

**Arbitration CAS 2019/A/6095 Red Tiger FC v. Fenerbahçe SK, award of 17 February 2020**

Panel: Mr H. Pat Barriscale (Ireland), Sole Arbitrator

*Football*

*Solidarity contribution*

*Burden of proof*

According to the general rules and principles of law, facts pleaded have to be proven by those who plead them, i.e. the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proven by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. In accordance with Article 8 of the Swiss Civil Code, unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact. Any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. The two requisites include the concept of ‘burden of proof’ are (i) the ‘burden of persuasion’ and (ii) the ‘burden of production of the proof’. In order to fulfil its burden of proof, a party must, therefore, provide the CAS panel with all relevant evidence that it holds, and, with reference thereto, convince the CAS panel that the facts it pleads are true, accurate and produce the consequences envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party.

**I. PARTIES**

1. Red Tiger Football Club (“the Club” or “the Appellant”) is a football club with its registered office in Ejigbo in Nigeria. The Club is affiliated to the Nigerian Football Federation (NFF).
2. Fenerbahçe SK (“Fenerbahçe” or the “Respondent”) is a football club with its registered offices in Istanbul in Turkey. The Club is affiliated to the Turkish Football Federation (TFF).

**II. FACTUAL BACKGROUND****A. Background Facts**

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, he refers in this Award only to the submissions and evidence it considers necessary to explain his reasoning.

4. In August 2013, the Nigerian player E. was transferred from the Russian Club FC Spartak Moscow to the Turkish Club Fenerbahçe SK for an amount of EUR 13,000,000 payable by Fenerbahçe SK in two instalments as follows: EUR 6,000,000 on 14 August 2013 and EUR 7,000,000 on 31 August 2014. The Turkish Football Federation confirmed that the player was registered with Fenerbahçe on 12 August 2013.
5. Thereafter the Club lodged a claim against the Respondent claiming its proportion of solidarity contribution in connection with the transfer of the player from Spartak Moscow to the Respondent suggesting that the Club had trained the player between 1 January 2002 and 30 December 2005. There were several other competing claims also in respect of the solidarity contribution in connection with the transfer of the player.

#### **B. Proceedings before the Dispute Resolution Chamber of FIFA**

6. On 29 August 2014, and completed on 20 September 2016, the Club lodged a claim in front of the Dispute Resolution Chamber (DRC) of FIFA, against the Respondent claiming its proportion of the solidarity contribution in connection with the transfer of the player from Spartak Moscow to Fenerbahçe.
7. After the closure of the investigation in the matter by FIFA, the Appellant presented further unsolicited comments together with another player passport issued by the Nigerian Football Federation on 29 March 2018 suggesting that the player who had been transferred was registered with the Appellant on 10 May 1999 to 30 June 2007.
8. The matter was considered by the Dispute Resolution Chamber of FIFA in Zurich (Switzerland) which issued its decision on 24 August 2018. It rejected the claim put forward by the Appellant and directed that the costs of the proceedings in the amount of CHF 25,000 to be paid by the Appellant to FIFA within 30 days of that date. This decision was communicated to both the Appellant and the Respondent by correspondence dated the 20<sup>th</sup> of December 2018.

#### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

9. On 7 January 2019, the Appellant filed its Statement of Appeal pursuant to Article R47 of the Code of Sport related Arbitration (the “CAS Code”). The Appellant sought the following reliefs:

*To overturn the decision of the FIFA Dispute Resolution Chamber passed in Zurich, Switzerland on the 24<sup>th</sup> of August 2018 on the claim presented by the Club and to rule in favour of the Appellant*

*To stay the execution of the same decision particularly the payment of the sum of CHF 25,000 as final costs of the proceedings.*

10. On 18 January 2019, the Appellant filed its Appeal Brief with the CAS Court Office pursuant to Article R51 of the CAS Code.
11. On 25 January 2019, the CAS Court Office granted the Respondent a deadline of 20 days to file its answer in accordance with Article R55 of the CAS Code.
12. On 25 January 2019, the Appellant requested that the panel to decide the arbitration would be a Sole Arbitrator in order to reduce the costs of the arbitration.
13. On 1 February 2019, the Respondent objected to the matter being dealt with by a Sole Arbitrator and requested that the matter be referred to a panel with three arbitrators.
14. On 14 February 2019, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had not made any decision with respect to the issue of the composition of the arbitral tribunal as of that date. It advised the Parties that the deadline of the Appellant to pay its share of the advance of costs was suspended until further notice from the CAS Court Office.
15. On 15 February 2019, the Respondent requested an extension of 15 days from the deadline set out in the CAS Court Office letter of 25 January 2019 its answer.
16. On 18 February 2019, the Appellant confirmed that it would have no objection to the Respondent's request for an extension of time within which to file its response.
17. On 18 February 2019, the CAS Court Office informed the Parties that the request for an extension of time to file its answer was granted.
18. On 21 February 2019, the CAS Court Office informed the Parties that the President of CAS Appeals Arbitration Division had decided to submit the present case to a Sole Arbitrator.
19. On 25 February 2019, the Appellant submitted a further written submission with a further witness statement attached thereto.
20. On 2 March 2019, the Respondent filed its answer pursuant to Article R55 (1) of the CAS Code.
21. On 4 March 2019, the Parties were invited by the CAS Court Office to inform them by 11 March 2019 whether they prefer a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.
22. On 8 March 2019, the Respondent informed the CAS Court Office that they prefer the Sole Arbitrator to issue an award based on the Parties' written submissions.

23. On 10 March 2019, the Appellant requested that the Sole Arbitrator renders a decision based on the Parties' written submissions.
24. On 9 May 2019, the CAS Court Office informed the Parties that pursuant to Article R54 of the Code of Sports Related Arbitration the CAS Code that the President of the CAS Appeals Arbitration Division had decided that the Arbitral Tribunal appointed to decide the present case is constituted as follows:  
  
Sole Arbitrator: H. Pat Barriscale, Barrister in Limerick, Ireland.
25. On 8 June 2019, the Appellant signed the order of procedure having amended the same slightly in handwriting to suggest that the amount they were claiming came to EUR 390,000.
26. On 11 June 2019, the Respondent signed the order of procedure.

#### **IV. SUBMISSION OF THE PARTIES**

27. 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 to what immediately follows:

##### **A. The Club's Submissions**

28. The Club submitted that it had discovered and nurtured the player E. from when he was a young person in early 1999 until he moved to South Africa in June 2007. They say that as a result of the same, they are entitled to a substantial percentage of the solidarity contribution arising from the player's transfer from FC Spartak Moscow to the Respondent Club in August 2013.
29. To support this claim, the Club produced two photographs purporting to show the player in the Appellant's lineup. These photographs are undated in any way, unsubstantiated and in no context. Further, they produced some type of identification from the Sport Light Football Association of Esolo which again is undated in any way. Finally, they produce a handwritten team sheet, again from the Sport Light Association of Esolo with the player's name apparently written thereon. This contains a handwritten date of the year 2004 and no more.
30. After the Club lodged its claim for the portion of the solidarity compensation it was informed that there was a claim from Delta Force FC, another Nigerian Football Club over the same player for the same period. They informed the Respondent that there was no basis whatsoever for such a claim by Delta Force as the player had never played for that team. In addition, they suggested that the Club, Delta Force FC, were defunct.

31. The Appellant then sought the player's international player passport from the Nigerian Football Federation (NFF). They suggested that they did not receive much cooperation from the NFF by reason of the fact that they were being deceived and had been led to believe that the player played for Delta Force FC and as a result the NFF were uncooperative.
32. The Club, Delta Force FC, were apparently resurrected again in 2015 and to try and advance their position, the Appellant's Attorney, Mr Precious approached Delta Force FC and obtained a Power of Attorney from them with a view to filing a claim on their behalf before FIFA and the Respondent in respect of their claim for the solidarity contribution. Mr Precious suggested that he asked them for any evidence that they had that could support the claim that the player had featured for them but they could not provide him with any such evidence.
33. Thereafter, the Appellant suggested that the same legal team who had promoted the original claim on behalf of Delta Force FC were now claiming on behalf of the NFF that as Delta Force FC were defunct that their money in respect of the solidarity contribution should be paid to the NFF.
34. The Appellant confirmed that they had continued to put pressure on the NFF to give them an accurate player passport and on the 19<sup>th</sup> of September 2016 they received an International Player Passport (IPP) which stated that the player was registered with the Appellant from the 1<sup>st</sup> of March 2001 until the 28<sup>th</sup> of February 2005 and thereafter with Delta Force FC.
35. It was further submitted on behalf of the Appellant that the Respondent had requested the player to sign a document on the 20 of September 2013 declaring that he had never played for Delta Force FC in his football career. The Respondent made no mention of this document and did not produce it until 2018. When it was produced, the Appellant suggested that it helped to prove their case before the NFF that the player had never played for Delta Force FC. Arising from the same, the Appellant stated that the NFF came up with the most accurate and authentic IPP on the player which was issued by the NFF on the 29<sup>th</sup> of March 2018. This suggested that the player was registered with the Appellant from 10 May 1998 until 30 June 2007. The Appellant sought to rely on the same to substantiate their claim.
36. The Appellant submitted the IPP of 29 March 2018 to the Dispute Resolution Chamber of FIFA immediately after that date but as the investigation had been closed at that stage it was rejected and not considered by the FIFA Panel making the decision.
37. The Club submitted that the Decision of the Dispute Resolution Chamber of FIFA was flawed in many respects and sought to rely on the following:-
  - a. Firstly, the contradictory player passports (five in total) which were before the DRC were all produced by the Respondent except for the one dated 19 September 2016. In those circumstances, the Club could not be blamed for causing the confusion which apparently existed before the DRC.

- b. Secondly, the DRC were wrong in refusing to accept the IPP dated 29 August 2018 as this was the most accurate in the circumstances and only came into existence after a thorough investigation by the NFF.
  - c. Thirdly, the Respondent by concealing the letter from the player of September 2013 until five years later in 2018 clearly withheld this information which added to the confusion and inconsistency in order to avoid paying the solidarity contribution.
  - d. Fourthly, the Club say that they have adequately discharged the burden of proof upon them by producing the most up to date and accurate IPP. They suggest that the IPP is the official document used to determine burden of proof in solidarity contribution claims and in the absence of any contrary proof or document superseding it, it is proof beyond reasonable doubt that the player was groomed by the Appellant for the period stated therein.
38. On the basis of all of the above, the Club say that they are entitled to the following reliefs:-
- a. *That the decision of the DRC reached on the 24<sup>th</sup> of August 2018 be overturned as it was largely flawed;*
  - b. *That the IPP on the 29<sup>th</sup> of March 2018 be admitted as the true and authentic IPP and used to calculate the Appellant's entitlement in this matter amounting to 60% of the total solidarity contribution;*
  - c. *That the final amount of costs of the DRC proceedings in the amount of CHF25,000 awarded against the Appellant be discharged.*

## **B. Respondent's Submissions**

39. The Respondent submitted that the FIFA DRC rejected the Appellant's claim because they had failed to submit convincing documentary evidence to allow them establish precisely to whom the solidarity contribution was to be paid. They had dealt efficiently and consistently with all of the competing claims which had been lodged by four different claimants namely Mpumalanga Black Aces, Delta Force FC, NFF and the Appellant. Further, serious confusion followed by reason of the fact that the Appellant's Lawyer, Mr Johnny Precious acted for three of the four claimants at different times. In addition, he submitted contradictory and inconsistent correspondence and documentation in the course of pursuing the claim on behalf of his different clients and some of this was exhibited in the answer by the Respondent.
40. Further, they submitted that the IPP issued by the NFF on 29 August 2018 did not in any way clear the air or contain any new material evidence as it was the eighth player passport produced since 2013. They point out that the Appellant was not included in any of the passports until the one issued on the 19<sup>th</sup> of June 2016. They concluded that some of the players' passports maybe generated casually with the only purpose of having the solidarity compensation for the clubs which are not entitled to it.

41. They submit that the appeal should be dismissed by reason of the fact that the Appellant has not provided anything new or any new hard evidence to the appeal except the latest version of the player's passport which they say is inconsistent with the player passport issued by the South African Football Federation. It is not a matter for Fenerbahçe to determine who is entitled to the solidarity contribution and the burden of proof in this regard is on the Appellant. They go on to say that the Appellant has filed a meritless appeal as they have shown in their answer and the Appellant's claim cannot be trusted.
42. In its prayers for relief, the Respondent requests as follows:-
- a) *To dismiss all prayers for relief submitted by the Appellant;*
  - b) *To dismiss all further or different motions or prayers for relief;*
  - c) *To uphold the Decision of FIFA'S DRC;*
  - d) *To order the Appellant to pay the entire costs of the present proceedings;*
  - e) *To order the Appellant to pay the legal fees and expenses of Fenerbahçe to be determined at a later stage in the proceedings.*

## V. JURISDICTION

43. Article R47 of the Code provides as follows:

*An appeal against the decision of a federation, association or sports-related 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 if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

44. Under Article 57 of the FIFA Statutes this Article provides as follows:

- a. *FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne, Switzerland to resolve disputes between FIFA Member Associations, Confederations, Clubs, Players, Officials, intermediaries and licensed match agents;*
- b. *The provisions of the CAS Code of Sports Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and additionally, Swiss Law;*

45. Under Article 58 of the FIFA Statutes this Article provides for the jurisdiction of CAS in the following terms:

- a. *Appeals against final decisions passed by FIFA'S Legal Bodies and against decisions passed by Confederations, Member Associations or Leagues shall be lodged with CAS within 21 days of receipt of the decision in question;*

- b. *Recourse may only be made to CAS after all other internal channels have been exhausted;*
- c. *CAS, however, do not deal with appeals arising from:-*
  - 1) *Violations of the laws of the game;*
  - 2) *Suspensions of up to four matches or up to 3 months (with the exception of doping decisions)*
  - 3) *Decisions against an Appeal to an independent and duly constituted arbitration panel recognized under the rules of an association or confederation may be made.*

46. The Sole Arbitrator is therefore of the opinion that CAS has jurisdiction based on Articles 57 and 58 of the FIFA Statutes.

## **VI. ADMISSIBILITY**

47. Article R49 of the Code provides as follows:

*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in the previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.*

48. The Statement of Appeal was filed on 7 January 2019 and, therefore within the 21-day deadline after having received the appeal decision on the 20<sup>th</sup> of December 2018. It complied with the requirements of Articles R48 and R64.1 of the CAS Code.

49. It follows that the Appeal is admissible.

## **VII. APPLICABLE LAW**

50. Article R58 of the Code provides as follows:

*The Panel shall decide the dispute according to the applicable regulations and subsidiarily 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.*

51. The current appeal is pursuant to the statutes, rules and regulations of FIFA and is of an international nature between a Nigerian Football Club and a Turkish Football Club. In the circumstances, the CAS Code does apply and, if necessary, Swiss Law.

## **VIII. MERITS**

52. Article 8 of the Swiss Civil Code (“SCC”) provides that:



*“Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact”.*

53. In this respect, the Sole Arbitrator confirms the principle established by CAS jurisprudence that *“in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (...). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence”* (e.g. CAS 2003/A/506, para. 54; CAS 2009/A/1810 & 1811, para. 46 and CAS 2009/A/1975, para. 71ff).
54. And furthermore, *“According to the general rules and principles of law, facts pleaded have to be proven by those who plead them, i.e. the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proven by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. This principle is also stated in the Swiss Civil Code. In accordance with Article 8 of the Swiss Civil Code: Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact. It is well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. The two requisites include the concept of ‘burden of proof’ are (i) the ‘burden of persuasion’ and (ii) the ‘burden of production of the proof’. In order to fulfil its burden of proof, a party must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequences envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party”* (CAS 2015/A/3909; CAS 2007/A/1380, with further references to CAS 2005/A/968 and CAS 2004/A/730).
55. As established by the long-standing jurisprudence of the CAS, the burden of proof in this appeal lies on the Appellant. The Sole Arbitrator is of the view that the Appellant has failed in this regard in that they have not produced clear substantiated authenticated and unambiguous documentation that the player, E., played for the Club and, if so, for what period of time. The simplest and clearest method of doing so would have been a letter or statement from the player himself setting out the periods that he was either training with or playing for the Club. They have failed to do this and seek to rely on some vague and unconvincing explanation as to why such a statement was not available.
56. Further, they seek to rely upon the International Player Passport of 29 March 2018 provided by the Nigerian Football Federation. This, they suggest, shows the true position as far as the player is concerned and confirms the position that they are entitled to a substantial proportion of the solidarity contribution. This passport itself is contradicted by other documentation which is available and is one of up to eight IPPs produced by the Nigerian Football Federation

with various dates between 10 August 2013 and 29 March 2018. The Sole Arbitrator is not convinced by any of the passports produced and is certainly not in a position to favour one passport over another.

57. Indeed the NFF, in a letter of 14 March 2014, specifically stated as follows:

*“With regard to the period not written in the player’s passport, Nigeria Football Federation do not have conclusive evidence of the player’s career within this time and, thus, cannot account for it”.*

58. The entire appeal was undermined by the fact that the Appellant’s lawyer acted, at different times, for three different clubs in seeking a portion of the solidarity contribution being Mpumalanga Black Aces FC, Delta Force FC and the Appellant. Indeed, as set out in the answer for Fenerbahçe SK, some of the claims and statements were entirely contradictory.

59. In all of the circumstances, notably the above-mentioned jurisprudence of the CAS, the Appellant has failed to discharge the burden of proof upon it and the appeal cannot succeed.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The appeal filed by Red Tiger FC against the decision rendered by the Dispute Resolution Chamber of FIFA on 24 August 2018 is dismissed.
2. The decision of the Dispute Resolution Chamber of FIFA rendered on 24 August 2018 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.