Arbitration CAS 2018/A/5998 Football Kenya Federation (FKF) v. Confédération Africaine de Football (CAF), award of 20 February 2020

Panel: Mr Mark Hovell (United Kingdom), President; Mr Emin Özkurt (Turkey); Mr Jacopo Tognon (Italy)

Football
Qualification of a national team for a continental competition
De novo review by CAS panels
Amendment of argument

1. **Pursuant to Article R57 of the CAS Code, procedures before CAS are *de novo*, meaning that defects in the procedures at first instance can generally be cured by panels' ability to consider the entire matters at hand afresh.**

2. **Pursuant to Article R56 of the CAS Code, unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorised to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.**

I. PARTIES

1. Football Kenya Federation (the "FKF" or "Appellant"), is the national governing body of football in Kenya, with its registered office in Nairobi, Kenya. The FKF is affiliated to the Confédération Africaine de Football, which is in turn affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Confédération Africaine de Football (the "CAF" or "Respondent") is the governing body for the sport of football in Africa.

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 at the hearing. 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.

A. Background to the African Women's Cup of Nations tournament

4. The CAF is the competition organiser of the African Women's Cup of Nations tournament ("AWCON"), the most recent edition of which was held in November 2018 in Ghana ("AWCON 2018"). Qualification for AWCON is open to all teams that are from member federations or associations affiliated to FIFA that were eligible to take part. In order to qualify for AWCON, teams have to undergo a qualification process organised by the CAF.

5. The final segment of qualification for AWCON 2018, which is of relevance to the case at hand, was the two-legged tie between the teams from the FKF and Equatorial Guinea, *i.e.* AWCON Qualifier Match numbers 29 and 30.

B. The matches between the teams from the FKF and Equatorial Guinea

6. On 6 June 2018, AWCON Qualifier Match 29 took place in Kenya, with the FKF winning 2-1 (the "First Leg").

7. On 9 June 2018, AWCON Qualifier Match 30 took place in Equatorial Guinea, with Equatorial Guinea winning the tie 2-0 (the "Second Leg").

8. After both the First Leg and the Second Leg, protests were filed by the FKF regarding the selection of several allegedly ineligible players by Equatorial Guinea.

C. Proceedings before the CAF Disciplinary Board

9. On 29 August 2018, the Disciplinary Coordinator of the CAF wrote to the FKF stating that the protest was deemed valid and a final decision was to be rendered by the CAF Disciplinary Board on 8 September 2018.

10. On 8 September 2018, the CAF Disciplinary Board issued a decision as follows (the "CAF Disciplinary Board Decision"):

> *"1.* [The FKF's] *protest is upheld;*
>
> *2. A sanction of 10,000 USD (Ten Thousand Dollars) is imposed on the Federación Ecuatoguineana De Fútbol;*
>
> *3. Equatorial Guinea's Team is disqualified from* [AWCON 2018]*".*

11. The CAF Disciplinary Board Decision stated that there was a right to appeal to the CAF Appeal Board. In order to file an appeal, it needed to be lodged within 3 days of the notification of the CAF Disciplinary Board Decision, with reasons for the appeal given in writing within a further 7 days.

12. On 17 October 2018, the grounds of the CAF Disciplinary Board Decision were notified to the FKF by email from the CAF.

D. Lead up to AWCON 2018

13. On 19 October 2018, the General Secretary of the FKF, Mr Robert Muthomi, received an official letter from the Deputy General Secretary of the CAF stating as follows:

> *"We would like to inform you that CAF Disciplinary Committee decided to disqualify Equatorial Guinea from the above-mentioned tournament following the appeal presented by the* [FKF].
>
> ***Consequently, Kenya is qualified to* [AWCON 2018].**
>
> *Kindly note that the official draw of the final tournament will take place in Accra on 21st October 2018 at 7.00pm in Movenpick Accra".*

14. The FKF therefore commenced its preparation for AWCON 2018. In between the period 19 October to 7 November 2018, the FKF liaised with the CAF and also FIFA in relation to matters related to AWCON 2018 including, *inter alia*, the official registration of players, official marketing circulars, confirmation of team doctors, and kit colours. The FKF also commenced booking flights for its players.

E. Proceedings before the CAF Appeal Board

15. Presumably within 3 days of the CAF Disciplinary Board Decision, the Football Federation of Equatorial Guinea ("FFEG") lodged an appeal against the CAF Disciplinary Board Decision. The FKF submitted that it was never made aware of the existence of these appeal proceedings before the CAF Appeal Board.

16. On 7 November 2018, the CAF Appeal Body rendered a decision as follows ("Appealed Decision"):

> *"Ruling on the appeal made by the* [FFEG] *against the* [CAF Disciplinary Board Decision]*, the* [CAF Appeal Body] *decides the following:*
>
> 1. *The appeal of the* [FFEG] *is admissible;*
>
> 2. *The* [CAF Disciplinary Board Decision] *is reversed;*
>
> 3. *The player Annette Jacky Messomo is eligible to play with the national team of Equatorial Guinea;*
>
> 4. *Equatorial Guinea is reinstated in the 2018 Africa Women's Nations Cup".*

17. As such, the outcome of the Appealed Decision was such that the team from Equatorial Guinea was reinstated to participate in AWCON 2018, in place of the team from Kenya.

18. The FKF was notified about the Appealed Decision on the same day, *i.e.* on 7 November 2018.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 12 November 2018, in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), the FKF filed a Statement of Appeal with the CAS challenging the Appealed Decision. In its Statement of Appeal, the FKF nominated Mr Emin Özkurt, Barrister, Istanbul, Turkey, as arbitrator.

20. On 14 November 2018, the CAS Court Office wrote to the parties, *inter alia*, confirming receipt of the Statement of Appeal by email. The CAS Court Office also noted that the FKF had applied for urgent provisional measures. In accordance with Article R37 of the CAS Code, the CAF was requested to file its position on the FKF's request within a day.

21. On 15 November 2018, the CAF submitted its position on the FKF's request for provisional measures. The CAS Court Office wrote to the parties informing them that the President of the CAS Appeals Arbitration Division ("Division President"), or her Deputy, would render an Order on Provisional and Conservatory Measures in short order.

22. On 16 November 2018, the CAS Court Office provided the Parties with a copy of the Operative part of the Order on Request for Provisional Measures issued by the Division President. In short, the Request for Provisional Measures was denied.

23. On 25 November 2018, in accordance with Article R53 of the CAS Code the CAF nominated Mr Jacopo Tognon, Attorney-at-Law, Padova, Italy, as arbitrator.

24. On 4 December 2018, the CAS Court Office wrote to the Parties confirming that the Division President had decided to refer this matter to a three-member Panel in accordance with Article R50 of the CAS Code, and that a President would be appointed in due course.

25. On 17 December 2018, in accordance with Article R51 of the CAS Code, the FKF filed its Appeal Brief.

26. On 22 January 2019, in accordance with Article R54 of the CAS Code, and on behalf of the Division President, the CAS Court Office informed the Parties that the Panel appointed to this case was constituted as follows:

    President: Mr Mark Hovell, Solicitor, Manchester, United Kingdom.

    Arbitrators: Mr Emin Özkurt, Barrister, Istanbul, Turkey;

    Mr Jacopo Tognon, Attorney-at-Law, Padova, Italy.

27. On 6 March 2019, in accordance with Article R55 of the CAS Code, the CAF filed its Answer.

28. On 8 March 2019, the CAS Court Office wrote to the Parties requesting them to confirm their preference for a hearing, or whether they wished for the Panel to render an award solely on the written papers.

29. On 12 March 2019, the CAF informed the CAS Court Office that the matter did not require a hearing to be held.

30. On 15 March 2019, the FKF confirmed to the CAS Court Office that it preferred for a hearing to be held in this matter.

31. On 20 March 2019, the CAS Court Office wrote to the Parties confirming that pursuant to Article R57 of the CAS Code, the Panel had determined to hold a hearing in this matter.

32. On 7 May 2019, the CAF submitted to the CAS Court Office a signed copy of the Order of Procedure.

33. On 9 May 2019, the FKF submitted to the CAS Court Office a signed copy of the Order of Procedure.

34. A hearing was held 18 June 2019 in Lausanne, Switzerland. The Parties did not raise any objection as to the composition of the Panel. The Members of the Panel were all present and were assisted by Mr Brent Nowicki, Managing Counsel to the CAS. The following persons attended the hearing:

    i. The FKF: - Mr Robert Muthomi, CEO;
    - Mr Dev Kumar Parmar, external counsel;
    - Mr Manuel Illanes Boguszewski external counsel;
    - Mr Sergio Barrasa Anton, all external counsel.

    ii. The CAF: Mrs Joëlle Monlouis, external counsel.

35. Mr Muthomi was invited by the President of the Panel to tell the truth. The Parties and the Panel had the opportunity to examine and cross-examine Mr Muthomi. The Parties then were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. After the Parties' final, closing submissions, the hearing was closed and the Panel reserved its detailed decision to this written Award.

36. Upon closing the hearing, the Parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

IV. THE PARTIES' SUBMISSIONS

37. 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 FKF's submissions

38. In its Statement of Appeal, the FKF requested the following prayers for relief:

> *"Prayer 1: The* [Appealed Decision]*, shall be entirely set aside:*
>
> *a. Ruling number 1-4 (inclusive) of the* [Appealed Decision]*, shall be annulled.*
>
> *b. No costs of the legal proceedings shall be charged on* [the FKF].
>
> *Prayer 2: FKF shall be reinstated into the tournament in the place of Equatorial Guinea:*
>
> *a. In the alternative that the CAS panel finds that FKF shall not be reinstated in the place of Equatorial Guinea, the CAS panel is invited to apply provisional measures to ensure that the tournament takes place including Kenya as an additional participant therein, thus making 9 participants rather than 8.*
>
> *b. In the secondary alternative that the CAS panel finds that FKF shall not be reinstated in place of Equatorial Guinea, nor shall FKF take part within the tournament as the '9th team', the CAS panel is invited to apply a provisional measure to stop the tournament from commencing until the safe conclusion of a full hearing, with all principles of due process having taken place, is heard.*
>
> *Prayer 3: In any case,* [the CAF] *shall bear the costs of any proceedings undertaken before CAS, and shall contribute to the legal fees incurred by the* [FKF] *at an amount of £30,000.00 (thirty-thousand British pounds only)".*

39. In its Appeal Brief, the FKF made the following requests for relief:

> *"Prayer 1: The* [Appealed Decision]*, shall be set aside:*
>
> *a. FKF shall be reimbursed by* [the CAF] *for all financial expenses incurred in preparation for the tournament, namely in the sum of 18,089,910.00 KES (eighteen million, eighty nine thousand, nine hundred and ten Kenyan Shillings only); and*
>
> *b. FKF shall be compensated for moral damages incurred through its removal from the tournament, at no less than the sum of 18,089,910.00 KES (eighteen million, eighty nine thousand, nine hundred and ten Kenyan Shillings only), although the Panel is invited to use its discretion as to precisely how high it sees fit to apply an award for moral damages.*
>
> *Prayer 2: In any case,* [the CAF] *shall bear the costs of any proceedings undertaken before CAS, and shall contribute to the legal fees incurred by the* [FKF] *at an amount of £37,000.00 (thirty seven thousand British pounds only)".*

40. In summary, the FKF submitted the following in support of its Appeal:

1. The CAF's failure to exercise its own governance framework

41. The FKF submitted that the CAF had ruled that the FKF would be participating in AWCON 2018 when it rendered the CAF Disciplinary Board Decision. Thereafter, it let the FKF continue to prepare for the tournament by incurring significant costs, only to then overturn the CAF Disciplinary Board Decision through the Appealed Decision, a mere 7 days before the start of AWCON 2018.

42. In the interim period, the FKF had not been notified of any appeal proceedings before the CAF until it was notified of the Appealed Decision. The FKF, therefore, had no opportunity to be heard or proffer any defence.

43. Moreover, the FKF had been *"fully involved in the logistical process"* with the CAF in relation to AWCON 2018, which demonstrated that AWCON 2018 and the FKF were both of the understanding that the latter would be participating in the event.

44. The CAF failed to exercise principles of its own governance framework after the CAF Disciplinary Board Decision because it failed to:

1. Inform the FKF that Equatorial Guinea had demonstrated an intention to appeal the CAF Disciplinary Board Decision;

2. Inform the FKF that Equatorial Guinea had subsequently submitted an appeal brief;

3. Inform the FKF that its position in AWCON could be in jeopardy;

4. Inform the FKF of any compensatory procedures in place, financial or otherwise, for time and monies already spent in preparation for AWCON; and

5. Demonstrate a sensible and logical pathway for the FKF to continue its participation within AWCON despite whether Equatorial Guinea had provided satisfactory evidence in relation to the disputed player eligibility or not.

2. Costs incurred in preparation for AWCON 2018

45. The FKF submitted that during the period 17 October 2018 and 7 November 2018 (prior to notification of the Appealed Decision), the FKF held a clear and genuine belief that it would be participating in AWCON 2018. Similarly, up to 16 November 2018, the FKF had a clear and genuine belief that it was going to be reinstated to AWCON 2018 due to the misappropriate handling of the matter by the CAF.

46. During the overall period between 17 October 2018 and 16 November 2018, the FKF incurred various costs in relation to, *inter alia*, hotels and transport. In its Appeal Brief, the FKF submitted a detailed breakdown of the various expenses, which totalled KES 18,089,910.

3. Compensation for moral damages

47. The FKF submitted that it was clear that there was a wrongdoing by the CAF, which had a direct impact on the FKF.

48. The FKF submitted that the definition and basic terms surrounding moral damages were explored in CAS 2013/A/3260. The parameters for claiming moral damages are determined as follows:

    1. A party claiming moral damages has to prove the damage;

    2. A party claiming moral damages has to identify the circumstances; and

    3. A party claiming moral damages has to identify a causal relationship.

49. Further, CAS (Oceania Registry) A3, A4/99 establishes that there can only be the possibility to claim moral damages if there is culpability. Moreover, the jurisprudence in CAS 2008/A/1534 demonstrated that a breach of a financial nature can only generate an award of a financial nature, and no moral damages. The FKF submitted that this was not a matter of a financial dispute, and therefore invited the Panel to agree that moral damages should therefore not be discounted, and should be considered as valid.

50. The FKF also noted that Article 49.1 of the Swiss Code of Obligations (the "SCO") states:

    "Any person whose personality rights are unlawfully infringed is entitled to a sum of money by way of satisfaction provided this is justified by the seriousness of the infringement and no other amends have been made".

51. The FKF submitted that the above was not restricted to natural persons, and also applied to legal persons. The FKF also noted that there has been no attempts by the CAF to resolve the situation.

52. The FKF argued that there was no dispute that there was a relationship between the Parties and that there was a fundamental breach of process by the CAF, which led to the direct subsequent loss by the FKF. The FKF further argued that the AWCON 2018 was an international tournament on a global scale, so the damage to the FKF was *"self-evident"*. Moreover, the FKF was due to have representation at AWCON for the first time in AWCON 2018, so the CAF's actions led to *"an unquantifiable detrimental impact on FKF and the nation of Kenya itself"*.

53. The FKF further stated that:

    "The impact on FKF, having its team withdrawn for what would have been its first participation, in representation of one of the most populous countries on the continent of Africa, was heartbreaking for those involved, for FKF, and for the entire nation (as well as its well-wishers in friendly and/or neighbouring countries). It is submitted that AWCON 2018 will be long remembered as the tournament in which Nigeria retained its crown, but in which FKF was thrown out due to administrative errors committed by CAF".

54. The FKF submitted that while it was unconventional, given that it suffered unquantifiable losses and damage the FKF did not have any rubric or barometer for an amount to request. Therefore, the FKF invited the Panel to decide upon the appropriate amount of compensation in moral damages. Notwithstanding the above, the FKF requested that the amount awarded be no less than an equivalent amount of the reimbursement for costs also requested by the FKF in this appeal.

55. The FKF submitted that while it accepts that it bears the burden of demonstrating that there has been damage, the FKF has clearly identified the circumstances and the relationship, which directly led to damages suffered by it. Further, it has clearly demonstrated that the CAF was culpable in this instance, and was not an innocent bystander. As such, the FKF requested that the Panel conclude that as a result of the CAF's actions, the FKF suffered damage in relation to its image and reputation in an amount no less than KES 18,089,910.

56. Lastly, the FKF stated that:

> *"*[it] *comes to the esteemed panel with clean hands, as a victim of a clear wrongdoing that has been injurious upon it. FKF does not seek to unjustly enrich itself from this dispute, however it does respectfully respect that the Panel ensure that it is both reimbursed for costs, as well as suitably compensated for the impact that this entire ordeal will have had on all of those affected".*

4. The hearing

57. At the hearing, the FKF submitted that the Panel could consider the tortious breaches of the CAF, in particular that it had acted negligently towards the FKF. It owed a duty to the FKF, which it breached when it failed to notify the FKF of Equatorial Guinea's appeal to the CAF Appeal Board. The FKF cited Article 41 of the SCO in this regard.

58. Mr Muthomi was examined and confirmed that the FKF were never informed by the CAF of the appeal to the CAF Appeal Board, but also acknowledged that there was nothing in the Regulations of the CAF that obliged it to do so.

B. The CAF's Submissions

59. In its Answer, the CAF requested the following requests for relief:

> *"Prayer 1: The Appeal shall be rejected and the* [Appealed Decision] *shall be confirmed.*
>
> *Prayer 2: In any event,* [the FKF] *shall be ordered to bear the costs of the arbitration and it shall be ordered to contribute to the legal fees incurred by* [the CAF] *at an amount of CHF 22,000".*

60. In summary, the CAF submitted the following in support of its Answer:

1. The FKF does not request the Appealed Decision to be set aside

61. The CAF noted that when the FKF filed its Statement of Appeal, it intended to challenge the Appealed Decision – which is evidenced by the prayers for relief requested in the Statement of Appeal. However, *"in a 180 degrees turn"*, the FKF then changed its prayers for relief altogether in its Appeal Brief, to request reimbursement for financial expenses and an additional amount as moral damages. There was no prayer for relief in the Appeal Brief, which related to the Appealed Decision being set aside and/or why it was not improperly rendered.

62. The CAF submitted that *"this cannot work"* as the purpose of appeal proceedings is to argue that an appealed decision is incorrect. Only if that is demonstrated can a party take legal conclusions. The CAF submitted that in the present case, the FKF failed to take that required first step and that *"this is where the present proceedings should already end"*.

63. The CAF submitted that in order to claim damages, the FKF needed to prove that the Appealed Decision was incorrect and/or rendered in a fraudulent manner by the CAF Appeals Board. In the absence of any prayer for relief corresponding to that, the FKF should be barred from requesting any damages.

64. The CAF submitted that the FKF's argument that it should be granted damages due to not being informed of the pending appeal process which led to the Appealed Decision *"does not work"* because it failed to identify any provisions which were violated by the CAF and overlooked *"the existing well-established jurisprudence for such a claim for damages"*. The CAF submitted that the FKF was attempting to take an impermissible shortcut and erred in its conclusions.

65. The CAF also stated that the FKF was to blame as *"any reasonable team placed in the same situation would have made the necessary enquiries prior to taking any steps for the upcoming competition"*.

66. The CAF argued that:

> *"[a]nyone would have expected the* [FFEG] *to appeal the extremely severe sanctions imposed. Therefore, it would, of course, have been up to the* [FKF] *to keep itself duly informed about the outcome of such an extremely likely Appeal. For some reason, the* [FKF] *did not do this. However, it cannot blame* [the CAF] *for this obvious failure"*.

67. The CAF argued that to be granted damages and/or moral damages, the FKF needed to have demonstrated that it committed inexcusable mistakes, acted fraudulently or arbitrarily. Nothing of the sort was submitted or proven by the FKF.

2. The FKF's request for reimbursement of expenses and moral damages

68. In relation to the FKF's request for reimbursement of expenses and moral damages, the CAF submitted the following:

a. Reimbursement of expenses

69. The CAF argued that it was the FKF's own fault for beginning its preparation for AWCON 2018 *"without being absolutely sure whether or not it would participate in the upcoming tournament"*, which *"any reasonable and careful team"* would have done.

70. Moreover, despite claiming that it was not kept up to date with any possible or ongoing proceedings, the FKF failed to include any prayers for relief in the present Appeal which seeks to set aside the Appealed Decision. Indeed, it appears that the FKF now agrees with the Appealed Decision – or at least no longer challenges it – which proves that the present Appeal is meritless.

71. In any event, the FKF did not point to a single legal provision that would have been violated by the CAF in the context of the appeal process.

b. Request for moral damages

72. With regards to the FKF's claim for moral damages, the CAF submitted that although the FKF admitted to bearing the burden of proof, it failed to demonstrate the fulfilment of the cumulative conditions to be awarded moral damages. The FKF merely stated that the *"fundamental breach of processes that manifested itself in a wrongdoing"* by the CAF, without identifying exactly what wrongdoing was committed by the CAF. The FKF even stated that the damage was *"self-evident"* which the CAF referred to as a generic and unsubstantiated statement.

c. Legal requirements under Swiss law

i. Liability for tort

73. Under Swiss law, the relationship between a federation and its members is not considered a contract. If there is no particular contract between a federation and a (direct or indirect) member, the Swiss courts have consistently held that the rules of contractual liability will not apply if the member claims damages from the federation. Instead, only the rules on tort apply (Article 41 of the SCO). Having said that, Article 41 of the SCO reads as follows:

> *"Whoever unlawfully causes damage to another, whether wilfully or negligently, shall be liable for damages".*

74. Therefore, the following four prerequisites have to be established cumulatively in order for damages to be awarded to a Claimant: (i) a damage; (ii) an unlawful act, (iii) a causal link between the damage and the unlawful act and (iv) a fault.

75. As the CAS have already pointed out, the Swiss Federal Tribunal ("SFT") has held repeatedly that it may be considered as an unlawful act and lead to compensation only if a court proceeds in bad faith, *"which requires that the court acted in a completely arbitrarily, blatantly, unsustainably, unreasonably or abusive manner"* (CAS 95/142).

ii. Liability for moral damages

76. In what concerns the request for moral damages, the CAF submitted that Article 49 of the SCO would be the relevant legal basis and which reads as follows:

> *"Any person whose personality rights are unlawfully infringed is entitled to a sum of money by way of satisfaction provided this is justified by the seriousness of the infringement and no other amends have been made".*

77. In particular, a claimant shall demonstrate the existence of (i) a violation of its personality rights, (ii) an unlawful act, (iii) a moral damage, *"i.e. a physical or emotional pain, which must be severe and which goes beyond what can be considered as bearable for a normal person in a similar situation"*, (iv) a causal nexus between the unlawful act and the damage and (v) the damage has not been remedied otherwise (CAS 2015/A/4350).

78. Likewise, the CAS clarified that when requested by a legal entity, the moral damages are limited in scope and can only be limited to losses brought about by the damage to its image and reputation (CAS 2013/A/3260).

79. The CAF submitted that while the FKF referred to some relevant jurisprudence, it failed to fully quote its most relevant part. In that regard, the CAS Panel in CAS 2013/A/3260 expressly underlined that:

> *"the awarding of moral damages is usually an exception rather than the rule and that Swiss courts have usually adopted a modest and restrictive approach when it comes to awarding moral damages".*

80. Similarly, the CAS Panel in CAS 95/142 recalled that moral damages resulting from the infringement of one's personality are *"awarded only for grave and lasting infringements".*

iii. No right to compensation in disciplinary proceedings

81. The CAF noted that under Swiss law, in order for liability to exist it does not suffice for act or decision subsequently turns out to be wrong and/or is subsequently overturned. Liability only exists where the competent person commits inexcusable mistakes (SFT decision 132 II 449) or where grave violations of the respective duties occur (SFT decision 132 II 305).

82. Accordingly, it is also expressly mentioned in some state laws that Courts of lower instances are liable only if the previous instance has acted maliciously or fraudulently. The CAF cited Article 6 of Swiss Cantonal Law of Zurich regarding state liability, which states *"if a decision is changed by legal remedy, the state is only liable if an official of the lower instance has acted fraudulently".*

iv. Burden of proof

83. It is well established that the FKF bears the burden of proof to prove that all conditions are met in order for the CAF to be liable towards it for tort or moral damages (CAS 2008/A/1636).

84. In particular, the FKF shall substantiate what unlawful act had been committed by the CAF, establish a nexus or causal relationship between the CAF's conduct and the alleged moral damages and eventually prove that the CAF's failure was so serious that it shall be acknowledged that it acted totally arbitrarily.

d. Request for reimbursement of expenses: the FKF failed to demonstrate that the prerequisites were fulfilled

i. Absence of mention of any legal or contractual basis

85. The CAF noted that the FKF was silent about the legal basis for its financial claim for reimbursement of the expenses incurred. In other words, the FKF failed to set out how the CAF has breached a contract or the law, which would lead to possible compensation. For that reason alone, the Appeal should be dismissed.

ii. Absence of any unlawful act by the CAF

86. The CAF submitted that only the rules on tort would be potentially applicable to the request of the FKF. However, the FKF failed to analyse any of the required elements to be in a position to claim damages.

87. The CAF submitted that the FKF (i) did not argue that the Appealed Decision was factually or legally wrong, (ii) did not claim that it should have been involved in the previous instance, (iii) did not identify on what grounds its rights would have been violated; (iv) made no reference to any regulations in the CAF's regulatory framework, its practice or jurisprudence that the CAF allegedly violated; and (v) did not argue that the CAF conducted itself maliciously or arbitrarily to harm the FKF. In the absence of any unlawful act, there is no basis for compensation under Swiss law.

iii. Absence of any fault by the CAF

88. The FKF has also failed to allege and prove any negligent or wilful conduct of the CAF, which could be classified as a fault within the meaning of Article 41 of the SCO. The FKF failed to explain or identify when the CAF allegedly departed from its own standard procedure and conducted the appeal proceedings in breach of its own regulations.

iv. The damage has not been proven

89. The CAF also noted that while the FKF submitted numerous invoices of alleged payments, the FKF did not submit any proof of payment for those invoices. The CAF submitted that the FKF *"merely created a camouflage of pretended payments without showing the necessary diligence to detail and corroborate the expenses made"*.

e. Request for moral damages: the FKF failed to demonstrate that the prerequisites were fulfilled

90. The CAF submitted that the threshold for claiming moral damages under Swiss law is *"extremely high"*, and the FKF were *"far"* from reaching such a threshold.

i. Absence of any unlawful act and absence of fault by the CAF

91. Similarly to the request for reimbursement of expenses, the FKF did not prove any wrongdoing by the CAF either in the Appealed Decision or the process that was followed.

ii. Absence of any moral damage

92. Once again, the CAF noted that moral damages are limited in scope and can only be limited to losses brought about by the damage to image and reputation. The CAF submitted that the FKF failed to prove any such damage.

93. The CAF noted that the FKF claimed an amount no less than the expenses it incurred, which was unsubstantiated and insufficient under Article 42 para. 1 of the SCO. Thus, this request should also be dismissed.

3. The CAF alone lacks standing to be sued

94. Notwithstanding the above, the CAF submitted that if the FKF were alleging that the CAF rendered a decision in breach of its regulations, the FFEG should have been a party to the Appeal. Given that it was not included as a party to this Appeal, the CAF argued that the Panel is barred from making any legal assessment as to the Appealed Decision. Consequently, the Appealed Decision should be considered final and binding.

95. The consequence of the above is that the FKF could not claim any damages, because in order to do so it would have needed to prove that the Appealed Decision was factually or legally wrong.

4. The Appealed Decision is correct

96. The CAF submitted that regardless of all the above, the Appealed Decision was in any event factually correct.

97. Further, the FKF did not submit any prayer for relief requesting the Appealed Decision to be amended or set aside – due to a violation of the right to be heard or otherwise. Even if it did, the CAF noted that any alleged procedural violations of the FKF's rights would be cured in the context of the *de novo* proceedings at the CAS (CAS 2012/A/2913). However, as it did not, the question of any possible violation of the right to be heard falls outside the scope of these proceedings.

V. JURISDICTION OF THE CAS

98. 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".*

99. The FKF relied on Article 48 para. 3 of the CAF Statutes, according to which appeals against final decisions issued by the CAF's legal bodies can be lodged with the CAS. The jurisdiction of CAS was not disputed by either of the Parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by both Parties.

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

VI. APPLICABLE LAW

101. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

> *"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".*

102. The FKF submitted that the Panel should *"apply the rules of law that the panel deems appropriate".*

103. The CAF submitted that the dispute should be decided *"based on CAF regulations, FIFA regulations (in what concerns the eligibility of players) and Swiss law pursuant to Article 48 para. 2 of the CAF Statutes and Article R58 of the CAS Code".*

104. The Panel determined to apply the various regulations of the CAF, FIFA regulations (concerning the eligibility of players), and Swiss law on a subsidiary basis.

VII. ADMISSIBILITY

105. The Statement of Appeal, which was filed on 12 November 2018, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee. The Appeal Brief which was filed complied with the requirements of Article R51 of the CAS Code.

106. It follows that the Appeal is admissible.

VIII. MERITS OF THE APPEAL

A. The main issues

107. The Panel observes that the main issues to be resolved are:

1. Has FKF appealed against the Appealed Decision?

2. In either case, what are the consequences?

108. The Panel will consider each of these in turn:

1. Has FKF appealed against the Appealed Decision?

109. The Panel notes that the Prayers for Relief of the FKF changed between its Statement of Appeal and its Appeal Brief. The Panel notes that in the first instance, the FKF was seeking to be allowed to remain in AWCON 2018 either at the expense of Equatorial Guinea or as an additional team. However, once the decision of the Division President was issued, denying the FKF's provisional measures and it was clear that FKF would not able to field a team in AWCON 2018, its Prayers for Relief changed and it sought financial recompense from the CAF.

110. The CAF submitted that these new Prayers failed to request that the Appealed Decision be annulled. The Panel notes that this was not strictly the case. The revised Prayers were as follows (with emphasis in bold added by the Panel):

> *"Prayer 1:* ***The*** **[Appealed Decision]*, shall be set aside*:**
>
> *a. FKF shall be reimbursed by* [the CAF] *for all financial expenses incurred in preparation for the tournament, namely in the sum of 18,089,910.00 KES (eighteen million, eighty nine thousand, nine hundred and ten Kenyan Shillings only); and*
>
> *b. FKF shall be compensated for moral damages incurred through its removal from the tournament, at no less than the sum of 18,089,910.00 KES (eighteen million, eighty nine thousand, nine hundred and ten Kenyan Shillings only), although the Panel is invited to use its discretion as to precisely how high it sees fit to apply an award for moral damages.*
>
> *Prayer 2: In any case,* [the CAF] *shall bear the costs of any proceedings undertaken before CAS, and shall contribute to the legal fees incurred by the* [FKF] *at an amount of £37,000.00 (thirty seven thousand British pounds only)".*

111. The difficulty here was not the Prayers of Relief themselves, but the lack of any submissions in support of the request to set the Appealed Decision aside. The Appealed Decision concerns the central issue, was the player Annette Jacky Messomo (the "Player") eligible to play for Equatorial Guinea? The initial view of the CAF Disciplinary Board was that she was not – she was from Cameroon. This resulted in the CAF Disciplinary Board Decision and the expulsion

of Equatorial Guinea from AWCON 2018, with FKF taking its place. However, on appeal, the CAF Appeal Board were apparently furnished with additional information relating to the Player:

1. she held Equatoguinean nationality;

2. a Court in Equatorial Guinea had ruled that Mr Ndong Nguema Pedro, himself born in Equatorial Guinea, recognised her as his daughter; and

3. the Football Federation of Cameroon confirmed that she had never played for any representative team of Cameroon.

112. With this additional information, the CAF Appeal Board arrived at the Appealed Decision, over-turning the CAF Disciplinary Board Decision and allowing Equatorial Guinea to claim the place in AWCON 2018 it had earned on the pitch. The consequence of that was that FKF were then out of AWCON 2018. The FKF described this as a *"unilateral dismissal"* of its team, however, to the Panel, this seemed simply a reversal of the ineligibility decision, which then left the qualification to be determined by the outcome of the matches between the teams from the 2 countries.

113. The core issue of this matter is whether or not the CAF Appeal Board were correct in this finding. If the FKF could convince the Panel that it was not, through the procedure at hand, then this Panel would have the power to overturn the Appealed Decision and could then consider what consequences should flow from that. As AWCON 2018 had long finished, these may well have been financial consequences.

114. The problem faced by the Panel is that the FKF has not advanced a single argument against the findings of the CAF Appeal Board in relation to the Player. There were no submissions and/or evidence regarding her nationality, whether Mr Pedro really was her father and whether she had already played for Cameroun, or the like.

115. Ultimately, the Panel concludes that the FKF has not actually appealed against the Appealed Decision, rather it has complained about the behaviour of the CAF in failing to notify it of the appeal by Equatorial Guinea and allowing it to incur expenses in the run up to AWCON 2018, only to be removed from it with a week to go.

116. The Parties will be aware that the procedure before CAS is *de novo* (pursuant to Article R57 of the CAS Code) meaning that defects in the procedure at first instance can generally be cured by the Panel's ability to consider the entire matters at hand afresh. As such, the non-notification by the CAF (and the Panel did note the CAF's position that (a) there was no express obligation upon the CAF to notify any affected party; (b) the CAF Disciplinary Board Decision did refer to the right of Equatorial Guinea to appeal that decision, as it was not final; and (c) the FKF could easily have enquired as to whether there had been an appeal made by Equatorial Guinea within the next few days from receipt of the CAF Disciplinary Board Decision) and the subsequent inability of the FKF to address the CAF Appeal Board on the Player's situation are cured, as the FKF could make any submissions regarding the Player and bring any relevant evidence to the Panel at CAS.

117. However, the FKF has not done so. The Panel can only conclude that this is because the CAF Appeal Board has come to the correct decision regarding the Player's eligibility. Without any submissions and/or evidence to consider, the Panel determines to deny the Prayer for Relief of the FKF to set the Appealed Decision aside.

2. What are the consequences?

118. As the Panel has therefore determined to uphold the Appealed Decision, the remaining prayers of relief of the FKF, seeking financial compensation must fall away too.

119. However, the Panel has some sympathy for the position of the FKF. There seems to have been a sloppy process followed by the CAF. Parts of the organisation were actively engaging with the FKF in the run up to AWCON 2018, while another part of the CAF was administrating the CAF Appeal Board process and must have known there was a risk to FKF that it would be removed from the competition. While the evidence of losses suffered by the FKF was difficult to understand (what were invoices and what were receipts, proving payments had actually been made), it did appear that the FKF had incurred wasted expenditure, which it could not recover and may still have further bills to pay.

120. The FKF has continued with an Appeal process at the CAS, when the matter would seem more suited to the Ordinary Division. Indeed, at the hearing, there was a discussion around whether there was any tortious liability on the CAF, however, this was not advanced in time contrary to Article R56 of the CAS Code, which says that *"the parties shall not be authorized to supplement or amend their requests or their argument (…) after the submission of the appeal brief and of the answer"*. The CAF did not consent to this change of tact by the FKF, nor did the Panel see any exceptional circumstances to allow the attempt by the FKF to advance new arguments and submissions concerning Article 41 of the SCO at the hearing.

121. The Panel envisage that the dispute may continue as the CAF Statutes appear to cater for such disputes between the CAF and its member federations to go to arbitration. As such, the FKF appears to have a route to summon the CAF before another Panel, but that is not for this Appeal Panel to deal with.

122. As such, the Panel must dismiss the Appeal of the FKF entirely.

B. Conclusion

123. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel determined to:

- dismiss the Appeal by the FKF in its entirety; and

- uphold the Appealed Decision.

124. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Football Kenya Federation on 12 November 2018 against the decision rendered by the CAF Appeal Board on 7 November 2018 is dismissed.

2. The decision rendered by the CAF Appeal Board on 7 November 2018 is upheld.

3. (…).

4. (…).

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