



Arbitration CAS 2010/A/2078 Gabros International Football Club v. Hertha BSC Berlin, award of 16 November 2010

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football

Transfer

Withdrawal of the offer before its acceptance

An offer can be withdrawn before acceptance and once it has been withdrawn, it is no longer able to be accepted and is of no legal effect anymore.

Gabros International Football Club (“the Appellant” or “Gabros”) is a Nigerian football club with its office in Nnewi, Nigeria. It is affiliated to the Nigerian Football Federation (NFF) and currently competes in league 1B of the Nigerian second level.

Hertha BSC GmbH & Co, more commonly known as Hertha BSC Berlin (“the Respondent” or “Hertha”) is a German football club with its office in Berlin, Germany. It is affiliated to the German Football Association (GFA) and competes in league 2 of the Bundesliga.

The Nigerian player S. (“the Player”) was born on 2 March 1987. Early in his career he played for an amateur Nigerian club, Juventus United FC, as well as for the Nigerian U17 team.

On 15 January 2004, the Player appears to sign a playing contract with Gabros (“the Gabros Contract”), having been transferred by Juventus to Gabros. The Appellant has submitted two contracts in relation to this Player and a copy of the registration form with the NFF (apparently called the Nigerian Football Association at that time). All these documents indicate that the duration of the Gabros Contract was four years. In addition, the Player’s signature is witnessed by Ben Aguwa, who the Appellant states is the Player’s uncle. However, the Respondent alleges any contract terminated on 15 December 2004; that the Player was a minor when he signed; that he does not have an uncle called Ben Aguwa; and has disputed the authenticity of the Player’s signature on the Gabros Contract.

On 2 March 2004, the Player arrived in Germany. Around this time he commenced training with Hertha.

Gabros state that, in accordance with the Gabros Contract, they made the payments due on 28 April 2004 to Ben Aguwa on behalf of the Player.

In or around June 2004, the agents Tony Adiele and Jorge Houseman appeared to represent the Player. They may have been acting in advance of that and may have been responsible for getting the Player to Germany. It is clear that on 8 July 2004 the Player's mother appoints Mr Houseman as the Player's Attorney to "*oversee the general welfare, education and football-playing career*" of the Player.

At that time Mr Houseman appears to discuss with Gabros the possibility of the Player transferring to Hertha. An agreement between Gabros and Mr Houseman appears to have been reached by which Gabros would release the Player's registration so that Hertha could obtain a "temporary" international transfer certificate (ITC) and play him in trial games. Also Mr Houseman would pay Gabros USD 40,000.

On 8 July 2004 the NFF wrote to the GFA and invited them to request a temporary ITC.

On 8 October 2004, after no response from the GFA, the Appellant wrote to the NFF cancelling the provisional authorisation for the ITC.

On 18 January 2005 the NFF wrote to the GFA cancelling the ITC.

On 2 March 2005, Hertha and the Player entered into an employment contract valid from 2 March 2005 until 30 June 2009 (the "Hertha Contract"). It should be noted that at this stage the Player had reached the age of 18.

On 17 March 2005 the GFA requested the issuance of the ITC from the NFF.

On 17 April 2005 the NFF refused the request for the ITC, citing the reason that the Player was subject to the Gabros Contract, which had a term of 4 years from 15 January 2004.

On 14 June 2005 Hertha, through the GFA, filed their request for the ITC with the Single Judge of the Player Status Committee of the Federation Internationale de Football Association (FIFA).

On 4 August 2005, the Respondent drafted and signed a transfer agreement (the "Transfer Agreement") and sent the same to the Appellant to sign. The Transfer Agreement provided for Gabros to release the Player's registration so that Hertha could obtain the ITC for the Player and would in return make a payment of USD 200,000 to Gabros along with the potential of a sell on fee.

On 5 August 2005, due to the non-issuance of the Player's ITC by the NFF, and following the request of the GFA, the Single Judge of the FIFA Player's Status Committee authorised the GFA to immediately register the Player for Hertha (the "FIFA PSC Decision").

On the same day Hertha wrote by fax to Gabros withdrawing the Transfer Agreement.

On 5 August 2005 and 13 August 2005 Gabros wrote to Hertha rejecting the Transfer Agreement and initially counter offered a transfer fee of USD 280,000, with the potential to receive more if the Player was sold on and then offering to "meet half way" and left that offer available to acceptance until 30 August 2005.

On 12 August 2005 Gabros requested that FIFA allow the Appellant to transfer the player to another club than Hertha since the financial negotiations between Gabros and Hertha had not come to a satisfactory conclusion for Gabros.

In its reply of 29 September 2005, FIFA informed Gabros that FIFA had no other possibilities than to respect the FIFA PSC Decision and its relevant effects, but referred to the said decision, which outlined that the Single Judge was not competent to decide if the club Gabros was entitled to any compensation from the Player and/or the club Hertha, and that it would fall into the competence of the Dispute Resolution Chamber to decide upon such a request.

For many months Gabros continued to complain to FIFA about the FIFA PSC Decision. On 8 August 2006 Gabros submitted a claim to FIFA against Hertha for the payment of the USD 280,000 in relation to the transfer of the Player. Gabros indicated that it wished to find an amicable solution for the matter at stake with Hertha. Therefore, FIFA invited Gabros to enter into direct negotiations with Hertha.

No settlement was reached and on 27 March 2007, Gabros reinforced its claim against Hertha before FIFA. However, prior to that, on 7 February 2007, Gabros signed the Transfer Agreement and filed a copy of the signed document with FIFA claiming this was now a binding agreement. Gabros stated that Hertha had authorised the Player to settle the dispute with Gabros and that before the Nigeria/Ghana U23 match on 7 February 2007 the Player met with officials from Gabros and the Transfer Agreement was “put back on the table” for Gabros to now sign and complete.

On 3 September 2007 Hertha filed its answer with FIFA raising issues on both the Gabros Contract and the Transfer Agreement.

On 3 December 2007 Gabros filed its final position on the claim whereby it refuted Hertha’s position and arguments.

On 13 March 2008 Hertha submitted its final position on the matter to FIFA.

On 25 June 2009 the Single Judge of the FIFA Players’ Status Committee rendered his decision (the “Appealed Decision”). He firstly concluded that the Transfer Agreement did not act as a valid agreement between the parties and then secondly concluded that there was no other legal basis for a financial claim of Gabros against Hertha. Within the Appealed Decision, the Single Judge made reference to the fact that Gabros failed to bring a claim against the Player under Article 17 para 2 of the FIFA Regulations on the Status and Transfer of Players (edition 2005; the “Regulations”) for breach of the Gabros Contract and failed to claim training compensation based on Article 20 and Annex 4 of the Regulations.

The Appealed Decision was issued to the parties on 19 February 2010.

The Appellant filed its Statement of Appeal and Appeal Brief together with the Court of Arbitration for Sport (CAS) on 9 March 2010. The Appellant challenged the Appealed Decision requesting:

- a) *An order setting aside the decision of the Single Judge of the Players' Status Committee passed in Zurich Switzerland on the 25th June 2009, by Salim Aloulou (Tunisia).*
- b) *An order that the Agreement between the club Hertha Berlin and Gabros International Football Club signed by Hertha on 4 August, 2005 and subsequently signed by Gabros on 27 March 2007 is valid, subsisting and binding.*
- c) *An order directing Hertha to pay the sum of USD 200.000 to Gabros as agreed in the contract of Employment dated 4th August 2005.*
- d) *An order directing Hertha to pay to Gabros 12.5% of the agreed sum of money collected when the Player S. was sold to the Russian Club.*
- e) *General punitive damages in the sum of USD 1,000,000 for breach of contract.*
- f) *The costs of the action”.*

The Appellant stated that the following issues were for determination:

- i. *“Whether there is a valid contract between the Appellant and the Player?*
- ii. *Whether there is a valid contract between the Appellant and Hertha?*
- iii. *Whether Hertha deliberately induced the breach of the contract to avoid its financial obligation to the Appellant?*
- iv. *If the above issues are resolved in favour of the Appellant whether the Appellant is entitled to compensation and damages?”*

FIFA had been included in the Statement of Appeal as the second respondent. On 23 March 2010, FIFA stated that the Appeal did not contain any request against FIFA and that they should not be considered a respondent in this procedure. Gabros, by virtue of its lawyer's letter of 6 April 2010 acknowledged FIFA's position and requested that FIFA be withdrawn from the procedure.

On 9 April 2010, the Respondent filed its Answer, with the following request for relief:

- 1. *The appeal is dismissed.*
- 2. *The Appellant shall bear all costs of the procedure including the legal fees of the Respondent in an amount of at least CHF 10,000”.*

Article R57 of the Code provides that the Sole Arbitrator may – after consulting the parties – decide not to hold a hearing if it deems himself sufficiently well informed. The Sole Arbitrator noted that neither of the parties requested a hearing. The Sole Arbitrator determined that having given the parties the opportunity to add to their written submissions with further submissions and testimonies he is sufficiently informed to decide the case without holding a hearing. The parties were advised of this decision in the Order of Procedure that was duly signed by the parties.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed between the parties, derives from articles 62 and 63 of the FIFA Statutes (August 2009 edition) as well as Article R47 of the Code.
2. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law. The parties confirmed this position by both signing the Order of Procedure in this matter.

Applicable law

3. 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 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”.
4. Moreover, article 62 paragraph 2 of the FIFA Statutes provides that the:
“Provisions of the CAS Code of Sport-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.
5. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FIFA shall apply primarily and Swiss Law shall apply subsidiarily.
6. The Appellant has submitted that Nigerian municipal law should dictate whether the Player had the legal capacity to sign the Gabros Contract. This issue is dealt with in the paragraphs below.

Admissibility

7. The hearing relating to the Appealed Decision was held on 25 June 2009, and the findings were notified to the parties shortly thereafter. The detailed version of the Appealed Decision was notified to the parties on 19 February 2010. The Appellant, therefore, had under article 63, paragraph 1 of the FIFA Statutes, until 12 March 2010 to file its Statement of Appeal, which it did so on 9 March 2010. Hence, the Appeal is admissible as it was filed within the stipulated deadlines.
8. The Appeal was filed within the deadline provided by the FIFA Statutes and stated in the Appealed Decision. The Appellant complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office fees.

The merits

9. The Sole Arbitrator noted the conflicting positions of the parties in relation to such matters as the authenticity of the Player's signature on the Gabros Contract, the length of the Gabros Contract, the role and authority of Ben Aguwa, the role of the Agent, was the Player placed under undue influence when giving his statement, can a player sign a contract at 16, why was a "temporary" ITC issued, and the like, but ultimately he had to determine the following:
 - (a) *Is the Transfer Agreement a binding contract on the parties?*
 - (b) *If so, has the Respondent breached the Transfer Agreement?*
 - (c) *If so, is the Appellant entitled to all its claims?*
10. It had been pointed out to the Appellant by FIFA in its letter of 19 September 2006 and by the Single Judge in the 5 August 2005 decision relating to the ITC, that the Appellant could have brought a claim to FIFA citing the Player's breach of the Gabros Contract, when he entered into the Hertha Contract. The Appellant could have brought Hertha into such claim and alleged they induced such breach using the procedure set out in Article 17 of the Regulations (Articles 21 and 23 in combination with Article 42.1 of the 2001 edition of the Regulations). If the Appellant had gone down this route, then an examination into all the conflicting evidence surrounding the Gabros Contract would have been necessary, however, the Appealed Decision that the Appellant has contested in these proceedings is based on the Appellant's claim that the Transfer Agreement is legally binding and has not been honoured by the Respondent. The same is true as regards any claim for training compensation – quite simply, the Appellant has not raised this claim either, so the Sole Arbitrator has to examine the Transfer Agreement alone.
11. The Transfer Agreement contained an offer, which, if the Appellant had signed, it would have accepted. The Sole Arbitrator is of the opinion that an offer can be withdrawn before acceptance and once it has been withdrawn, it is no longer able to be accepted. The timing of events does not seem in dispute – the very day after the Respondent sent the Transfer Agreement to the Appellant to accept, they sent a notice of withdrawal of the offer by fax to the Appellant. Hertha had now received the ITC it needed. This is not disputed by the Appellant, in fact, it is noted that rather than say the offer had been accepted, the Appellant continued on a course of correspondence in which it rejects the offer and counters for more money and sell on rights, as set out in its correspondence dated 5 and 13 August 2005. The decision of the Single Judge in relation to the issuance of the ITC is subject to any compensation that may be due to the Appellant.
12. It is at this stage that perhaps the Appellant should have exercised its rights under Article 17 of the Regulations. Instead it continued to attempt to negotiate with the Respondent and when nothing came of that, it complained to FIFA. Those complaints, however, never involved the conduct of the Player. If he had signed a 4 year contract with the Appellant, and then, part way through signed with another club, then he would have breached his original contract. Despite seeking a further explanation on why the Appellant did not pursue the Player, the Appellant remains silent on the point. As has been pointed out by the Single Judge in the Appealed

Decision, pursuant to Article 25.5 of the Regulations, the time has now passed to bring such a claim.

13. The Sole Arbitrator is satisfied that the offer contained in the Transfer Agreement was withdrawn by the Respondent on the 5 August 2005.
14. An offer can be put back on the table and then be accepted, and the Appellant states that is indeed what happened. It has put forward evidence by way of unsigned witness statements from people involved with Gabros and third parties at the NFF and the Olympic Team. On the other hand, the Respondent has stated that it did not authorise the Player to represent it and put the offer contained in the Transfer Agreement back to the Appellant. The Respondent has questioned why it would? It had signed the Player and had been granted an ITC.
15. The Sole Arbitrator does struggle to believe that any club would authorise a player to act for it in any financial negotiations without anything in writing. Further, the Sole Arbitrator wonders why there is no correspondence from Hertha confirming it had authorised the Player in this way, acknowledging the Transfer Agreement, etc. The matter was still in dispute and was with FIFA, why would Hertha suddenly put the offer back on the table? The Sole Arbitrator notes the reasoning for issuing the Transfer Agreement back in August 2005 as the season was about to start, they needed to play the Player, they didn't have the ITC, so were willing to make a nuisance payment to secure the ITC quickly. What happened in February 2007 to make Hertha put the exact same offer on the table, through the Player rather than through its normal channels? On balance, the Sole Arbitrator has determined that the offer was not put forward again by the Respondent, and the signing of the Transfer Agreement by the Appellant in February 2007 was of no legal effect, as that offer had been previously withdrawn.
16. The Appellant has raised the argument that the Transfer Agreement was completed when the Player physically transferred. The Sole Arbitrator notes that the Player had already signed with Hertha and that the purpose of the Transfer Agreement was to facilitate the ITC and in return a payment would be made. The subject matters of that arrangement were to be the ITC and money. The Sole Arbitrator determines that for the Transfer Agreement to have been binding and to have legal effect, it would have had to have been signed on 4 August 2005, before it was withdrawn, not some 18 months after.
17. Finally, the Sole Arbitrator can only agree with the Single Judge, in that the Appellant should have utilised its rights against the Player and then the Respondent also, under Article 17 of the Regulations and pursued a breach of the Gabros Contract, using the sums in the Transfer Agreement as evidence as to the level of compensation it claimed. However, the time for going down this route has long expired.
18. As such, the Sole Arbitrator dismisses the Appeal.

The Court of Arbitration for Sport rules:

1. The appeal filed by Gabros International Football Club against the decision of the FIFA Players' Status Committee dated 25 June 2009 is dismissed.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.