent was first of all relegated (and thus, eliminating the condition for the payment of the bonus), it implies also that the Respondent did not *"avoid relegation during the championship"* and it was only afterwards that it was reinstated in the 1st League.

28. The last assertion to be dealt with by the Sole Arbitrator is the submission of the Appellant that the facts leading to the relegation of FC Arges have to be taken into account when deciding over this matter. The Appellant asserts that if the game would have been fair, FC Arges would probably not have reached the necessary score for their maintenance in the 1st League. Furthermore, if the decision to sanction FC Arges would have been taken before the end of the 2008/2009 season, the Respondent would not have been relegated at all. The fact that the decision to relegate FC Arges was only adopted after the season should not be hold against the interest of the Appellant.

29. Although in different circumstances these assertions may raise a point, this is not the case here. Therefore the Sole Arbitrator disagrees with this submission. The assertion as made is stated in general terms with no evidence to support it, and as such constitute a very remote assumption and indeed is just a speculation, as the Respondent justly wrote.

30. No evidences were brought by the Appellant in the framework of this appeal in regard of the full circumstances of the relegation of FC Arges; whether it was a direct decision to relegate this club, or a decision deducting points from that club that brought to its relegation. If it was a matter of deducting points, the new question would be whether the points deducted were only in reference to the matches in which the bribery took place or not, etc. All these elements would have been essential in order to allow the Sole Arbitrator to decide whether they would have had any influence on the relegation of the Respondent and if such circumstances could have avoid the relegation. In the absence of any supporting evidences and in the absence of any established facts to this effect, the assertion of the Appellant in this point remains indeed not more than a speculation.

Conclusion

31. In light of all of the above, the Sole Arbitrator concludes that the Decision of the Appeal Commission of the Romanian Professional Football League should be confirmed and the Appeal filed by the Appellant should be rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed by the Appellant against the decision issued by the Appeal Commission of the Romanian Professional Football League dated 27 August 2009 is dismissed.

2. The decision issued by the Appeal Commission of the Romanian Professional Football League dated 27 August 2009 is confirmed.

(…)

5. All other motions or prayers for relief are dismissed.