Arbitration CAS 2017/A/5098 Philip Chiyangwa v. Fédération Internationale de Football Association (FIFA), award of 3 April 2018

Panel: Mr Mark Hovell (United Kingdom), President; Mr Augustin Senghor (Senegal); Mr Bernhard Heusler (Switzerland)

Football
Governance
Implicit cause for terminating an occupation-related application

The fact that FIFA Ethics Review Committee's (FIFA ERC) correspondence to an applicant to a position in the FIFA Membership Associations Committee did not set forth that said applicant's failure to reply thereto could lead to his application failing, shall not be seen as rendering said FIFA ERC unable to terminate said applicant's eligibility process. If, for instance, a warning of possible sanctions is customary in disciplinary matters, it is implicit and customary in the field of employment applications that one applicant's failure to answer his interlocutor's requests shall lead to the process of his application coming to an end.

I. PARTIES

1. Philip Chiyangwa (the "Appellant") is a Zimbabwean businessman who has also served as a Member of Parliament. He is the current president of the Zimbabwe Football Association ("ZIFA") and Council of Southern Africa Football Associations ("COSAFA").

2. The Fédération Internationale de Football Association ("FIFA" or the "Respondent") is the governing body of world football and has its registered office in Zurich, Switzerland.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 4 March 2016, the CEO of ZIFA informed FIFA that the Appellant (amongst others) was a member of ZIFA's Executive Committee and was interested in joining the Standing Committees at FIFA.

5. On 16 August 2016, FIFA wrote to the Appellant (by email to two addresses philipchiyangwa@gmail.com and philip.chiyangwa00@icloud.com) and requested him to complete the requisite eligibility questionnaire (the "Questionnaire") for the FIFA Ethics Review Committee (the "FIFA ERC") in order to apply for consideration of his candidature to the FIFA Membership Associations Committee (the "FIFA MAC"). He was made aware that candidates for the FIFA MAC must pass an eligibility check carried out by the FIFA ERC and would be subject to a check of their integrity as well as for potential conflicts of interest. An external company would be used to assist the FIFA ERC with these checks. The letter expressly stated:

> *"we kindly request that you provide us with the details of any current criminal proceedings against you or any past criminal proceedings against you that have resulted in a dismissal or a conviction".*

6. On 9 September 2016, as the Appellant had not returned the Questionnaire, FIFA wrote to him again and set him a new deadline to respond by. The correspondence went by email to the same two email addresses.

7. On 12 September 2016, the Appellant submitted the Questionnaire to the FIFA ERC by email. The email came from the philip.chiyangwa@gmail.com email address.

8. On 13/14 October 2016, the FIFA Council agreed to appoint the Appellant as a member of the FIFA MAC, subject to him passing the checks to be made by the FIFA ERC.

9. On 8 November 2016, the FIFA ERC emailed the Appellant (now using the philip.chiyangwa@gmail.com address) and requested him to submit additional information regarding his application. Through its external checks company, the FIFA ERC was aware of a number of legal matters that had not been referred to in the Appellant's answers to the Questionnaire. The FIFA ERC's email read:

> *"we kindly ask you to please provide any and all information and/or clarification in relation to the aforementioned on-going legal proceedings, including the status of such legal proceedings into which you may be involved. Also, in case there were indeed on-going legal proceedings into which you or any of the legal entities to which you are affiliated are involved, the Review Committee kindly asks to be provided with an explanation (which should include any documentary evidence that you deem pertinent to support your position) as to why such facts were not disclosed in the eligibility questionnaire that you had submitted to the Review Committee by means of your email of 12 September 2016".*

10. On 12 November 2016, the Appellant disclosed various pending Civil, Criminal or Disciplinary Proceedings that he or entities linked to him had been involved in.

11. On 6 December 2016, the FIFA ERC emailed the Appellant (again using the philip.chiyangwa@gmail.com address) and requested him to provide further additional information (the "Letter"). The FIFA ERC attached to the Letter an external report provided by a company hired by FIFA to conduct background checks (the "Mintz Report"). The FIFA

ERC requested the Appellant to provide such additional information by 12 December 2016. The Appellant claims that he never received the Letter, and therefore did not respond to the request by the given deadline.

12. On 21 December 2016, the FIFA ERC met and determined that the Appellant could not be declared eligible for the position he was proposed.

13. On 9 January 2017, the FIFA ERC informed the FIFA Secretary General of this decision.

14. On 17 March 2017, the FIFA Secretary General wrote to the Appellant (again using the philip.chiyangwa@gmail.com address) informing him that the FIFA ERC had declined his eligibility to the FIFA MAC (the "Appealed Decision"). This letter did not provide any reasons for the Appealed Decision, nor did it provide information as to how the Appellant might challenge the Appealed Decision. It did, however, invite the Appellant to *"not hesitate in contacting directly the Review Committee"* for further clarification.

15. On 23 March 2017, the Appellant wrote back to the FIFA ERC, requesting that it provide him with the following:

> *"3.1 all the reasons for such a declaration of ineligibility. My understanding is that, in principle, such finding of ineligibility can only be made if I was found to have committed misconduct that has a direct material connection to the position that I hold or am a candidate for; and*
>
> *3.2 the recourse that I have should I disagree with or object to any of the Review Committee's findings which may have a bearing on my standing".*

16. On 27 March 2017, the FIFA ERC responded (again using the philip.chiyangwa@gmail.com address) to the Appellant, stating the following:

> *"we kindly inform you that the Review Committee unanimously decided that you could not be declared eligible because you had not answered to the Review Committee's correspondence dated 6 December 2016 asking for further information within the deadline set in this correspondence.*
>
> *With regard to the second question asked in your correspondence, we kindly inform you that appeals against final decisions passed by the Review Committee in the context of eligibility checks shall be lodged with CAS within 21 days of notification of the decision in question".*

III. PROCEEDINGS BEFORE THE CAS

17. On 13 April 2017, pursuant to Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), the Appellant filed a Statement of Appeal against the Appealed Decision at the Court of Arbitration for Sport (the "CAS"). The Statement of Appeal contained the following requests for relief:

"12.7 The Appellant prays that the decision of the Review Committee be set aside and in its place the following order be made.

12.7.1 The Appellant is hereby declared eligible to stand as a candidate to the FIFA Membership Associations Committee".

18. In his Statement of Appeal, the Appellant requested that the matter be heard by a sole arbitrator and also requested that, pursuant to Article R51 of the CAS Code, his Statement of Appeal be deemed as his Appeal Brief.

19. On 28 April 2017, FIFA wrote to the CAS Court Office stating that it agreed with the language of the proceedings being English, but given the importance of the case, did not agree with the matter being heard by a sole arbitrator and instead requested that the case be submitted to a panel of three arbitrators. Further, FIFA requested that in accordance with Article R55 of the CAS Code, the deadline for the filing of its Answer be fixed after the payment by the Appellant of the advance of costs.

20. On 28 April 2017, the CAS Court Office wrote to the parties stating that the President of the CAS Appeals Arbitration Division, or her Deputy, would decide on the number of arbitrators that would hear this matter. Further, in accordance with Article R55 of the CAS Code, the deadline for the filing of FIFA's Answer would be fixed after the payment by the Appellant of the advance of costs.

21. Later that same day, the CAS Court Office wrote to the parties again, confirming that in accordance with Article R50 of the CAS Code and taking into account the circumstances of the present case, the President of the CAS Appeals Arbitration Division decided that this matter would be submitted to a three person panel. The CAS Court Office granted the Appellant a deadline of 10 days to nominate an arbitrator.

22. On 5 May 2017, the Appellant wrote to the CAS Court Office nominating Mr Augustin Senghor, Attorney-at-Law, Dakar, Senegal as an arbitrator. The CAS Court Office wrote to the parties granting FIFA a deadline of 10 days to nominate an arbitrator.

23. On 17 May 2017, FIFA wrote to the CAS Court Office nominating Mr Bernhard Heusler, Attorney-at-Law, Basel, Switzerland as an arbitrator.

24. On 5 July 2017, pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to this case was constituted as follows:

President: Mr Mark Hovell, Solicitor in Manchester, United Kingdom;

Arbitrators: Mr Augustin Senghor, Attorney-at-law in Dakar, Senegal;

Mr Bernhard Heusler, Attorney-at-law in Basel, Switzerland.

25. On 24 July 2017, pursuant to Article R55 of the CAS Code, FIFA filed its Answer containing the following requests for relief:

> *"1. Dismiss the appeal in its entirety.*
>
> *2. Alternatively, reject the appeal and confirm the decision under appeal in its entirety.*
>
> *3. Condemn the Appellant to pay all the costs of the present arbitration.*
>
> *4. Condemn the Appellant to pay FIFA a compensation for the costs incurred by FIFA before the Court of Arbitration for Sport, to be determined by the Court of Arbitration for Sport".*

26. On 25 July 2017, pursuant to Article R57 of the CAS Code, the CAS Court Office invited the parties to state if they preferred a hearing to be held or for the Panel to issue an award based solely on the parties' written submissions.

27. On 1 August 2017, the Appellant wrote to the CAS Court Office stating that he deemed a hearing necessary. The Appellant also presented additional submissions to the Panel.

28. On 2 August 2017, FIFA wrote to the CAS Court Office stating that it did not deem a hearing to be necessary and wished for the Panel to render an award solely on the written submissions.

29. On 3 August 2017, the CAS Court Office asked FIFA whether it agreed to the admissibility of the Appellant's additional submissions.

30. On 7 August 2017, FIFA wrote to the CAS Court Office stating that it did not agree with the admission of the Appellant's additional submissions.

31. On the same date, the Appellant wrote to the CAS Court Office requesting the Panel to accede to the admission of his submissions made on 1 August 2017.

32. On 8 August 2017, the CAS Court Office wrote to the parties taking note of the Appellant's letter of 7 August 2017 and requesting the parties to refrain from filing unsolicited comments pending further instructions from the Panel.

33. On 12 October 2017, the CAS Court Office wrote to the parties on behalf of the Panel informing that the Panel had decided that the Appeal was deemed admissible and the reasons thereto would be included in the final award. Furthermore, the CAS Court Office invited the Respondent to produce the recordings or minutes of the FIFA ERC meeting of March 2017 by 19 October 2017.

34. On 19 October 2017, the Respondent provided the CAS Court Office with the documents requested by the Panel on 12 October 2017.

35. On 23 October 2017, the CAS Court Office wrote to the parties informing them that based on the written submissions to date the Panel deemed itself sufficiently informed to render an award on the written submissions alone, without a hearing, in accordance with Article R44.2 of the CAS Code. Accordingly, no hearing would be held in this matter. Furthermore, the CAS Court Office, on behalf of the Panel, informed the parties that the Panel decided to allow a second round of submissions. Accordingly, the CAS Court Office invited the Appellant to file his reply within 14 days and indicated that the Respondent would be granted a similar deadline from the receipt of the Reply to file a rejoinder.

36. On 30 October 2017, the CAS Court Office wrote to the parties providing them with the Order of Procedure and asking them to return a signed copy of it by 6 November 2017.

37. On 31 October 2017, the Appellant filed his Reply.

38. On 3 November 2017, the parties filed a signed Order of Procedure with the CAS Court Office.

39. On 14 November 2017, the Respondent filed its Rejoinder.

IV. SUBMISSIONS OF THE PARTIES

40. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Panel however, has carefully considered all the submissions made by the parties, even if no explicit reference is made in what immediately follows.

A. The Appellant's submissions

41. In summary, the Appellant submitted the following in support of his Appeal:

- The Appellant did not fail to respond to the Letter, because he never actually received a copy of the Letter. Moreover, even if he did not respond to the Letter, the Letter did not outline the consequences of failing to respond.

- The allegations raised in the Letter *"were not proven or established"* and were all untrue. In any event, the Appellant had already addressed all the allegations in his letter dated 11 November 2016 as best he could.

- The FIFA ERC's decision was made solely on the basis of the Appellant's failure to respond to correspondence.

i. The Appellant did not fail or refuse to respond to the Letter because he did not receive the Letter

42. The Appellant claimed that he did not receive the Letter. The Appellant noted that he had previously responded to correspondence from the FIFA ERC on time. For example, in response to the FIFA ERC's letter of 8 November 2016, the Appellant responded by 11 November 2016. The Appellant argued that this demonstrated that he respected FIFA and the importance of communication, and that he *"could not have wilfully ignored"* the Letter had he seen it.

43. The Appellant also submitted that at the material time, he was just elected for the COSAFA presidency and was heavily involved in the CAF elections, where he was the campaign manager for the incumbent president. Finally, the Appellant claimed that FIFA failed to prove that the Letter was delivered to or received by the Appellant.

44. The Appellant also argued that in any event, even if he had failed to respond to the Letter, there was no warning provided about the consequences for failing to respond. *"It did not provide that should the [A]ppellant fail to respond within the set time limit an adverse inference would be drawn".*

ii. The allegations raised in the letter of 6 December 2016 were not proven

45. The Appellant also claimed that the allegations raised in the Letter were untrue. The Appellant claimed that an integrity check focusing on public records, media and social media research was conducted on the Appellant to identify risk and reputational issues. The check considered indications of assets, lifestyle and financial position. A number of issues were raised by the FIFA ERC but in his response of 11 November 2016, the Appellant addressed these issues to the best of his ability.

46. In summary, the Appellant claimed that he had never been convicted by any court and does not have any pending criminal charges against him. The Appellant's responses to the individual allegations made against him are briefly summarised below:

a) Mrs E Chiyangwa vs Dr P Chiyangwa

47. In November 2013, the Appellant's wife, Mrs Elizabeth Chiyangwa, filed for divorce in the Harare High Court citing infidelity. The matter was resolved, as the Appellant reconciled with his wife and she consequently withdrew the summons for divorce.

b) Lafarge vs Pinnacle Property Holdings P/L

48. The Appellant claimed that the parties had entered into a deed of settlement, so the matter was resolved.

c) Interfin Bank vs Finwood Investments P/L

49. In this matter there were three defendants, Finwood Investments (principal debtor), Native Investments Africa and the Appellant (both as guarantors). The Appellant was sued as a guarantor. The debt was not incurred by the Appellant but by Finwood Investments. The Appellant claimed that the judgement against the Appellant was reversed by the courts, and also a settlement agreement was entered into by the relevant parties, so this matter was resolved.

d) Tetrad Bank vs Finwood Investments (PVT) Ltd

50. Again in this matter, the Appellant was sued as a guarantor/surety. The debt was not incurred by him but by Finwood. The Appellant claimed that the debt was being paid through a land swap, and that this process was almost finalised.

e) Kilima Investments (PVT) Ltd

51. This matter involved a land exchange transaction with the City of Harare. The Appellant claimed the dispute arose as a result of the new management of the city council attempting to vilify him for political reasons. Again, the Appellant claimed that this matter had been resolved.

f) Land cases with the Government

52. The Appellant was involved with three cases against the Government of Zimbabwe relating to settlers on his private land. The Appellant stated that two of those cases had settled but he was waiting on the government for compensation for the third case.

g) Pamela Rusere

53. In March 2014, the Appellant's former wife, Pamela Rusere, sued him in the Harare High Court claiming USD 13,087 monthly maintenance for the upkeep of the couple's two children. Mrs Rusere had also filed for a protection order. However, the Appellant claimed that Mrs Rusere had since withdrawn both the maintenance claim and protection order, so there were no pending proceedings in this regard.

h) CBZ vs Pinnacle Property Holding

54. In April 2012, CBZ Bank sued the Appellant (and one of his companies – Pinnacle Property Holdings) in the Harare High Court to recover an USD 8 million loan. The bank later withdrew the case following an out of court settlement between the parties. The Appellant claimed that there was no pending matter and noted that again, he was only sued as a guarantor/surety (the debt was incurred by Pinnacle Holdings).

i) The Appellant's involvement in football

55. The Appellant claimed that the allegations made against him by Mr Francis Zimunya to the ZIFA Electoral Committee during the ZIFA elections were merely allegations that were *"made in a bid to soil the image of a potential candidate"* who he regarded as a threat.

j) ZIFA Debt

56. The Appellant noted that allegations were made against him regarding the amount of debt which ZIFA had incurred. The Appellant argued, *inter alia*, that the decisions made by ZIFA were undertaken by the ZIFA Executive Committee and not him personally and that the ZIFA insolvency proceedings were nothing out of the ordinary.

k) ENG Capital

57. The Appellant noted that he was arrested in January 2014 on charges of obstructing the course of justice by trying to prevent the arrest of two ENG Capital directors who were accused of defrauding investors out of billions of Zimbabwean dollars. However, the Appellant claimed that he was acquitted of all charges in August 2014.

l) Espionage charges

58. The Appellant noted that in December 2004, he was arrested by Zimbabwean authorities on espionage charges. However, he was acquitted of these charges in May 2005.

m) Sanctions imposed by the Australian Reserve Bank

59. The Appellant claimed that the Reserve Bank of Australia has never informed him of any sanctions made against him. He further stated that in his lifetime he has never visited Australia and has never had any business or other interests in that country, nor has he ever made any financial transaction with any Australian financial institution. The Appellant submitted that it is *"absolutely nonsensical that the Australian Reserve Bank would purport to impose sanctions on him when there is no nexus"* between the Appellant and said financial institution. Finally, the Appellant stated that he first learned about the aforementioned sanctions in this proceedings.

iii. The FIFA ERC's decision was made solely on the basis of the Appellant's failure to respond to correspondence

60. The Appellant claimed that the FIFA ERC did not did not consider the merits of the Appellant's case, nor did it consider the alleged seriousness of the allegations raised in the Mintz Report. The Appellant stated that the minutes of the FIFA ERC meeting of 21 December 2016 demonstrate such fact. Accordingly, the Appellant sustained that he was not in default and hence the Appeal should be allowed.

B. FIFA's submissions

61. In summary, FIFA submitted the following in support of its defence:

- The Appellant failed to timely file his Appeal and therefore it should be dismissed.

- The Letter was properly sent and the Appellant did not respond to it, therefore violating *"his obligation to collaborate to establish the relevant facts"* in relation to the eligibility check conducted by the FIFA ERC.

- The standard for passing the eligibility check is such that *"high ranking FIFA officials must appear as completely honest and beyond all suspicion"* and that of an *"impeccable integrity record"*; hence, the Appellant, in assuming his role at the FIFA MAC, should be subject to such standard. Additionally, the FIFA ERC has a wide margin as to the appreciation of the standard for passing an eligibility check, moreover in light of *"the special circumstances currently created by the serious difficulties that FIFA has faced with its image in recent times"*.

- In any event, the information contained in the Mintz Report and the Appellant's response (or lack of one) thereof are enough to justify the FIFA ERC decision to deem the Appellant ineligible.

- The FIFA ERC reviewed all information available.

i. The Appeal filed by the Appellant was late

62. FIFA claimed that, pursuant to article 58 par. 1 of the FIFA Statutes and article R49 of the CAS Code, appeals lodged against final decisions passed by the FIFA ERC related to eligibility checks shall be filed within 21 days of notification of such decision.

63. Accordingly, FIFA is of the opinion that since the Appealed Decision was informed to the Appellant on 17 March 2017 the Appeal should have been filled until 7 April 2017. Given the fact that the Appeal was filed on 13 April 2017, FIFA claimed it was late and the case should therefore be dismissed.

ii. The Letter was properly sent and the Appellant did not respond to it, violating his duty to cooperate

64. FIFA affirmed in its defence that the email used by the FIFA ERC to send the Letter was the same one used in all communications during the eligibility check proceeding before the FIFA ERC. Additionally, FIFA noted that the same email account was used by the Appellant to request additional information on 23 March 2017 and to which a response was sent by the FIFA ERC on 27 March 2017.

65. Furthermore, FIFA outlined that the Appellant referred several times in his Appeal to the Letter and its content, which allegedly demonstrated that he had in fact received the Letter.

66. The Respondent went on to state that requiring the FIFA ERC to check the acknowledgement by addresses of sent correspondence after past correspondence had been properly delivered would *"lead to a shift of responsibilities as it would become the Review Committee's task to enquire with every candidate whether he would like to respond to a question or not"*, something that would *"render the Review Committee largely inoperable, possibly having to contact numerous candidates multiple times"*.

67. FIFA was of the opinion that it should be assumed that the Appellant did receive the Letter on 6 December 2016 and should have replied to it within the given deadline of 12 December 2016.

68. In connection with the deadline given in the Letter, FIFA stated that it was printed in bold which allegedly denotes its importance and dispenses further warning. In addition, FIFA claimed that adding a warning to the Letter, as the Appellant suggested, would not have led to a different outcome as the Appellant would not have noted it if he had not received the Letter as he claimed. According to FIFA, this is further evidence that a warning was not necessary.

69. FIFA submitted that, consequently, by not reacting to the Letter the Appellant violated his duty to cooperate to establish the relevant facts, as outlined in paragraph 10 of the Questionnaire. FIFA argued that collaboration during proceedings conducted by the FIFA ERC is of *"utmost importance"* and is *"asked from all candidates"*, and therefore *"the FIFA ERC was right in declaring the Appellant not eligible"*.

iii. The standard to be applied for passing an eligibility check

70. FIFA submitted that in accordance with the FIFA Governance Regulations (the "FGR"), in particular 1 paragraph 4 of Annexe:

> *"In the context of carrying out eligibility checks, the relevant body in charge has a wide margin of appreciation in evaluating and weighing the information gathered with regard to specific individuals. Notwithstanding this, an eligibility check shall, in principle, be deemed as not passed if the individual concerned is found to have committed misconduct that has a direct material connection to the position he holds or is a candidate for".*

71. FIFA furthermore submitted that CAS jurisprudence deems that *"high ranking FIFA officials must appear as completely honest and beyond all suspicion"* and that they must hold *"impeccable integrity record"*. FIFA went on to state that the Appellant would appear in public assuming his function with the FIFA MAC, claiming thus that said standard should not be deviated from.

72. Additionally, FIFA prayed the Panel to *"pay close attention to the special circumstances currently created by the serious difficulties that FIFA has faced with its image in recent times"*, claiming that *"a particularly elevated standard for eligibility and integrity checks"* needs to be adopted in light of the current circumstances involving the Respondent. FIFA also referred to CAS jurisprudence in support of this allegation.

iv. The allegations contained in the Mintz Report are serious and justify the decision of the FIFA ERC

73. FIFA alleged that in any event the Appealed Decision was justified by the contents of the Mintz Report and the responses (or lack thereof) provided by the Appellant. In summary, FIFA submitted that the Appellant neither in his submissions to the FIFA ERC on 11 November 2016 nor in his Appeal Brief was able to provide answers to all allegations presented in the Mintz Report.

74. In summary, FIFA claimed that since apparently a few proceedings were still ongoing against the Appellant and/or companies affiliated to him and that an order to pay had been issued against the Appellant by a court of law there was a legitimate basis for the FIFA ERC to render the Appellant ineligible. FIFA furthermore submitted that the allegations against the Appellant, regardless of the fact that he may have been acquitted or that the companies to which the Appellant is affiliated are of a separate legal nature, impact the public's perception of the Appellant and hence are of relevance for the outcome of the eligibility check. FIFA's considerations to the allegations made against the Appellant are briefly summarised below:

a) Sanctions imposed by the Reserve Bank of Australia

75. The Appellant neither disclosed in the Questionnaire nor addressed the reports that he was allegedly sanctioned by the Reserve Bank of Australia under the Banking (Foreign) Exchange Regulations 1959 from June 2007 to March 2013.

b) Investigation for externalising foreign currency to Namibia

76. The Appellant did not provide information regarding news media reports that he was allegedly under investigation for externalising foreign currency from Zimbabwe to Namibia in the amount of USD 200,000 between 2001 and 2004, an investigation that seemingly was still ongoing as of March 2006.

c) Commercialization of FIFA's World Cup hospitality packages by Native Investment Group

77. The Appellant did not provide information regarding allegations that his company, Native Investment Group, was granted an exclusive contract to sell FIFA's World Cup hospitality packages in Zimbabwe seemingly without a *"tender process"*.

d) Pamela Rusere

78. The Appellant only provided information about the situation with Mrs Pamela Rusere in the Appeal Brief, but nevertheless without evidence referring to the alleged dropping of a protection order by Mrs Rusere. FIFA submitted that the presentation in the Appeal Brief of additional information in connection with this matter evidences that the FIFA ERC needed to have received such information.

e) Mrs E Chiyangwa vs Dr P Chiyangwa

79. FIFA claimed the Appellant referred to a statement in the Mintz Report by declaring that the matter between him and his wife had been resolved. Since such report was only sent to the Appellant as an enclosure to the Letter, it denoted that the Appellant in fact received the Letter.

f) Interfin Bank vs Finwood Investments P/L

80. FIFA concurred that the Appellant was only sued as a surety in such procedure. However, FIFA underlined that the Appellant was nevertheless ordered to repay a loan and that he failed to report such proceeding in the Questionnaire. Additionally, FIFA stated that even if under the assumption that proceedings involving legal entities should not have been disclosed, the Appellant should have informed this proceeding in the Questionnaire since there was a personal court order issued against him.

g) Land cases with the Government

81. The Appellant provided additional information and documentation on the Appeal Brief, which denoted that such information was relevant and should have been made available for the FIFA ERC. Additionally, FIFA filed that the Appellant admitted that a proceeding involving one of the companies to which he is affiliated was still pending and therefore it should have been clear that the FIFA ERC would require further information pursuant to the communication sent by the FIFA ERC to the Appellant on 8 November 2016.

h) Espionage charges and suspension from a political party

82. FIFA submitted that despite having been acquitted, the Appellant's arrest on espionage charges and the consequent suspension of the Appellant by a political party impact the public's perception of the Appellant and hence are of relevance.

i. The FIFA ERC reviewed all information available

83. FIFA claimed that the FIFA ERC reviewed all documentation made available to its members, including the Mintz Report and the documentation filed by the Appellant. FIFA further submitted that the Appellant had been asked for additional information not only once, but twice. Accordingly, FIFA stated that it was the lack of collaboration, amongst other matters, that led to the FIFA ERC's decision to deem the Appellant ineligible.

V. JURISDICTION OF THE CAS

84. Article R47 of the CAS Code provides as follows:

> *"An appeal against a decision of a federation, association or sports related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration*

agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the Statutes or regulations of that body".

85. Moreover, the Appellant relied on the instruction of the FIFA ERC to appeal to the CAS, as the matter at hand is a dispute arising from a decision of FIFA. The jurisdiction of CAS was not disputed by any of the parties, who both signed the Order of Procedure.

86. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

87. The Panel notes that the Appellant submitted that his Statement of Appeal, which was filed on 13 April 2017, complied with the requirements of Articles R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

88. However, the Respondent submitted that the said requirements of the CAS Code had not been met, as the Statement of Appeal was filed after 21 days from the notification of the Appealed Decision had elapsed.

89. The Panel notes that issue here is when the Appealed Decision was notified to the Appellant – when the FIFA Secretary General wrote to the Appellant on 17 March 2017 or when the FIFA ERC responded to the Appellant's questions by letter of 27 March 2017?

90. The Panel notes that FIFA has many legal bodies. In its Statutes, reference is made at Article 52 to its "Judicial Bodies", further it has its Dispute Resolution Chamber and its Players' Status Committee, along with its Single Judges. These are all in addition to the FIFA ERC. The right of appeal from their decisions is contained in Article 58 of the FIFA Statutes and it does set a 21 day deadline to appeal to CAS from "notification of the decision in question". Such provision was indeed quoted in the FIFA ERC letter of 27 March 2017.

91. Some of these FIFA bodies (but not the FIFA ERC) have additional Procedural Rules, which govern the appeal process. Indeed, decisions from the DRC and the PSC are always accompanied with a standard set of appeal guidelines for the parties, so they are fully aware of the appeal process to CAS.

92. In the matter at hand, the Panel notes that the FIFA ERC allowed the FIFA Secretary General to notify the Appellant that his application has been rejected (letter of 17 March 2017). In the Panel's opinion, such letter was akin to a "decision". However, there was no communication on how to appeal such decision, but there was an invitation to contact the FIFA ERC direct *"for further clarification"*. The Appellant did this 10 days later, on Thursday 23 March 2017. He asked for "all the reasons for such declaration of ineligibility" and also how to appeal. On Monday 27 March 2017, the FIFA ERC then provided him with a 2-line explanation and how to appeal.

93. The Panel notes that the Appellant would still have had time to appeal after he heard from the FIFA ERC on 27 March 2017, to stay within 21 days of the letter from the Secretary General. However, the Panel feels that FIFA did not explain clearly whether the time limit for appeal to CAS started to run with the notification of the letter dated 17 March 2017 or with the notification of the letter dated 27 March 2017. Thus, in absence of any further information, the Appellant could legitimately argue that the time limit for appeal started on the date when he received the explanatory letter from the FIFA ERC. If FIFA had been defending a decision of one of its other bodies that follows the Procedural Rules, this line of argumentation would not have been pursued.

94. Ultimately, as this issue need interpreting by the Panel (which was the notification), the Panel determines that in order to protect the Appellant's right to be heard and his right to a fair trial, it should weigh matters in favour of the Appellant and direct that the 21 days runs from the grounded notification from the FIFA ERC dated 27 March 2017.

95. It follows that the Appeal is admissible.

96. Finally, the Panel would point out that this may be a unique case, as FIFA has these Procedural Rules for most of its decisions that its bodies deliver and usually indicates the conditions for appeal in its decisions. The CAS case law shows that an appellant may rather consider it wise to issue a "protective" appeal – *i.e.* file their statement of appeal with the CAS and ask for the time to file his/her appeal brief to be suspended pending the receipt of the grounds of the decision under appeal (see for example CAS 2000/A/281).

VII. APPLICABLE LAW

97. Article R58 of the CAS Code provides the following:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

98. In the present case, the "applicable regulations" for the purposes of Article R58 of the Code are, indisputably, the FIFA regulations because the Appeal is directed against a decision issued by the FIFA ERC, which was passed applying FIFA's rules and regulations.

99. In addition to the FIFA regulations, Swiss law applies subsidiarily, pursuant to Article R58 of the CAS Code, since FIFA, which rendered the Appealed Decision, has its seat in Switzerland.

100. Accordingly the Panel rules that FIFA Regulations would apply, with Swiss law applying to fill in any gaps or lacuna, when appropriate.

VIII. LEGAL DISCUSSION

A. Merits

101. The matter at hand involves the decision to turn down the Appellant's application to join the FIFA MAC, taken by the FIFA ERC. The Panel fully recognises that the FIFA ERC must apply high standards when assessing any application and is, of course, aware of *"the serious difficulties that FIFA has faced with its image in recent times"*. However, it is equally important that the FIFA ERC follows the proper procedures and applies the rules of natural justice and fairness during such application processes. If it becomes aware of alleged behaviour by an applicant, then it must put such allegations to that person and allow them to respond, before any decision on their application is taken.

102. Should the Panel determine that the proper procedures were not followed, then, in accordance with Article 57 of the CAS Code, it can take its own decision to replace the Appealed Decision or return the matter to the FIFA ERC. The Panel therefore observes that the main issues to be resolved are:

a) Did the Appellant receive the Letter and, if so, what are the consequences of not responding?

b) If so, did the Appellant fail to cooperate with the FIFA ERC and does that justify the Appealed Decision?

c) If not, should the matter be sent back to the FIFA ERC or heard *de novo* by the Panel?

a) Did the Appellant receive the Letter and, if so, what are the consequences of not responding?

103. The Panel notes that the first two communications sent by the FIFA ERC were to the Appellant's @gmail.com and @icloud.com addresses, however, it appears that the @gmail.com address was incorrect, as it missed out the full stop between his first name and surname. Despite that typo, the emails were received, as the Appellant responded from his gmail.com account. The Panel notes that all correspondence between the parties was then to and from that account. Including the emails to the FIFA Secretary General, the Panel saw a total of 7 emails to and from that account. However, the only one that seems not to have got through was the one of 6 December 2016, which contained the Letter.

104. The Panel hasn't been made aware by the Appellant that this email somehow ended up in his junk mail; nor from the FIFA ERC that it received a bounce back message. This would point to the email being received.

105. The Appellant states that he always responded to deadlines set by the FIFA ERC before, so this should be taken as evidence that he didn't receive the Letter, which contained another deadline. The Panel notes that he did indeed respond to the deadlines set by the FIFA ERC on

9 September and 8 November 2016, however, the first of these emails was actually a reminder from the FIFA ERC, as he had failed to comply with the deadline set in its earlier email of 16 August 2016. This argument is inconclusive, so far as the Panel are concerned in helping it determine whether the Letter was received or not. The Panel does note FIFA's position that it would cause a potential burden on FIFA bodies if they were expected to chase up every counter party to respond to their communications.

106. The determining factor, in the opinion of the Panel, is that if the Appellant did not receive the Letter, then how would he be able to quote the deadline set in the Letter (*i.e.* the need to respond by 12 December 2016) in his Statement of Appeal, when there was no reference to that date in any of the correspondence that followed from the FIFA ERC or the Secretary General of FIFA? This uncertainty, coupled with the fact that it seems unlikely that the email of 6 December 2016 would not get through to the Appellant when all others had and when there had been no bounce back or the email found in the spam mailbox, all leads the Panel to the opinion that it is more likely than not that the Letter was received by the Appellant.

107. The Panel notes that the Appellant argued that even if it was determined that he had received the Letter, the fact that it did not contain a warning that not responding to it could lead to his application failing, should result in the FIFA ERC being unable to terminate the process at that stage.

108. The Panel notes, however, that the deadline was clearly made, in bold, in the Letter, but does acknowledge that there was no warning that a failure to meet the deadline could result in the eligibility process coming to an end. The Panel, notes that this is not a disciplinary process, where a warning of possible sanctions is customary so a party can defend themselves and be properly heard, rather it was an application process for a job or position with one of FIFA's bodies. If one fails to answer questions asked of them during an interview process, the likely outcome is that one won't get the job. This is implicit and customary.

109. The lack of such a warning does not assist the Appellant in the matter at hand.

b) Did the Appellant fail to cooperate with the FIFA ERC and does that justify the Appealed Decision?

110. The Panel notes that within the Statement of Appeal (and the Answer) there is a long list of information relating to a variety of legal and quasi-legal proceedings that the Appellant was either personally involved in or that concerned a third party that he was related to. However, the matter at hand focuses solely on whether the FIFA ERC were correct in terminating the eligibility process on 21 December 2016 or not.

111. Whilst the Appellant may now have provided the CAS with all it was asked by the FIFA ERC to provide it with by 12 December 2016 and the Respondent may have commented on all this in its Answer, none of this information was available at the date that the Appealed Decision was taken. Rather, the Appealed Decision was taken solely on the basis that the Appellant missed the deadline he was set.

112. The Panel notes the process up to 21 December 2016. The Appellant is asked to complete the Questionnaire. Whilst the email from the FIFA ERC specifically refers to criminal proceedings, the Questionnaire does go further and asks about civil, disciplinary proceedings and investigations too. The FIFA ERC emails did also expressly refer to the fact that it would use an external agency to carry out verification checks.

113. The Questionnaire could have been clearer and could have referred to requiring the details of any third parties that the Appellant was connected or associated to, and asking for details of any proceedings or investigations they were facing or had faced. However, that information was requested by the FIFA ERC on 8 November 2016. The Appellant did then give further information, but it appears that it wasn't sufficient or in line with the contents of the Mintz Report, so a copy of that Report was sent on 6 December 2016, in the Letter, requesting for more detailed and in-depth information regarding the ongoing legal proceedings that he and/or the third parties which he was affiliated to were involved with.

114. It is clear to the Panel that the FIFA ERC had some legitimate concerns at that stage, so it asked him to clarify matters. The Appellant says that these allegations or concerns weren't proved. However, this misses the point. The allegations were made or concerns raised, so the next stage of such a process is that the Appellant has to rebut these allegations and alleviate any concerns if he wishes his application to succeed. By failing to do so, he has not helped himself.

115. In the Panel's determination, the FIFA ERC was justified to raise any additional concerns highlighted in the Mintz Report, to enable it to ultimately take a decision on the eligibility of the Appellant. If those concerns go unanswered, what could the Appellant reasonably expect? The process would be, and was, justifiably terminated at that point.

c) Should the matter be sent back to the FIFA ERC or heard de novo by the Panel?

116. Having agreed with the process undertaken by the FIFA ERC, there is no need to send the matter back to it.

B. Conclusion

117. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel finds that the Appeal of the Appellant is to be dismissed.

118. All further claims or requests for relief are dismissed.

119. It would seem to the Panel that nothing should stop the Appellant from applying again in the future for the position he sought, but this time to provide the information the FIFA ERC requested in a timely fashion. The Panel's role is not to consider a second application, but solely to review the process and outcome of the initial application.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Philip Chiyangwa against the decision of the FIFA Ethics Review Committee of 17 March 2017 is dismissed.

2. The decision of the FIFA Ethics Review Committee of 17 March 2017 is upheld.

3. (…).

4. (…).

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