



Arbitration CAS 2008/A/1674 Al-Hilal Al-Saudi Club v. Fédération Internationale de Football Association (FIFA), order of 12 December 2008

Panel: Mr Chris Georghiades (Cyprus), President; Mr Jirayr Habibian (Lebanon); Mr Hendrik Willem Kesler (the Netherlands)

Football

Request for a stay

Appellant's Standing to Appeal

Conditions to be fulfilled in case of a request for a stay

Irreparable harm

Balance of interests

1. In analysing the Appellant's standing to appeal, the Panel must determine whether the Appellant has shown that it has a 'sufficient interest' in the matter being appealed. Sufficient interest is a broad, flexible concept free from undesirable rigidity and includes whether the Appellant can demonstrate a sporting and financial interest. The issue of the Appellant's 'sufficient interest' has to be considered both at the preliminary stage of the proceedings and at the substantive stage. At the preliminary stage of the proceedings it is sufficient for the Appellant to show that it has *prima facie* standing to appeal.
2. In accordance with CAS jurisprudence, as a general rule, when deciding whether to stay the execution of the decision being appealed the CAS considers (a) whether the measure is useful to protect the applicant from substantial damage that would be difficult to remedy at a later stage ("irreparable harm" test), (b) whether a *prima facie* analysis of the merits of the dispute indicates that the applicant has a reasonable chance of success ("likelihood of success" test) and (c) whether the interests of the applicant as to the risk of damage to which it may be exposed outweigh the interests of the summoned party in maintaining the status quo ("balance of interests" test); these three factors are cumulative.
3. For a club to be deprived of a player mid-season may affect the club's standing in a league and ultimately affect a club's relegation prospects. The "irreparable harm" test is satisfied if the Appellant can demonstrate that the requested measure is necessary in order to protect its position from risks that would be impossible to cancel and very difficult to remedy at a later stage.
4. According to the CAS jurisprudence on the test of the balance of interests, the deterrent effect of the sanction will not be undermined if its imposition is merely postponed and not cancelled in case of postponing a playing sanction.

Al-Hilal Al-Saudi Club (the “Appellant” or the “New Club”) is a football club, based in Riyadh, Saudi Arabia, playing in the Saudi League Tournament for Premier Level Teams. It is affiliated to the Saudi Arabian Football Association.

The Fédération Internationale de Football Association (the “Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

Pursuant to the above, the Appellant is subject to and bound by the applicable rules and regulations of FIFA.

On 15 June 2004, a football player E. (the “Player”) entered into an employment contract (the “First Contract”) with a Turkish football club Gaziantepspor (the “Former Club”) valid from 1 July 2004 to 30 June 2007.

On 14 March 2006, the Player filed a claim with FIFA to release him from the First Contract for alleged non-payment of his salary.

On 17 March 2006, the Former Club filed a complaint with FIFA for an unexcused absence of the Player from 15 March 2006 and requested that he be ordered to return immediately to the Former Club. The Former Club claimed that the Player had been paid all monies due to him, a fact disputed by the Player who alleged that receipts for payments had been forged.

On 27 April 2006, FIFA’s Dispute Resolution Chamber (the “DRC”) ruled that the Former Club has respected its financial obligations towards the Player, that the Player had no just cause to terminate the First Contract and ordered the Player to return immediately to the Former Club (the “First Decision”).

By letter dated 6 June 2006, the Player appealed the First Decision to the Court of Arbitration for Sport (CAS), with the reference *CAS 2006/A/1100* (the “First Arbitration”).

On 6 July 2006, the Panel in the First Arbitration granted the Player’s request for provisional measures and stayed the execution of the First Decision pending the final award.

On 27 July 2006, the Player entered into an employment contract with the New Club (the Player remains in the employment of the New Club and his current employment contract is valid from 1 July 2008 to 1 July 2009).

On 15 November 2006, the Panel in the First Arbitration rendered its final award in which it concluded that the Player had breached the First Contract without just cause but that *“a player cannot be compelled to remain in the employment of a particular employer”*. The Panel referred the matter back to the DRC to calculate the compensation due to the Former Club and to determine any sporting

sanctions against the Player and/or the New Club under Article 17 of the FIFA Regulations for the Status and Transfer of Players (the “Regulations”).

On 30 November 2007, the DRC held the Player and the New Club jointly and severally liable to pay the Former Club US\$ 600,000 compensation “*within 30 days of notification of the present decision*” and that “*A restriction of four months on his eligibility to play in official matches is imposed on the player E. This sanction shall take effect as of notification of the present decision*” (the “Second Decision”). The parties before the DRC with respect to the Second Decision were the Former Club as the claimant party and the Player and the New Club as the respondent parties.

The DRC stated at paragraph 28 of its Second Decision that:

“In continuation, the DRC focused on the further consequences of the breach of contract in question, and in this respect, first of all decided that, in accordance with art. 17 par. 2 of the Regulations, the new club of the player, i.e. Al-Hilal, must be jointly and severally responsible for the payment of the above-mentioned amount of compensation. In this respect, the DRC was eager to point out that the joint liability of the player’s new club is independent from the question as to whether the new club has committed an inducement to contractual breach. This conclusion is in line with the well-established jurisprudence of the DRC that was repeatedly confirmed by the CAS. Notwithstanding the aforementioned, the DRC recalled that according to art. 17 par. 4 of the Regulations, it shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach”.

Furthermore, the DRC stated at paragraph 33 of its Second Decision that:

“Finally, the DRC had to analyse whether, in view of art. 17 par. 4 of the Regulations, the player’s new club Al-Hilal is to be found responsible for having induced the player to terminate his contract with Gaziantepspor without just cause during the protected period, and therefore shall be banned from registering any new players, either nationally or internationally, for two registration periods. In this respect, taking into consideration the particular circumstances of the case at stake as well as the explanations of Al-Hilal, the DRC decided that the presumption contained in the Regulations cannot be upheld, and that therefore, no sporting sanctions shall be imposed on Al-Hilal for inducement to breach of contract in accordance with art. 17 par. 4 of the Regulations. In particular, the DC pointed out that Al-Hilal had decided to acquire the player’s services only after the first decision of the DRC and, most importantly, only following the decision of the CAS accepting the player’s request for the stay of the execution of the said DRC decision”.

On 12 October 2008, the New Club filed an appeal with the CAS partially challenging the Second Decision of the DRC and named FIFA as the Respondent.

In its combined statement of appeal and appeal brief, the New Club/Appellant partially challenges the Second Decision of the DRC. The Appellant states that the compensation to the Former Club has been paid – the statement of appeal contains a copy of the bank transfer evidencing that payment was made on 10 October 2008 – and submits that it is not disputing the length of the suspension. However, the Appellant is disputing when the suspension shall take effect.

The Appellant submits that although the Second Decision is dated 30 November 2007, it was only notified to them on 29 September 2008. The Appellant further submits that the season in Saudi

Arabia commenced on 13 September 2008 and accordingly, any sporting sanction should take effect from the beginning of the 2009 season.

The Appellant requests the CAS *“To withhold and freeze the execution of article (6) of the DCR decision which stated that «A restriction of four months on his eligibility to play in official matches is imposed on the player E. This sanction shall take effect as of the notification of the present decision» till final award on the present appeal is issued”*.

By letter dated 24 October 2008 and within the time limit granted, the Respondent filed its ‘Answer to the request for stay of execution’.

The Respondent requests that the CAS reject the Appellant’s application to stay the execution of the Second Decision for formal reasons (lack of standing to be sued) or, in the alternative, for substantive reasons. After setting forth the factual background, the Respondent turned to its arguments for rejecting the Appellant’s application.

The Respondent requests that the CAS reject the Appellant’s application to stay the execution of the Second Decision for substantive reasons by concluding that

- the Appellant’s likelihood of success on the merits is *“absolutely inexistent”*,
- should the Appellant ultimately be successful in its appeal, it would be entitled to claim damages and thus the Appellant would not suffer irreparable harm should its request for provisional measures be denied, and
- *“the interests of FIFA in the immediate application of the suspension on the player’s eligibility outweigh the interests of the Appellant to stay the execution of the decision in question”*.

By letter dated 26 October 2008, the Appellant responded to FIFA’s ‘Answer to the request for stay of execution’. As this letter was unsolicited and in light of FIFA’s objection to its admission, it is for the President of the Panel to decide whether the letter is admissible.

The President of the Panel notes that in its ‘Answer to the request for stay of execution’ the Respondent claims *inter alia* that the Appellant lacks standing to appeal. The President of the Panel further considers that the Respondent is not prejudiced by the introduction of the additional correspondence, *i.e.*, its introduction did not cause any delay to the proceedings as it was filed before the Panel was formed. In order to afford the Appellant an opportunity to respond to the claims raised by the Respondent, taking into consideration in full the objections of the Respondent and in light of all the circumstances, the President of the Panel deems the Appellant’s letter dated 26 October 2008 admissible.

In relation to the Respondent’s argument that the Appellant does not have standing to appeal, the Appellant submits in its letter dated 26 October 2008 that it was the second respondent party before the DRC and accordingly, *“the rights of the Appellant to have recourse to the Appeal before the CAS is a guaranteed right by law, and by virtue of the applicable regulations before CAS namely article R47 of the Code...”*.

The Appellant concludes that it is directly affected by the Second Decision and accordingly, has standing to appeal it.

Turning to the substance of its application for provisional measures, the Appellant reiterates that it is not challenging the Second Decision but rather challenges the “*wrongful*” application of Article 17.3 of the Regulations. The Appellant submits that FIFA is inconsistent in its application of Article 17(3):

“If art. 17 par 3 is binding on FIFA as to the imposing of the Sanction then the same approach and Syllogism should be applied to the starting point of the sanction. Noting that the language and the wording of the said article is very clear and leave no room for interpretation”.

The Appellant concludes by reiterating its request that a stay be granted.

In its letter dated 30 October 2008, the Respondent objects to the admission of the Appellant’s letter but submits that should the Appellant’s letter be admitted, it relies on the arguments raised in its ‘Answer to the request for stay of execution’.

LAW

CAS Jurisdiction

1. Article R47 of the Code of Sports-related Arbitration (the “Code”) provides that:
“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as 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”.
2. The jurisdiction of the CAS, which is not disputed by either party, derives from Article R47 of the Code and from the FIFA Statutes, as referred to at paragraph III.8 of the Second Decision of the DRC which specifies that *“According to art. 61 par. 1 of the FIFA Statutes this decision may be appealed before the Court of Arbitration for Sport (CAS)”.*
3. It follows that, in principle, the CAS has jurisdiction to decide the present dispute.

Applicable Law

4. According to Article R58 of the Code, the Panel shall decide the dispute:
“according to the applicable regulations and 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”.

5. Article 62 paragraph 2 of the FIFA Statutes (May 2008 edition) reads as follows:
“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”.
6. In the present matter, the parties submit that the rules and regulations of FIFA apply. Accordingly, the Panel shall apply primarily the various regulations of FIFA and, additionally, Swiss law.

Admissibility

7. Paragraph III.8 of the Second Decision provides that *“The statement of appeal must be sent to the CAS within 21 days of receiving notification of this decision...”*.
8. Although the Second Decision is dated 30 November 2007, the Appellant states that it was only received by them on 29 September 2008. The Respondent neither disputes this fact nor offers any explanation for the delay in notification. The appeal was filed on 13 October 2008 and therefore within 21 days of the Appellant receiving notification of the Second Decision.
9. Accordingly, the Appellant’s appeal was filed in due time and is admissible.

Legal Discussion

A. The Appellant’s Standing to Appeal the Second Decision of the DRC

10. In its ‘Answer to the request for stay of execution’, the Respondent alleges that the Appellant *“... is the wrong plaintiff and has no active legal standing to appeal the sporting sanction in question and to submit any question related thereto to the CAS”*. The Respondent further alleges that in the present case *“only the player is directly affected by the sanction imposed on him. The club Al-Hilal, however, is affected by the sanction for the breach of contract only indirectly”*.
11. In analysing the Appellant’s standing to appeal, the Panel must determine whether the Appellant has shown that it has a ‘sufficient interest’ in the matter being appealed. Sufficient interest is a broad, flexible concept free from undesirable rigidity and includes whether the Appellant can demonstrate a sporting and financial interest.
12. The issue of the Appellant’s ‘sufficient interest’ will be considered both at this stage of the proceedings and at the substantive stage. At this stage of the proceedings it is sufficient for the Appellant to show that it has *prima facie* standing to appeal.
13. The Panel takes note of the decision in *CAS 2005/A/895* where, in discussing the criteria necessary to fulfil the ‘legitimate interest’ requirement of the Fédération Equestre Internationale’s General Regulations (for a party to establish standing to appeal), the Panel

stated that it “considers that the FEI rule’s requirement of “legitimate interest” is satisfied if it can be stated that the appellant (i) is sufficiently affected by the appealed decision and (ii) has a tangible interest, of financial or sporting nature, at stake”.

14. The Panel notes that the Appellant was a party to the proceedings before the DRC, which found the Appellant jointly and severally liable for the payment of the compensation adjudicated. The DRC also imposed a four-month playing ban on the Player, thereby leaving the Appellant without the services of “a key player to the team”.
15. The Panel considers that the Appellant is directly affected by the Second Decision of the DRC. As a result of the Second Decision, the Appellant is deprived of the Player’s services throughout his suspension, which has a direct impact on the Appellant’s team. The Appellant also paid a substantial sum to retain the Player and continues to pay the Player’s salary, despite the fact that the Player is presently unable to play. Furthermore, the Appellant was found jointly and severally liable to pay the compensation awarded by the DRC.
16. In light of the above and taking into account all the arguments put forward by the parties, the Panel is of the view that the Appellant has a financial and sporting interest in this matter and accordingly has sufficient interest to appeal the Second Decision to the CAS.

B. *The Appellant’s Application for Provisional and Conservatory Measures*

17. The Appellant requests the CAS “To withhold and freeze the execution of article (6) of the DCR decision which stated that «A restriction of four months on his eligibility to play in official matches is imposed on the player E. This sanction shall take effect as of the notification of the present decision» till final award on the present appeal is issued”.
18. In accordance with CAS jurisprudence, as a general rule, when deciding whether to stay the execution of the decision being appealed the CAS considers:
 - (a) Whether the measure is useful to protect the applicant from substantial damage that would be difficult to remedy at a later stage (“irreparable harm” test): “The Appellant must demonstrate that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage” (CAS 2007/A/1370-1376, CAS 2008/A/1630).
 - (b) Whether a *prima facie* analysis of the merits of the dispute indicates that the applicant has a reasonable chance of success (“likelihood of success” test): “The Appellant must make at least a plausible case that the facts relied upon by him and the rights which he seeks to enforce exist and that the material criteria for a cause of action are fulfilled” (CAS 2008/A/1453, CAS 2008/A/1630).
 - (c) Whether the interests of the applicant as to the risk of damage to which it may be exposed outweigh the interests of the summoned party in maintaining the *status quo* (“balance of interests” test): “It is then necessary to compare the disadvantage to the Appellant of

immediate execution of the decision with the disadvantages for the Respondent in being deprived such execution” (CAS 2008/A/1453, CAS 2008/A/1630).

19. In accordance with CAS jurisprudence, these three factors are cumulative (see *CAS 98/200* and *CAS 2007/A/1397*).

C. Irreparable harm

20. The Appellant submits that *“the club is now suffering damages that jeopardizes its investments as well as its standing in the different championships it participates in due to a situation it did not create nor instigate nor been advised of”*. The Panel notes that for a club to be deprived of a player mid-season may affect the club’s standing in a league and ultimately affect a club’s relegation prospects. The Panel is of the opinion that if it were to refuse to grant the measure requested and subsequently rule in favour of the Appellant, it would be very difficult for the Appellant, at that later stage, to remedy the damage caused by the absence of the Player. Accordingly, the Panel is satisfied that the Appellant can demonstrate that the requested measure is necessary in order to protect its position from risks that would be impossible to cancel and very difficult to remedy at a later stage.
21. The Panel notes that in the case cited by the Respondent, *TAS 2005/A/916*, although the request for provisional measures was initially refused by the President of the Appeals Arbitration Division, it was subsequently granted by the Panel on the basis of new facts submitted. (See *TAS 2005/A/916*, Order dated 23 August 2005.)

D. Likelihood of success

22. The Appellant’s case turns on a strict interpretation of Article 17(3) of the Regulations which provides in pertinent part that *“In all cases, these sporting sanctions shall take effect from the start of the following Season of the New Club”*. The Appellant submits that as the Second Decision was notified to them on 29 September 2008 – after the commencement of the 2008 season in Saudi Arabia on 13 September 2008 – any sporting sanction should take effect from the beginning of the 2009 season.
23. The Panel notes that although the Second Decision is dated 30 November 2007, it was only notified to the Appellant on 29 September 2008. The Panel further notes that the Respondent neither disputes this fact nor offers any explanation for the delay in notification.
24. The Respondent submits that *“the DRC has established a constant and continuous jurisdiction pertaining to the beginning of the suspension imposed on a player, which is based on the approach to consider the cited wording of the mentioned provision as a mere guideline which is not strictly binding, but which gives the DRC also the possibility to decide on another starting point for a player’s sanction, if necessary and more appropriate”* and cites the award in *CAS 2008/A/1448* (*cf. par. 7.4.7. et seq.*) in support of its argument. However, the Panel notes that the decision in *CAS 2008/A/1448* deals with

whether a breach has been committed and what sanctions should be imposed but does not deal with when the sanction should come into effect.

25. As mentioned above, the Panel must consider on a *prima facie* assessment of the merits of the case, whether the Appellant has a reasonable chance of success. The Panel is satisfied that based on such an analysis, the Appellant has made a plausible case that the facts relied upon by it and the rights which it seeks to enforce exist and that the material criteria for a cause of action are fulfilled.

E. Balance of interests

26. Turning finally to the balance of convenience or interests, the Respondent submits that the principle of the maintenance of contractual stability is a crucial pillar of the FIFA Regulations and that *“it is of particular importance that the effects of a sanction imposed on a player for unjustified breach of contract are not postponed, in order that the world of football unmistakably recognizes the relation between the player’s illicit behaviour and the sanction related thereto. Therefore, the immediate application of the sanction at stake would cause a desirable effect and constitute a strong signal for the public with regard to the determination of the competent authorities to safeguard and protect the enforcement of the principle of the maintenance of contractual stability”*.
27. The Panel refers to CAS jurisprudence on the issue of postponing a playing sanction and endorses the findings of a previous Panel which held that *“the deterrent effect of the sanction will not be undermined if its imposition is merely postponed and not cancelled”* (see *CAS 2004/A/780* at par. 5.12; see also *CAS 2003/O/482* where the Panel stated at par. 8.6: *“Nor can the Panel see why the deterrent effect of the sanction is undermined if its imposition is merely postponed (but not cancelled)”*).

F. Conclusion on the Appellant’s Application for Provisional and Conservatory Measures

28. In view of the above, the application for a stay of Article 6 (paragraph III.6) of the DCR Second Decision is to be allowed, pending the final award in this matter.

Miscellaneous

29. This decision is a procedural order, not an award. As a result, it may not be challenged in court pursuant to Article 190 Swiss Private International Law Act.

The Court of Arbitration for Sport rules:

1. The application for provisional and conservatory measures filed by Al-Hilal Al-Saudi Club on 13 October 2008 in the matter *CAS 2008/A/1674 Al-Hilal Al-Saudi Club v. FIFA* is granted.

(...)