



Arbitration CAS 2017/A/5322 FK Olimpik Sarajevo v. Football Association of Bosnia and Herzegovina & MSK Zilina & Slovakian Football Association & Admir Vladavic, award of 2 March 2018

Panel: Mr Ivaylo Dermendjiev (Bulgaria), Sole Arbitrator

Football

Disciplinary sanction for failure to comply with a FIFA decision

Standing to be sued with respect to disciplinary sanctions

Under Swiss law, one defending party has standing to be sued (legitimation passive) if it is personally obliged by the disputed right at stake. In other words, one party has standing to be sued and may thus be summoned before the CAS only if it has some take in the dispute because something is sought against it. Only FIFA has standing to be sued with respect to disciplinary sanctions imposed by FIFA on a club.

I. THE PARTIES

1. FK Olimpik Sarajevo (the “Appellant”) is a professional football club based in Sarajevo, Bosnia and Herzegovina.
2. The Football Association of Bosnia and Herzegovina (the “First Respondent”) is the governing body for football in Bosnia and Herzegovina. The First Respondent is a member of Fédération Internationale de Football Association (“FIFA”).
3. MSK Zilina (the “Second Respondent”) is a professional football club based in Zilina, Slovakia.
4. The Slovakian Football Association (the “Third Respondent”) is the governing body for football in Slovakia. The Third Respondent is a member of FIFA.
5. Mr Admir Vladavic (the “Fourth Respondent”) is a former professional football player of Bosnian nationality.
6. The First Respondent, the Second Respondent, the Third Respondent and the Fourth Respondent will be referred to collectively as the “Respondents”.
7. The Appellant and the Respondents will be jointly referred to as the “Parties”.

II. DECISION APPEALED AGAINST

8. On 12 December 2013, the FIFA Dispute Resolution Chamber decided upon an employment-related dispute arisen between the Appellant, the Second and the Fourth Respondent and ruled that that the Fourth Respondent had to pay certain amounts to the Second Respondent. By the same decision the Appellant was held jointly and severally liable for the payment of the amounts.
9. On 31 January 2017, the FIFA Disciplinary Committee pronounced the Appellant guilty of failing to comply with the decision passed by the FIFA Dispute Resolution Chamber on 12 December 2013 and was therefore found to be in violation of Art. 64 of the FIFA Disciplinary Code. The Appellant was ordered to pay a fine of CHF 15,000 and was granted a final grace period of 60 days to settle its debts towards the Second Respondent failing which the Second Respondent would be entitled to demand that six points be deducted from the Appellant's first team in the domestic league championship. If the Appellant still failed to pay even after deduction of points, the FIFA Disciplinary Committee would decide on a possible relegation of the Appellant's first team to the next lower division. The First Respondent was reminded of its duty to implement the decision and, if so requested, provide FIFA with proof that points have been deducted. In case of First Respondent's failure to comply with the decision, FIFA Disciplinary Committee would decide on appropriate sanctions on its member including possible expulsion from all FIFA competitions. Lastly, the Appellant was ordered to bear the costs for the FIFA proceedings (the "Appealed Decision"). The Appealed Decision noted that, according to Art. 64, para. 5 of the FIFA Disciplinary Code and Art. 58, para.1 of the FIFA Statutes, it was subject to appeal before the Court of Arbitration for Sport (the "CAS") within 21 days of receipt of notification thereof.
10. The grounds of the Appealed Decision were notified to the Appellant on 22 August 2017.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 7 September 2017, the Appellant filed a statement of appeal against the Appealed Decision before the CAS. The Appellant requested that the appeal be submitted to a sole arbitrator.
12. The statement of appeal included an application "*to stay the execution of the Decision appealed against*", the Appellant stating in support of the said request that "*The reason for above mentioned proposition - request is based on behalf of difficult financial situation of the Appellant which has been relegated to the lower Division of national League after the season 2016/2017 has been finished*".
13. As the Appellant did not identify the respondent(s) and respective contact detail(s) in its statement of appeal, on 13 September 2017, the CAS Court Office drew the Appellant's attention to Article R48.1 of the Code of Sports-related Arbitration (the "Code") and invited the Appellant to complete its appeal, by indicating the name and full address of the respondent(s) and to provide the statement of appeal in as many copies as there were other parties and arbitrators and one additional copy for the CAS.

14. By a letter dated 15 September 2017, the Appellant expressly indicated that it was filing its appeal against the following respondents: (1) the Football Association of Bosnia and Herzegovina; (2) MSK Zilina; (3) the Slovakian Football Association; and (4) Admir Vladavic. The Appellant also stated that, pursuant to Article R51 of the Code, the statement of appeal filed on 7 September 2017 with respect to the Appealed Decision should be considered as appeal brief. The Appellant further noted that the appeal was “*drafted in five copies - one copy for the Court, and one for each of the respondents mentioned above*”.
15. On 22 September 2017, the CAS Court Office couriered the statement of appeal to the Respondents and invited them to submit an answer within 20 days upon receipt, pursuant to Article R55 of the Code.
16. On 26 September 2017, as the appeal was not directed against it, FIFA renounced its right to intervene in the arbitration proceedings, but noted that, according to longstanding jurisprudence of CAS, any appeal against a decision issued by the FIFA Disciplinary Committee should be directed against FIFA and that, as a consequence, it was the only party that has standing to be sued and not the previously opposing party in a financial case before the competent FIFA bodies. FIFA further noted that, should an appeal not be directed against FIFA, the CAS was not in a position to review the decision of the first instance. FIFA also highlighted that it was not automatically a party to any CAS procedure, if not called by the appellant. Lastly, FIFA recalled that the decision passed by the FIFA Dispute Resolution Chamber on 12 December 2013 had long become final and binding meaning that any request for relief with respect to it should also be dismissed.
17. On 29 September 2017, the CAS Court Office enclosed to the Parties’ attention the FIFA letter dated 26 September 2017.
18. On 3 October 2017, the Second Respondent, with reference to the correspondence of 22 and 29 September 2017, stated that the appeal should not have been directed against the Respondents but against FIFA which was the only party having standing to be sued and that the appeal should be rejected.
19. On 6 October 2017, the CAS Court Office invited the Appellant to state whether, in light of the observations filed by FIFA as per its letter dated 26 September 2017 and the position of the Second Respondent in its letter dated 3 October 2017, it wished to maintain its request for provisional measures and the present appeal.
20. On 18 October 2017, the Appellant confirmed that it maintained its request for provisional measures and the present appeal.
21. On 20 October 2017, the CAS Court Office noted that the time limit for the Respondents to have filed their respective answer had expired and that the only communication that had been received had been the Second Respondent’s letter of 3 October 2017.

22. On 2 November 2017, the President of the CAS Appeals Arbitration Division issued an Order dismissing the request for stay of the Appealed Decision.
23. Also on 2 November 2017, the Parties were invited to inform the CAS Court Office whether they prefer a hearing to be held in the present matter or for the Sole Arbitrator to issue an award based solely on the parties' written submissions.
24. On 8 November 2017, the CAS Court Office informed the Parties that, pursuant to Article R54 of the Code, and on behalf of the President of the CAS Appeals Arbitration, the panel appointed to decide the case was constituted as follows: Mr. Ivaylo Dermendjiev, attorney-at-law in Sofia, Bulgaria, as Sole Arbitrator.
25. On 9 November 2017, the First Respondent expressed its preference for the Sole Arbitrator to decide the matter based solely on the Parties' written submissions. The other Parties did not submit their position with respect to the holding of hearing.
26. On 20 November 2017, the CAS Court Office advised the Parties that the Sole Arbitrator deemed himself sufficiently well informed to decide this matter based on the Parties' written submissions, without the need to hold a hearing, pursuant to Article R57 of the Code.
27. On 7 December 2017, the Appellant and the Second Respondent signed the Order of Procedure. On 11 December 2017, the First Respondent and the Third Respondent also signed the Order of Procedure. By signing of the Order of Procedure, these Parties confirmed their agreement that the Sole Arbitrator may decide this matter based on the Parties' written submissions and that their right to be heard had been respected. The Fourth Respondent did not return a signed copy of the Order of Procedure.

IV. POSITIONS OF THE PARTIES

A. The Appellant

28. In its submissions the Appellant asserted that the fine imposed by the Appealed Decision was significantly high bearing in mind that the Appellant intended to fulfil its obligations towards the Second Respondent as they were ascertained by the decision of the FIFA Dispute Resolution Chamber dated 12 December 2013. For that purpose the Appellant had been in constant contact with the Second Respondent in order to negotiate and reach a settlement agreement which unfortunately was never concluded. In that respect the Appellant states that the Second Respondent did not accept the proposed payment plan.
29. The Appellant further points out that since 2015 its financial situation drastically changed considering the fact that after winning the national cup in the season 2014/2015 it was relegated to the lower division for the season 2016/2017. As a result, the Appellant lost its main sponsors and premiums and accumulated great financial loss.

30. The Appellant contends that the fine imposed by the Appealed Decision is disproportionately high considering the range of CHF 300.00 and CHF 1,000,000.00 provided for in the FIFA Disciplinary Code.
31. Lastly, the Appellant maintains that the fine pronounced by the Appealed Decision and the amount ordered for payment by the decision of the FIFA Dispute Resolution Chamber dated 12 December 2013 are significantly higher than its annual budget and that the Appellant is unfortunately unable to comply with the Appealed Decision for reasons which are to be considered *vis maior*.
32. In the statement of appeal, serving as appeal brief, the Appellant requested the following relief:

“Regarding above mentioned, and especially difficult financial situation [sic] of the Appellant as well as the intention to fulfil determined obligations (entered negotiations with MSK Zilina), we find this Appeal established, and accordingly we once more propose - request for relief in a way that Court of Arbitration for Sport (CAS) acting upon this appeal issue the Decision by which appeal will be adopted in entirety and accordingly change the Decision of the FIFA Disciplinary Committee in order to abolish the fine, or if find the reasons of the appeal to be based, lower the fine pronounced by the Decision of the FIFA Disciplinary Committee - (Decision 150253 PST BiH ZH) issued on 31st January 2017”.

B. The Respondents

33. Except for the Second Respondent, the remaining Respondents did not file any answers to the appeal brief.
34. The Second Respondent, without actually filing an answer to the substance of the appeal, was the only respondent to present a written position stating that the appeal should be rejected. In its communication of 3 October 2017, the Second Respondent held as follows:

“Based on the contents of the Statement of Appeal it is apparent that the appeal should not be filed against named respondents, i.e. MSK Zilina, Slovak Football Association, the Football Association of Bosnia and Herzegovina and Admir Vladavic, but against FIFA which confirmed this statement in its submission to the CAS dated 26 September 2017. The Statement of Appeal is directed only to the amount of the fine in the sum of 15.000,-CHF imposed by FIFA Disciplinary Committee on appellant by its decision 150253 PST BiH ZH therefore such appeal shall be directed against FIFA which is the only party that has standing to be sued.

In view of the above and considering the legal principle of non ultra petita we believe that such appeal should be rejected”.

V. JURISDICTION OF THE CAS

35. Article R47.1 of the Code provides as follows:

“An appeal against the 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 it prior to the appeal, in accordance with the statutes or regulations of that body”.

36. The jurisdiction of the CAS, which is not disputed by any of the Parties and has been confirmed by the Parties signing the Order of Procedure, derives from Article 58, para.1 of the FIFA Statutes (edition 2016, in force as of 1 April 2015) in conjunction with Article R47 of the Code.

37. It follows that the CAS has jurisdiction to decide this dispute.

VI. ADMISSIBILITY

38. Article R49 of the Code in its relevant part 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 a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.

39. Article 58, para.1 of the FIFA Statutes is in the following lines:

“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 notification of the decision in question”.

40. The grounds of the Appealed Decision were notified to the Appellant on 22 August 2017.

41. The statement of appeal was filed on 7 September 2017 and, thus, within the deadline of twenty-one days set in Article R49 of the Code and in Article 58.1 of the FIFA Statutes.

42. No further recourse against the Appealed Decision is available within the structure of FIFA.

43. Accordingly, the appeal filed by the Appellant is admissible.

VII. APPLICABLE LAW

44. Article R58 of the Code provides as follows:

“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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

45. The matter at stake relates to an appeal against a FIFA decision, and reference must hence be made to Article 57.2 of the FIFA Statutes (edition 2016) which states that:

“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”.

46. As a consequence, the FIFA regulations will be applied primarily, and Swiss law shall apply subsidiarily.

VIII. MERITS

47. The core principle applicable by CAS is the *de novo* principle resulting from Article R57 of the Code. According to Article R57 of the Code, the Sole Arbitrator has full power to review the facts and the law of the case. Furthermore, the Sole Arbitrator may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

48. However, in light of the express position of FIFA and the Second Respondent (articulated in their letters dated 26 September 2017 and 3 October 2017, respectively) that an appeal against a decision issued by the FIFA Disciplinary Committee should be directed against FIFA, as a threshold matter, the Sole Arbitrator must first address the question as to who has to be considered as respondent in the present proceedings.

49. As a starting point, the Sole Arbitrator notes that under Swiss law, lack of standing to be sued is generally considered a reason to reject an appeal on the merits, and not a reason to declare such appeal inadmissible (Swiss Federal Tribunal, ATF 126 III 59, para. 1.a. p. 63).

50. By an Order dated 2 November 2017, the President of the CAS Appeals Arbitration Division dismissed the request for a stay of the Appealed Decision (see para. 22 above). In doing so, the President of the CAS Appeals Arbitration Division held that Appellant had not made a plausible case that the material criteria for a cause of action are fulfilled with respect to its challenge because the Respondents in the present case have no standing to be sued with respect to the Appealed Decision.

51. Notwithstanding the Order on Request for a Stay rendered by the President of the CAS Appeals Arbitration Division, the Sole Arbitrator must fully and independently address the issue as to whether the Appellant has named the right parties as Respondents in the present proceedings and, if not, whether FIFA is to be considered as a respondent or not.
52. The CAS has developed well-established jurisprudence to the effect that a party has standing to be sued (“*légitimation passive*”) only if it has some stake in the dispute because something is sought against it.
53. In this respect, the Panel in CAS 2007/A/1329 & 1330, para. 27, stated as follows:
“Under Swiss law, applicable pursuant to Articles 60.2 of the FIFA Statutes and R58 of the CAS Code, the defending party has standing to be sued (légitimation passive) if it is personally obliged by the “disputed right” at stake (see CAS 2006/A/1206). In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it (cf. CAS 2006/A/1189; CAS 2006/A/1192)”.
54. Similarly, the Panel in CAS 2012/A/3032 with further references to other CAS precedents explained that:
“42. As a principle, and as it has already been established in CAS jurisprudence, a party has standing to be sued (“légitimation passive”) in CAS proceedings only if it has some stake in the dispute because something is sought against it in front of CAS (cf. CAS 2008/A/1620, para. 4.1.; CAS 2007/A/1367, para. 37.). FIFA disciplinary proceedings, like basically all disciplinary proceedings of a sport association, are primarily meant to protect an essential interest of FIFA and FIFA’s (direct and indirect) members, i.e. the full compliance with the rules of the association and, as here, with the decisions rendered by FIFA’s decision-making bodies and/or by CAS (cf. CAS 2008/A/1620, para. 4.6.).
43. As a consequence, in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party, only FIFA has standing to be sued, but not the (previously) opposing party in, e.g., a financial dispute before the competent FIFA bodies. In other words, only FIFA can be the correct respondent having standing to be sued”.
55. In line with CAS constant jurisprudence, the Panel in CAS 2014/A/3831 (paras. 6.10 *et seq.*) reiterated that a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it. In this respect, where a club requests that the sanctions and fines imposed upon it by a decision of a FIFA legal body be revoked and that the said decision be set aside, the prayers and reliefs sought can practically and legally speaking only be made against FIFA as the body charged with imposing and enforcing disciplinary sanctions on clubs who contravene the FIFA Disciplinary Code. The club benefiting from the FIFA decision has no standing to be sued.
56. The Sole Arbitrator concurs with the established previous CAS jurisprudence and notes that the statement of appeal dated 7 September 2017 was indeed lodged clearly against the Appealed Decision as expressly indicated in its section entitled “*Subject*”. However, the statement of appeal

did not conform to the requirements of Article R48 of the CAS Code, including the requirement to (clearly) indicate the name and full address of the “Respondent(s)”. When rightly requested by the CAS Court Office to complete its statement of appeal (see paras.13 and 14 above), on 15 September 2017 the Appellant actually designated the Football Association of Bosnia and Herzegovina, MSK Zilina, the Slovakian Football Association and Admir Vladavic as the Respondents, not the FIFA. Thereafter, in response to an invitation by the CAS Court Office sent in light of the observations filed by FIFA as per its letter dated 26 September 2017 and the position of the Second Respondent in its letter dated 3 October 2017, the Appellant expressly maintained its appeal “*in entirety*” without making any corrections as regards to whom the appeal was directed against.

57. Even if, materially, FIFA could be considered as a relevant party, and even if it can be argued also from a formal point that the appeal initially designated the appeal as having been filed against the Appealed Decision (albeit not naming the issuing body as respondent), FIFA cannot be taken to have become automatically a party to the dispute considering also that, when curing the irregularities of the statement of appeal, the Appellant did not indicate it as a proper respondent. The more is so given that FIFA expressly renounced its right to participate in the present proceedings.
58. In consistence with previous jurisprudence referred to above, if the Appellant failed to indicate FIFA formally as the Respondent in its statement of appeal or in its completed statement of appeal pursuant to Article R48 of the CAS Code, FIFA cannot be considered as a party to the arbitration proceedings. Pursuant to Article R48 of the Code, FIFA, even being the first instance deciding body, cannot be considered *ex officio* as a respondent.
59. Having found that the Respondents named by the Appellant have no standing to be sued, the Sole Arbitrator does not need to enter into exploring in essence if the disciplinary sanction imposed by FIFA Disciplinary Committee must be annulled or modified and the appeal must be dismissed on that account only.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by FK Olimpik Sarajevo on 7 September 2017 against the decision of FIFA Disciplinary Committee of 31 January 2017, is dismissed.
2. The decision issued on 31 January 2017 by the FIFA Disciplinary Committee is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.