



**Arbitration CAS 2009/A/1947 Tema Youth FC v. Ghana Football Association (GFA), award of 30 November 2009 (operative part of 15 October 2009)**

Panel: Mr Mark Hovell (United Kingdom), President; Mr Jean-Philippe Rochat (Switzerland); Mr Rui Botica Santos (Portugal)

*Football*

*Disciplinary sanctions for fielding a non-qualified player*

*FIFA Statutes and express appeal to the CAS against all decisions of members of FIFA*

*CAS jurisdiction and true consent to arbitration*

- 1. Article 63.1 of the 2009 edition of the FIFA Statutes does not create an express appeal to the CAS against all decisions of members of FIFA. If that was FIFA's intention, then there would be no need for Articles 63.5 and 63.6; FIFA and WADA could simply use Article 63.1 to appeal to the CAS. Article 63.1 of the FIFA Statutes does not constitute a binding arbitration clause by reference in this case. National federations and associations are simply left with a choice and as such the FIFA Statutes do not provide a binding arbitration clause conferring jurisdiction to the CAS.**
- 2. For the CAS to have jurisdiction on a specific matter, all cases should be considered on their own circumstances to determine whether the parties have given their true consent to arbitration.**

Tema Youth Football Club ("Tema" or "the Appellant") is a professional football club from the city of Tema, Ghana, playing football in the leagues and recognised as a club affiliated to the Ghana Football Association.

Ghana Football Association ("the Respondent" or GFA) is the governing body of football in Ghana and is affiliated to FIFA.

On 12 August 2006, the football player E. ("the Player") and the football club Accra Grade Olympic ("Accra") negotiated and agreed a professional contract for a period of three years.

On 22 July 2008, Accra and the Danish football club Odense Boldklub A/S ("Odense") agreed to "transfer" the Player for the period from 22 July 2008 to 31 December 2008 to Odense. In that agreement, the parties declared this transfer as "*a loan*". On 15 August 2008, the Respondent issued the International Transfer Certificate (ITC) for the Player to the Danish Football Association (DFA).

At the end of December 2008, the Player returned to Ghana and reported to Accra. According to the Appellant's submissions, the Player did not play for Accra nor receive any further remuneration from them and turned down the offer of a new contract.

On 31 March 2009, Accra and the Appellant purportedly signed a settlement agreement concerning the Player. The Panel has not been provided with a copy of this agreement.

On 8 April 2009, the Player signed a professional contract with the Appellant.

On 15 April 2009, the Respondent requested that the DFA issue an ITC for the Player, having received a request from the Appellant to do so on 4 April 2009.

On 30 April 2009, upon receipt of the ITC from the DFA, the Chairman of the Respondent issued the Player's licence (number 001329).

On 10 May 2009, the Player played in an official fixture for the Appellant's team against Berekum Arsenal. On 17 May 2009, the Player also played in a match against Sekondi Eleven Wise. The Appellant won both games.

On 12 May 2009, Accra filed a complaint with the Players' Status Committee of the Respondent about the registration of the Player. Accra alleged that the Player was still under contract with them.

On 26 June 2009, Accra filed a letter with the General Secretary of the GFA detailing that it had reached an amicable settlement with Tema regarding the registration dispute of the Player. By this letter, Accra stated that it wished to withdraw its complaint against the Appellant. Accra claimed that this dispute was settled and an agreement had been signed between the parties on 31 March 2009.

On 9 July 2009, the Players' Status Committee of the Respondent decided to discontinue the matter.

Following the premier league matches referred above, both Berekum Arsenal and Sekondi Eleven Wise filed protests with the Respondent's Disciplinary Committee against the participation of the Player in the Appellant's team.

On 16 July 2009, the Disciplinary Committee of the Respondent made a decision that the Player was an "unqualified player". The Disciplinary Committee ruled the following, inter alia:

- (a) Tema Youth forfeits its 10th May 2009 Premier League Match with Berekum Arsenal F.C. for fielding an unqualified player in the person of E. in line with GFA regulation 34(1)(g);*
- (b) Tema Youth forfeits its 17th May 2009 Premier League Match against Sekondi Eleven Wise for fielding the same unqualified player. (GFA Regulation 34(1)(g) ...".*

On 19 July 2009, the Appellant filed an appeal against the decision of the Disciplinary Committee with the Respondent's Appeals Committee.

On 5 August 2009, the Appeals Committee of the Respondent confirmed the decision of the Disciplinary Committee and directed that a further 6 points be deducted from the "accumulative points

*build up*” of the Appellant, as the “*penalty imposed on the Appellant falls short of provisions of Article 34(11) of the GFA Regulations...*”.

Following this decision, the Appellant called for a review by the Appeals Committee according to Article 41.7 of the GFA Statutes, which was heard on 21 August 2009.

On 28 August 2009, the Appeals Committee confirmed its prior decision and dismissed the application of the Appellant (hereafter referred to as “the Decision”).

On 7 September 2009, the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (hereafter referred to as “the CAS”).

Within the Statement of Appeal, the Appellant simultaneously submitted a request to the CAS to issue an order that:

- “(1) The Decision subject to appeal shall be annulled;*
- (2) The Respondent shall be obliged to revoke the deduction of points from the accumulated build up of the Appellant and to revoke the forfeiture of winning matches fielding the player E.*
- (3) In accordance with request No. 2, the Respondent be obligated to correct the 2008-2009 Premier League Table.*
- (4) The Respondent shall be obligated to declare the Appellant not to be relegated and to be admitted to the 2009-2010 Premier League season.*
- (5) The Respondent shall bear the costs of this arbitral proceeding and contribute an amount of the legal costs of the Appellant according to Article R64.5 of the Code of Sports-related Arbitration”.*

On 15 September 2009, the Appellant filed its Appeal Brief and Application for Provisional Measures (Stay of Execution) with the CAS. Regarding provisional measures, the Appellant requested the following:

- “(1) The execution of the Decision (and consequentially also of the decision of the Respondent of the 5 August 2009 and the decision of the Disciplinary Committee of the 16 July 2009) shall be suspended until CAS has rendered its final decision in the Appeal Proceeding CAS 2009/A/1947;*
- 2) Until final decision of the CAS the Appellant shall be provisionally admitted to participate in the 2009-2010 Ghana Premier League which is due to begin on the 4 October 2009.*

*Alternatively:*

- 2 a) Until final decision of the CAS the Respondent shall postpone the start of the 2009-2010 Ghana Premier League and the Ghana Division One League;*

*or:*

- 2 b) Until final decision of the CAS the Respondent shall postpone all matches of the Ghana Premier League and the Ghana Division One League in which the Claimant or were scheduled to play.*
- 3) The provisional measures shall be granted ex parte”.*

On 16 September 2009, the CAS invited the Respondent to express its position with respect to the Appellant's Application for Provisional Measures. The Respondent was to answer on or before 28 September 2009.

On 24 September 2009, the Respondent requested an extension of time to select an arbitrator in this case.

By fax of 29 September 2009, the Appellant's representative agreed to a short extension of the Respondent's deadline to nominate an arbitrator. In the same letter, the Appellant requested an additional provisional measure in addition to those already requested in its Application of 15 September 2009.

By letter of 30 September 2009, the CAS invited the Respondent to nominate an arbitrator on or before 2 October 2009 and granted it a last deadline to file its position concerning the Appellant's Application for Provisional Measures as well as the additional provisional measure requested by the Appellant.

By fax of 1 October 2009, the CAS was notified that the Respondent would be legally represented.

In this fax, the Respondent addressed a number of issues:

- a) the Respondent submitted that the CAS does not have jurisdiction in the matter and that any requests for provisional measures would therefore be inadmissible.
- b) In addition, the Respondent argued that the appeal was directed against the wrong decision. The Appellant was directing its appeal against the decision of the Appeals Committee of 28 August 2009. The Respondent argued that any appeal should have been directed against the decision of the Appeals Committee of the Respondent of 5 August 2009 and that the 21 days deadline to appeal against the said decision had already expired.

By fax of 1 October 2009, Counsel for the Appellant put forward the argument that the Respondent's brief of 1 October 2009 was itself inadmissible, as the Respondent did not file an Answer within the prescribed deadline.

By fax dated 1 October 2009, the CAS gave notice of the formation of the arbitral panel for the present dispute ("the Panel").

By letter of 7 October 2009, the Respondent filed its Answer.

By letter of 15 October 2009, the CAS has communicated the operative part of the award to the Parties.

## LAW

### CAS Jurisdiction

1. In accordance with Swiss Private International Law (Article 186), the CAS has power to decide upon its own jurisdiction.
2. The competence of the CAS to act as an appeal body is based on Article R47 of the Code.
3. As this is an appeal arbitration procedure, pursuant to Article R47 of the Code, the Panel must address the jurisdictional issue by looking for either a “*specific arbitration agreement*” or, whilst examining fully the statutory regulations of the GFA, establish whether they provide for an appeal to the CAS.
4. The Panel accepts that the Appellant and the Respondent have not concluded a specific arbitration agreement. Notwithstanding this, the questions that remain are whether Article 43.1 or any other provision of the GFA Statutes provides a route to the CAS, or whether a combination of the GFA Statutes and the FIFA Statutes result in an “*arbitration clause by reference*”.
5. With regard to the Appellant’s argument based on the FIFA Statutes, the Panel observes that Article 64 of the 2009 edition does not oblige national federations or associations to insert an arbitration clause conferring jurisdiction on the CAS. In the Panel’s view, Article 64 merely obliges national federations to make a provision for arbitration and to confer jurisdiction “*to an independent and duly constituted arbitration tribunal recognised under the rules of the Association or Confederation or to the CAS*”.
6. The Panel did note the provisions of Article 2.6 of the GFA Statutes, that state that the Respondent “*is a member of FIFA .... Accordingly it is itself obliged to respect the Statutes, Regulations, ... of FIFA ...*”. It could be argued that this would include Article 63.1 of the FIFA Statutes. However, Article 63.1 of the 2009 edition does not, in the Panel’s opinion, create an express appeal to the CAS against all decisions of Members of FIFA, such as the Respondent. If that was FIFA’s intention, then why would there be any need for Articles 63.5 and 63.6 of the FIFA Statutes. FIFA and WADA could simply use Article 63.1 to appeal to the CAS. On this point, the Panel therefore concludes that Article 63.1 of the FIFA Statutes could not *per se* constitute a binding arbitration clause by reference in this case.
7. This interpretation of Articles 63 and 64 of the FIFA Statutes is supported by previous CAS jurisprudence, in particular *the Cole Case* where the CAS held that “*FIFA statutes do not contain any mandatory provision that obliges the Respondent to allow a right of appeal from its decisions*” (CAS 2005/A/952). Moreover, the CAS jurisprudence suggests that if the FIFA Statutes did compel the Respondent to provide for a right of appeal from its decisions, no right of appeal to the CAS would exist until the Respondent has expressly made a provision for this right in its statutory regulations (see CAS 2004/A/676, where the Panel has clearly stated, in its award on jurisdiction, that “*It is only with the implementation by the individual confederations of the new FIFA statutes*

*into their individual statutes, that the CAS can be held to have jurisdiction. The FIFA rules (...) do not constitute per se a basis for arbitration. Instead, they constitute an instruction to introduce a regulation providing for CAS arbitration”).* On this reasoning, national federations and associations are simply left with a choice and as such the FIFA Statutes do not provide a binding arbitration clause conferring jurisdiction to the CAS.

8. The Panel also considered whether the Respondent had made an error when drafting its own Statutes and intended to refer to “*an organ of GFA*” instead of “*an organ of FIFA*”, in Article 43.1 of its Statutes. However, there was no evidence to support this and the Panel felt the GFA Regulations needed to deal with appeals from FIFA organs and the Panel noted Article 41.7 of the GFA Statutes, which does state that the decisions of the Appeals Committee “*shall be final*”, save for the ability to review its own decisions, as it did.
9. The Panel, in addition, considered the judgment of the Swiss Federal Court in the matter of *Stanley Roberts v/ FIBA and the CAS*, 7 February 2001. Whilst it was noted this case appears to support the “global reference” arguments, it was felt by the Panel that, it indicates all cases should be considered on their own circumstances to determine whether the Parties have given their true consent to arbitration. Again, the Panel found that the relevant statutes and provisions deal with the binding nature of CAS awards and in no way are related to CAS jurisdiction or could be interpreted as a parties’ consent to arbitration.
10. Finally, the Panel noted the urgency of this matter and the request for provisional measures. It felt that the Appellant, if it had wished to advance further arguments on jurisdiction to those advanced by the Respondent in its letter to the CAS Court Office of 1 October 2009, could have done so in its own correspondence sent to the CAS Court Office later that same day. As such, the Panel had to decide whether, in accordance with Article R44.2 of the Code, to hold a hearing on jurisdictional matters or whether it deemed itself able to consider such matters on the written submissions alone. The Panel determined to consider such matters on the written submissions alone.
11. In the present case, it is the Panel’s view that it lacks the jurisdiction to entertain the Appellant’s appeal, and that the appeal to the CAS should be rejected.
12. Accordingly, the CAS does not have jurisdiction to rule on the Application for Provisional Measures (Stay of Execution) filed by the Appellant.

**The Court of Arbitration for Sport rules:**

1. The CAS has no jurisdiction to adjudicate in the present dispute between Tema Youth FC v. Ghana Football Association.
  2. The Appeal filed by Tema Youth FC on 7 September 2009 is dismissed.
  3. The Application for Provisional Measures (Stay of Execution) filed on 15 September 2009 by Tema Youth is rejected.
  4. All other requests or motions submitted by the parties are dismissed.
- (...).