Arbitration CAS 2017/A/5019 Abdul Aziz Yusif v. Ismaily SC, award of 12 June 2018

Panel: Mr Manfred Nan (The Netherlands), Sole Arbitrator

Football
Breach of employment contract
Timely filing of the appeal brief under Article R51 CAS Code
Notification of decisions under Article 19(2) FIFA Rules Governing the Procedures of the PSC and the DRC
Statute of limitation under Article 25(5) FIFA Regulations on the Status and Transfer of Players
Essentialia negotii for employment contracts
Standing to be sued
FIFA as necessary respondent to sporting sanctions appeals

1. **Pursuant to Article R51 of the CAS Code, according to which the appeal brief has to be filed *"within ten days following the expiry of the time limit for the appeal"*, it is the date of the expiry of the time limit to file the statement of appeal, not the date of the actual filing of the statement of appeal that is decisive for the timely filing of the appeal brief.**

2. **With regards to decisions intended for the parties to a dispute, in particular clubs, Article 19(2) of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (Procedural Rules) determines that in the absence of direct contact details, the decision is addressed to the association concerned with the instruction to immediately forward the decision to the pertinent party. Article 19(2) FIFA Procedural Rules further sets out the legal fiction pursuant to which decisions are considered to have been communicated properly to the ultimate addressee four days after communication of the decision to the association. In case *e.g.* notification of a decision to a player is not made via the player's federation, but via his football club, in the absence of evidence of exact timing of notification, the legal fiction set out in Article 19(2) FIFA Procedural Rules may be applied by analogy.**

3. **While the wording of Article 25(5) of the FIFA Regulations on the Status and Transfer of Players is not entirely clear in the sense that it states that the matter shall not be "heard" if more than two years have elapsed since the event giving rise to the dispute, it clearly follows from the FIFA Commentary that the relevant moment in time to determine the two year window is not the moment when the FIFA DRC actually convenes in order to take a decision, but the moment of filing the claim with FIFA.**

4. **For an employment contract to be considered valid and binding, it should contain the *essentialia negotii* of an employment contract, that is, the parties to the contract and their role, the duration of the employment relationship, the remuneration and the signature of both parties.**

5. In the context of standing to be sued the question is whether, in view of an appellant's prayers for relief, the appellant has named the right respondent. A party has standing to be sued if it is personally obliged by the "disputed right" at stake or has a *de facto* interest in the outcome of an appeal.

6. 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 with the decisions rendered by FIFA's decision-making bodies and/or by CAS. 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 other words, appeals against sporting sanctions must be directed against FIFA as the party having standing to be sued.

I. PARTIES

1. Mr Abdul Aziz Yusif (the "Appellant" or the "Player") is a professional football player of Ghanaian nationality.

2. Ismaily SC (the "First Respondent" or "Ismaily") is a football club with its registered office in Ismaïlia, Egypt. Ismaily is registered with the Egyptian Football Association ("EFA"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeal arbitration proceedings. This background is set out for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be referred to, where relevant, in connection with the legal discussion.

A. Background Facts

4. On 31 December 2012, the Player and the Ghanaian football club Asante Kotoko entered into an employment contract for a period of three years, valid as from the date of signing until 30 December 2015.

5. On 17 July 2014, Ismaily presented a written offer to Asante Kotoko to acquire the services of the Player for an amount of USD 100,000 as well as *"20% from the next transfer"*, which offer was accepted by Asante Kotoko on the same day.

6. Also on 17 July 2014, the Player signed a document named *"Formal Offer for: Abdul Aziz Yusif"* (the "Formal Offer") sent to him by Ismaily, pursuant to which the Player was offered an employment contract for a period of five years for a total remuneration of USD 570,000.

7. On 20 July 2014, Ismaily informed Asante Kotoko that it would pay the amount of USD 100,000 *"once the player passes the medical test scheduled once he reaches Egypt as we are preparing his papers to enter the country nowadays"*.

8. On 1 August 2014, Asante Kotoko informed the Egyptian football club Smouha SC ("Smouha") that its management had accepted *"the offer of ABDUL AZIZ YUSIF for a transfer fee of USD 100,000 (one hundred thousand dollars) and 20% as onward transfer"*.

9. On 2 August 2014, Ismaily informed Asante Kotoko that the Player had received the visa to enter Egypt, confirming its interest in the Player and stating that *"the money transfer once the player passes his medical check"*.

10. On 11 August 2014, Smouha paid the transfer fee of USD 100,000 to Asante Kotoko.

11. On an unknown date, Smouha and the Player concluded an employment contract for a period of three years for a total remuneration of USD 973,230.

B. Proceedings before the Dispute Resolution Chamber of FIFA

12. On 28 July 2015, Ismaily lodged a claim against the Player for breach of contract with the FIFA Dispute Resolution Chamber (the "FIFA DRC"). Ismaily also called Smouha and Asante Kotoko as respondents, arguing that they induced the Player to breach his employment contract with Ismaily. Ismaily claimed an amount of USD 615,000 (USD 570,000 corresponding to the value of the Formal Offer and USD 45,000 for the specificity of sport) from the Player and requested that Smouha and Asante Kotoko were to be held jointly and severally liable. Finally, Ismaily requested the FIFA DRC to impose sporting sanctions on the Player, Smouha and Asante Kotoko.

13. The Player, Smouha and Asante Kotoko replied to Ismaily's claim arguing that its arguments were unjustified and that the claim had to be rejected.

14. On 13 October 2016, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

> "1. *The claim of* [Ismaily] *against* [the Player] and [Smouha] *is partially accepted.*
>
> 2. *The claim of* [Ismaily] *against* [Asante Kotoko] *is rejected.*
>
> 3. [The Player] *is ordered to pay to* [Ismaily] *within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of USD 615,000 plus 5% interest p.a. on said amount as from 28 July 2015 until the date of effective payment.*

4. [Smouha] *is jointly and severally liable for the payment of the aforementioned compensation.*

5. *In the event that the aforementioned amount is not paid within the above-mentioned time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

6. [Ismaily] *is directed to inform* [the Player] *and* [Smouha] *immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*

7. *A restriction of four months on his eligibility to play in official matches is imposed on* [the Player]. *This sanction applies with immediate effect as of the date of notification of the present decision. The sporting sanction shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs.*

8. *Any further claim lodged by* [Ismaily] *is rejected".*

15. On 10 January 2017, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

➢ As to whether the Formal Offer established a final and binding employment contract between Ismaily and the Player, the FIFA DRC "[…] *recalled its well-established jurisprudence which dictates that in order for an employment contract to be considered as valid and binding, apart from the signature of both the employer and the employee, it should contain the essentialia negotii of an employment contract, such as the parties to the contract and their role, the duration of the employment relationship, the remuneration and the signature of both parties.*

➢ *With the above in mind, the Chamber acknowledged that the Formal Offer consisted of a document dated 17 July 2014, drafted on* [Ismaily's] *headed paper, signed by* [the Player] *and stamped by* [Ismaily]. *According to such document, the parties established that the contract period would last five years and that* [the Player] *would be entitled to receive a total salary of USD 570,000. Moreover, the Chamber wished to underline that, from the contents of the Formal Offer, it is evident that the agreement of the parties related to the rendering of* [Player's] *services as a football player against the payment of a salary by* [Ismaily].

➢ *Consequently, the Chamber continued that all the essentialia negotii are included in the Formal Offer, in order to be considered as a valid employment contract concluded between* [Ismaily] *and* [the Player].

➢ *Furthermore, and as to the argument of the Respondents that the Formal Offer was not a valid contract as it was not registered either at the* [EFA] *and/or on TMS, the Chamber wished to emphasize that, as a general rule, the registration of an employment contract at a federation and/or on TMS does not constitute a condition for its validity. In this regard, the Chamber considered relevant to recall its jurisprudence in accordance with which the validity of an employment contract cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure in connection with the international transfer of a player, which are of the sole responsibility of a club and on which a player has no influence".*

- As to the question of the alleged breach of contract without just cause by the Player, *"*[…] *the Chamber was eager to highlight that based on the parties' respective statements and the documentation available on file, it was undisputed that* [the Player] *never joined* [Ismaily] *in order to offer his services to the latter in accordance with the relevant employment contract. Also, it is undisputed that, in August 2015,* [the Player] *signed an employment contract with* [Smouha] *covering partially the same period of time as the employment contract the* [Player] *signed with* [Ismaily]. *By acting as such, the Chamber concurred that* [the Player] *had acted in breach of the employment contract concluded with* [Ismaily] *and is therefore to be held liable for breaching the contract without just cause".*

- After having established that the Player's breach took place within the "protected period as defined in item 7 of the "Definitions" section of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), the FIFA DRC turned its attention to the question of the consequences of such breach.

- *"In doing so, the Dispute Resolution Chamber established that, in accordance with art. 17 par. 1 of the Regulations,* [the Player] *is liable to pay compensation to* [Ismaily]. *Furthermore, in accordance with the unambiguous contents of article 17 par. 2 of the Regulations, the Chamber established that* [the Player's] *new club, i.e.* [Smouha]*, shall be jointly and severally liable for the payment of compensation. In this respect, the Chamber 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 induced the contractual breach. This conclusion is in line with the well-established jurisprudence of the Chamber and has been repeatedly confirmed by the CAS. Notwithstanding the aforementioned, the Chamber recalled that according to art. 17 par. 4 sent. 2 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. In any event, the Chamber determined that it would attend to the question of the possible inducement to breach of contract by* [Smouha] *at a later stage of its deliberations, i.e. after having discussed the issue of the compensation due to* [Ismaily]*".*

- As to the compensation for breach of contract to be paid, *"*[…] *the DRC established, on the one hand, that the total value of the* [Player's] *employment agreement with* [Ismaily] *for the remaining contractual period amounted to USD 570,000. On the other hand, the members of the Chamber established that should* [the Player] *have stayed with* [Smouha] *until the end of the contract concluded with* [Ismaily]*, i.e. for five years, he would have been entitled to receive an amount equivalent to USD 1,622,050.*

- *Subsequently, the members of the DRC noted that* [Ismaily] *is requesting the amount of USD 615,000 as compensation for breach of contract.*

- *Consequently, on account of the above-mentioned considerations, the Chamber decided that* [the Player] *must pay the amount of USD 615,000 to* [Ismaily] *as compensation for breach of contract, which is considered by the Chamber to be a reasonable and fair amount. Furthermore,* [Smouha] *is jointly and severally liable for the payment of the relevant compensation* […].

- *In addition and with regard to* [Ismaily's] *request for interest, the Chamber decided that* [Ismaily] *is entitled to 5% interest p.a. on said amount as of 28 July 2015 until the date of effective payment".*

- As to whether sporting sanctions were to be imposed on any of the respondents, and with reference to Article 17(3) FIFA RSTP, *"*[…] *the Dispute Resolution Chamber recalled that the breach of contract by* [the Player] *had occurred during the applicable protected period. Consequently, the Chamber decided that, by virtue of art. 17 par. 3 of the Regulations,* [the Player] *had to be sanctioned with a restriction of four months on his eligibility to participate in official matches.*
- *In continuation, the Chamber focused on the issue of inducement by* [Smouha] *and held that, considering the small time frame between the signature of the Formal Offer by* [the Player] *and the signature of the contract between* [the Player] *and* [Smouha] *as well as the fact that the Formal Offer was never executed, it could not be reasonably expected from* [Smouha] *to have been aware that* [the Player] *had signed another contract, i.e. the Formal Offer, covering the same period. In view of the above, the Chamber decided that the issue of inducement as regard* [Smouha] *is not to be further considered.*
- *Furthermore, as to* [Ismaily's] *claim with respect to* [Asante Kotoko]*, the Chamber was eager to recall that, in accordance with art. 17 par. 2 of the Regulations, if a professional is required to pay compensation, is the new club to be held jointly and severally liable for such payment. Moreover, the Chamber also recalled that, according to art. 17 par. 4 sent. 2 of the Regulations, it is the new club to be presumed, unless established to the contrary, to be held liable for the inducement to the breach of contract. On account of the above, the Chamber considered that* [Asante Kotoko]*, being the* [Player's] *former club, cannot be held liable for the breach of contract by* [the Player] *for lack of regulatory basis. Consequently, the DRC decided to reject* [Ismaily's] *claim with respect to* [Asante Kotoko]*".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 31 January 2017, the Player lodged a Statement of Appeal with the Court of Arbitration for Sport ("CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (the "CAS Code"), challenging the Appealed Decision.

17. On 10 February 2017, the Player filed his Appeal Brief in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments giving rise to the appeal. The Player submitted the following requests for relief:

> *"1. To set aside the the* [sic] *sanction of the payment of compensation to the tune of USD 615,000 imposed on my client to be paid jointly and severally with Smouha SC plus 5% interest calculated from 28th july, 2015.*
>
> *2. To set aside the imposition of sporting sanctions of a restriction from playing official matches for four months.*
>
> *3. To stay the execution of the sporting sanction during the pendency of this appeal in other not to render it nugatory in the event that this appeal succeeds".*

18. On 8 March 2017, the CAS Court Office informed the parties that another appeal had been filed against the Appealed Decision by Smouha. The parties were therefore requested to indicate

whether they would agree to consolidate the present procedure with CAS 2017/A/4977 Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & FIFA.

19. On 13 March 2017, FIFA renounced its right to request its possible intervention in the present arbitration pursuant to Article R41.3 of the CAS Code. FIFA nonetheless indicated that because the Player had not designated FIFA as a respondent, whereas one of its main contentions is related to an alleged lack of competence of the FIFA DRC, any question related to the competence may not be taken into consideration by CAS. In respect of the sporting sanctions imposed on the Player, FIFA maintains that only FIFA has standing to defend the point of the imposition of sporting sanctions in a litigation. The question of the imposition of sporting sanctions, including the Player's request for provisional measures, is outside the scope of the Panel's power of review.

20. Also on 13 March 2017, Ismaily objected to the admissibility of the Player's appeal and to the consolidation of the proceedings with CAS 2017/A/4977 Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & FIFA because the Statement of Appeal was allegedly filed late and because the CAS Court Office fee was allegedly paid late.

21. On 21 March 2017, the Player responded to Ismaily's objection to the admissibility of the appeal, requesting the appeal to be declared admissible.

22. On 21 March 2017, the CAS Court Office informed the parties that in light of Ismaily's objection, and in accordance with Article R52 para. 4 of the CAS Code, the issue of the consolidation would be submitted to the President of the CAS Appeals Arbitration Division.

23. On 25 April 2017, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the parties that: *"Counsel for the Appellant took the necessary steps to pay the CAS Court Office fee within the time limit imposed by Article R49 of the [CAS Code]. Unfortunately, Counsel for the Appellant's first attempt to transfer the money was denied as he mentioned the wrong beneficiary, i.e. CAS instead of ICAS. In his second attempt, a mistake has been made in the CAS account number and was again rejected. Finally, the bank transfer was properly made and the CAS Court Office duly received the amount of CHF 1,000 on its bank account. Although some mistakes were made, the Division President does not consider that Counsel for the Appellant acted in bad faith in this matter"*. The Division President also indicated that the originals of the Statement of Appeal, *prima facie*, were filed on time. The Division President therefore considered, *prima facie*, that he was not in a position to declare the appeal inadmissible at such stage of the proceedings, but that this was without prejudice to any other decision that the Panel could take in this respect, once constituted.

24. On 21 June 2017, the Player requested a sole arbitrator to be appointed in order to reduce the costs of the proceedings.

25. On 22 June 2017, Ismaily objected to the appointment of a sole arbitrator.

26. Also on 22 June 2017, the CAS Court Office informed the parties that, in accordance with Article R50 para. 1 of the CAS Code, the President of the Division would decide whether or not to submit the appeal to a sole arbitrator.

27. On 4 July 2017, the CAS Court Office informed the parties that, in view of the similarities between this case and CAS 2017/A/4977 Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & FIFA and the precarious financial situation of the Player, the Division President had decided to refer this case to a sole arbitrator, who would also act as President in CAS 2017/A/4977 Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & FIFA.

28. On 25 August 2017, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

   - Mr Manfred Nan, Attorney-at-Law in Arnhem, the Netherlands

29. On 14 September 2017, Ismaily filed its Answer, pursuant to Article R55 of the CAS Code. In this submission, Ismaily argued that the Player's Appeal Brief was filed late. Ismaily submitted the following request for relief:

   "a) Entirely reject the Appeal filed by the Appellant Mr. Abdul Aziz Yusif.

   b) Confirm the decision rendered on the 13th of October 2016 by the FIFA DRC.

   c) Condemn the Appellant to the payment of the whole CAS administration costs and Panel fees;

   d) Fix a sum to be paid by the Appellant to Ismaily in order to cover its defence fees and costs in the amount of CHF 25,000".

30. On 23 October 2017, the Player and Ismaily returned duly signed copies of the Order of Procedure to the CAS Court Office.

31. On 7 November 2017, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.

32. In addition to the Sole Arbitrator, Ms Delphine Deschenaux-Rochat, Counsel to the CAS, and Mr Dennis Koolaard, Ad hoc Clerk, the following persons attended the hearing:

   For the Player

   - Mr Aziz Abdul, the Player;
   - Mr Alhassan-Abu Jones Abdul-Fataahu, Counsel

   For Ismaily:

   - Mr Juan de Dios Crespo Pérez, Counsel;
   - Mr Enric Ripoll González, Counsel;
   - Mr Nasr Eldin Azzam, Counsel

33. Save for the Player, no witnesses or expert witnesses were heard. Both parties and the Sole Arbitrator had the opportunity to examine and cross-examine the Player in person.

34. The parties were afforded full opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

35. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

36. The Sole Arbitrator confirms that he carefully heard and took into account in his decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

37. The Player's submissions, in essence, may be summarised as follows:

- The FIFA DRC lacked jurisdiction because the two year statute of limitation was violated. The event giving rise to the dispute was the signing of the Formal Offer by the Player on 17 July 2014. Since the dispute was only heard by the FIFA DRC in October 2016, Article 25(5) FIFA RSTP was violated. The Appealed Decision is therefore to be set aside.

- In order for an employment contract to be considered valid and binding, it must contain the *essentialia negotii*. Among such mandatory requirements is the signature of both parties. However, the Formal Offer was only signed by the Player, while Ismaily merely embossed its stamp. Nowhere is a stamp supposed to substitute for a party's signature in an employment contract, else the rules would have provided for that rather than insist on signatures as is the settled jurisprudence on the issue. The Formal Offer also does not contain a period with start and end dates and does not specify the role of the parties, whom pays whom and what the obligations of the parties are. The Formal Offer can therefore not be considered as a final and binding employment contract.

- Ismaily did not make the payment of the transfer fee it had itself proposed to Asante Kotoko. This payment was conditional upon the Player passing a medical examination upon arrival in Egypt. Ismaily however merely arranged a visa for the Player, but no flight ticket. One wonders how Ismaily expected the Player to get to Egypt to do the medical. A good two weeks after procuring the signature of the Player, Ismaily had neither paid the transfer fee, nor sent the Player a ticket to fly to Egypt to complete registration formalities. Ismaily had also not requested for an ITC from the Ghana FA. All these circumstances are indicative of a lack of desire to bring the transfer to a closure, which explains why Asante Kotoko accepted the proposal from Smouha on 1 August 2014. Finally, for a whole year, while the Player was registered for and played

for another club in the same league, Ismaily never took the necessary step of reporting the matter to the EFA for redress.

38. Ismaily's submissions, in essence, may be summarised as follows:

- Contrary to the Player's contention, the FIFA DRC heard from the dispute for the first time on 5 March 2015, *i.e.* the date that Ismaily lodged its claim. This was only 7 months after the termination without just cause of the contract. The fact that the FIFA DRC did not hold a meeting to decide the case until 13 October 2016 cannot be used as an excuse to deny justice to Ismaily. With reference to CAS jurisprudence it is submitted that the word "hear" in Article 25(5) FIFA RSTP clearly refers to the moment when the matter is lodged before the competent body. The claim was thus timely submitted.

- The Formal Offer is a binding employment contract as all the *essentialia negotii* are present. Ismaily refers to jurisprudence of CAS and the FIFA DRC in this respect. Contrary to the argument of the Player, the FIFA DRC has held that a formal offer, sent by a football club with its official letterhead and stamp, and signed by a player is valid and binding. The duration of the employment relationship is also clearly set out in the Formal Offer. It is clear that the Formal Offer is related to the rendering of the player's services as a football player, against the payment of a salary by that club. This undoubtedly refers to a football employment contract between a football player and a football club.

- It is not true that Ismaily was not interested in the Player. Quite the opposite, as soon as Asante Kotoko accepted its offer, it immediately prepared the Player's visa in order to enter Egypt and join the Club. Nowhere in the Formal Offer was it established that Ismaily was obliged to provide flight tickets to the Player. Actually, a USD 20,000 sign-on fee was agreed. The Player therefore could have afforded the arrangement of his flight. In any event, the Player finally ended up travelling to Egypt, while it is not clear whether Smouha purchased the Player's ticket. In any event, the Player received his visa on 31 July 2014, *i.e.* 14 days after the *"related release procedure started"*. This has to be considered a short time, considering the difficulties in Egypt following the coup d'état suffered in 2013 and the constitutional referendum in 2014. All this clearly reveals the serious interest of Ismaily to welcome the Player.

- By not honouring his contract, by not appearing at Ismaily's premises and by signing another employment agreement, the Player breached his employment contract without just cause. Indeed, pursuant to Article 18(5) FIFA RSTP, *"[i]f a professional enters into more than one contract covering the same period, the provisions set forth in Chapter IV shall apply"*.

- As to the non-payment of the transfer fee to Asante Kotoko, it was agreed to proceed with the payment only once the Player had passed his medical test. Since the Player did not enter Egypt, Ismaily did not proceed with the payment and other formalities.

For the avoidance of doubt, different from an employment contract, a transfer agreement may be made subject to the successful passing of a medical examination.

V. JURISDICTION

39. The jurisdiction of CAS, which is not disputed, derives from Article 58(1) of the FIFA Statutes (2016 edition) as it determines that *"*[a]*ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

40. The jurisdiction of CAS is further confirmed by the parties by means of their signatures on the Order of Procedure.

41. It follows that CAS has jurisdiction to adjudicate on and decide the present dispute.

VI. ADMISSIBILITY

42. Ismaily objects to the admissibility of the Player's appeal.

43. Although Ismaily initially objected to the admissibility of the Player's appeal on the ground that his Statement of Appeal was filed late, this argument was ultimately withdrawn during the hearing.

44. Ismaily however maintained its two other objections in respect of the admissibility of the appeal; it argues that the Player violated Article R48 of the CAS Code by being late in paying the CAS Court Office fee, and that the Player violated Article R51 of the CAS Code by filing his Appeal Brief 13 days after filing the Statement of Appeal, whereas the deadline was 10 days.

45. First of all, the Sole Arbitrator observes that the Statement of Appeal was filed within the deadline of 21 days set by article 58(1) of the FIFA Statutes, *i.e.* on 31 January 2017.

46. As to the deadline of paying the CAS Court Office fee, the Sole Arbitrator observes that Article R48 CAS Code determines as follows:

> "[…]
>
> *Upon filing the statement, the Appellant shall pay the CAS Court Office fee provided for in Article R64.1 or Article R65.2.*
>
> *If the above-mentioned requirements are not fulfilled when the statement of appeal is filed, the CAS Court Office may grant a one-time short deadline to the Appellant to complete its statement of appeal, failing receipt of which within the deadline, the CAS Court Office shall not proceed".*

47. Ismaily maintains that contrary to the wording of Article R48, the Player was granted not one, but three extensions of the deadline to pay the CAS Court Office fee, and that the fee was finally paid after the deadline, on 28 February 2017.

48. The Sole Arbitrator notes that no new arguments in this respect were advanced by Ismaily in its Answer in comparison with its letter dated 13 March 2017.

49. The Sole Arbitrator does not see any reason to deviate from the *prima facie* ruling of the President of the CAS Appeals Arbitration Division dated 25 April 2017. Indeed, it appears that some mistakes were made by counsel for the Player in respect of the payment of the CAS Court Office fee, but these mistakes do not appear to have been made in bad faith or with the intention to stall the proceedings.

50. As to the alleged late filing of the Appeal Brief, the Sole Arbitrator notes that the Appeal Brief was indeed filed on 13 February 2017, *i.e.* 13 days after the filing of the Statement of Appeal.

51. Article R51 of the CAS Code determines as follows:

> *"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which it intends to rely.* […] *The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit".*

52. Pursuant to this wording, the date of filing of the Statement of Appeal is not decisive, but the date of expiry of the time limit to file the Statement of Appeal.

53. Based on Article 58(1) FIFA Statutes, *"[a]ppeals against final decisions passed by FIFA's legal bodies* […] *shall be lodged with CAS within 21 days of notification of the decision in question".*

54. In order to determine the ultimate date to file the Statement of Appeal, one needs to look at the date of notification of the Appealed Decision to the Player.

55. The Sole Arbitrator observes that Article 19 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules") determines as follows:

> *"1. Decisions shall be sent to the parties directly, with a copy also sent to the respective associations.*
>
> *2. Notification is deemed to be complete at the moment the decision is received by the party, at least by fax. Notification of a representative shall be regarded as notification of the party.*
>
> *3. In the absence of direct contact details, decisions intended for the parties to a dispute, in particular clubs, are addressed to the association concerned with the instruction to forward the decisions immediately to the pertinent party. These decisions are considered to have been communicated properly to the ultimate addressee four days after communication of the decisions to the association. Failure by the association to comply with the aforementioned instruction may result in disciplinary proceedings in accordance with the FIFA Disciplinary Code".*

56. On 10 January 2017, the grounds of the Appealed Decision were notified to Ismaily, Smouha, Asante Kotoko, EFA, the Ghana Football Association, and the Player. However, unlike the other parties, the Player was not notified directly, but via his football club at the time, Al-Shabab Club. The Ghana Football Association was thus not instructed to forward the Appealed Decision to the Player, but the FIFA DRC apparently assumed that Al-Shabab Club would notify the Player without explicitly requesting it to do so. It is therefore not clear what was the *dies a quo*, *i.e.* the date the time limit to file an appeal commenced.

57. Even if the situation in the matter at hand is not specifically contemplated for in the FIFA Procedural Rules, the Sole Arbitrator finds that the legal fiction set out in Article 19(2) FIFA Procedural Rules, pursuant to which *"decisions are considered to have been communicated properly to the ultimate addressee four days after communication of the decision to the association"* shall be applied by analogy. Although one can infer that the Player was somehow notified of the Appealed Decision, there is no evidence on file when this actually occurred. Under such circumstances, it is doubtful whether the deadline to file an appeal ever commenced at all, but at the very least the Player should benefit from the legal fiction set out in Article 19(2) FIFA Procedural Rules.

58. Accordingly, in the absence of any evidence to the contrary (*i.e.* evidence that the Player was notified already before 14 January 2017), the Sole Arbitrator finds that the Appealed Decision shall be considered notified to the Player on 14 January 2017 (*i.e.* four days after the notification of the Appealed Decision to Al-Shabab Club and the Ghana Football Association), as a consequence of which the deadline to file the Statement of Appeal expired on 5 February 2017, and the deadline to file the Appeal Brief thus on 15 February 2017.

59. Since the Player filed his Appeal Brief on 13 February 2017, it was timely filed.

60. The Player's appeal complies with all other requirements of Article R48 of the CAS Code.

61. It follows that the appeal is admissible and that Ismaily's objections against the admissibility of the appeal are dismissed.

VII. APPLICABLE LAW

62. Neither the Player, nor the Club made any submissions on the law to be applied to the merits of the present dispute.

63. Article R58 of the CAS Code provides the following:

> *"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"*.

64. Article 57(2) of the FIFA Statutes determines the following:

> *"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".*

65. The Sole Arbitrator is satisfied that the various regulations of FIFA are primarily applicable, in particular the FIFA RSTP, and subsidiarily Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS

A. The Main Issues

66. The main issues to be resolved by the Sole Arbitrator are:

    i) Was the FIFA DRC prevented from adjudicating on and deciding the matter at hand because the two-year statute of limitation was violated?

    ii) Does the Formal Offer constitute a binding employment contract, and what are the consequences thereof?

    iii) Shall the sporting sanctions imposed on the Player by the FIFA DRC be withdrawn?

i) Was the FIFA DRC prevented from adjudicating on and deciding the matter at hand because the two-year statute of limitation was violated?

67. Whereas the Player maintains that the FIFA DRC was not competent to issue a decision because the two-year statute of limitation was violated, Ismaily argues that the statute of limitation was not violated.

68. The statute of limitation of the FIFA DRC is set out in Article 25(5) FIFA RSTP and determines as follows:

> *"The Players' Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge (as the case may be) shall not hear any case subject to these regulations if more than two years have elapsed since the event giving rise to the dispute. Application of this time limit shall be examined ex officio in each individual case".*

69. The Sole Arbitrator notes that Article 25(4)(1) and (2) of the FIFA Commentary on the Regulations for the Status and Transfer of Players (the "FIFA Commentary"), that was referred to by Ismaily during the hearing, determines the following:

> *"1. A party waives its right to lodge a claim with the FIFA deciding bodies (Players' Status Committee, DRC, single judge or DRC judge) if more than two years have elapsed from the event giving rise to the dispute. The period of limitation in which a claim may be lodged is examined ex officio by the deciding body while considering the formal aspects of the case.*
>
> *2. The events giving rise to the dispute depend on the particular case and can be explained with the following example: the clubs A and B (obviously belonging to different associations) enter into a transfer agreement*

for the player X. Club B shall pay club A transfer compensation in five equal instalments. The last instalment is due on 30 June 2003. Club A does not claim this amount for a long time. On 10 August 2005, club A lodges a claim with the Players' Status Committee to demand payment of the last instalment. The deciding body will be unable to consider the substance of this matter as more than two years have elapsed since the event giving rise to the dispute, i.e. the date that the last instalment matured".

70. Although the wording of Article 25(5) FIFA RSTP is not entirely clear in the sense that it states that the matter shall not be "heard" if more than two years have elapsed since the event giving rise to the dispute, the FIFA Commentary makes it clear that the relevant moment in time is not the moment when the FIFA DRC actually convenes in order to take a decision, but the moment of filing the claim with FIFA.

71. The Sole Arbitrator also finds that a statute of limitation in general cannot be made dependent on a factor that is not under the control of the claimant. Indeed, Ismaily had no influence on when the FIFA DRC would convene to hear the matter. The only factor within Ismaily's power was to ensure that it lodged a claim before the FIFA DRC within a certain period after the dispute arose.

72. The Sole Arbitrator therefore has no doubt concluding that the moment when Ismaily filed its claim with the FIFA DRC is determinative for assessing any potential violation of the statute of limitation.

73. Applying the above general considerations to the matter at hand, even if one would consider that the two-year statute of limitation commenced at the earliest possible moment, *i.e.* with the signing of the Formal Offer by the Player when no actual dispute had arisen yet (17 July 2014), still Ismaily's claim was lodged on 28 July 2015 and thus clearly within the two-year period. The claim was thus filed timely.

74. Consequently, the Sole Arbitrator finds that the FIFA DRC was not prevented from adjudicating on and deciding the matter at hand because the two-year statute of limitation was not violated.

ii) Does the Formal Offer constitute a binding employment contract, and what are the consequences thereof?

75. Whereas the Player maintains that the Formal Offer does not constitute a binding employment contract, Ismaily argues that it does.

76. The Sole Arbitrator takes note of the fact that the FIFA DRC in the Appealed Decision concluded that the Formal Offer does constitute a binding employment contract because it considered that all *essentialia negotii* were complied with. Indeed, the FIFA DRC maintains that according to its *"well-established jurisprudence which dictates that in order for an employment contract to be considered as valid and binding, apart from the signature of both the employer and the employee, it should contain the essentialia negotii of an employment contract, such as the parties to the contract and their role, the duration of the employment relationship, the remuneration and the signature of both parties"*.

77. The Sole Arbitrator observes that the Formal Offer does not contain any signature from any representative of Ismaily, but only a stamp. Although this in itself is not decisive, because a contract may be deemed to be concluded if it is clear that an offer has been accepted, in the present case it is not made clear which person represented Ismaily in presenting the Formal Offer to the Player, which makes it doubtful whether the offer was binding on Ismaily.

78. The Sole Arbitrator notes that the Formal Contract undoubtedly complies with certain *essentialia negotii*, such as the Player's signature, the parties to the contract, the duration of the contract, and the remuneration to be paid to the Player.

79. However, although referred to as an essential condition by the FIFA DRC in the Appealed Decision, the Formal Offer does not evenly roughly describe the role of the parties. Although one can infer that it concerns an employment contract as a professional football player, this is not explicitly mentioned and the Formal Offer is silent on the exact duties to be fulfilled by the Player. For instance, it is not clear whether the Player was to be remunerated only for his services as a professional football player or that the remuneration also covered his image rights.

80. The Sole Arbitrator also considers it relevant that the Formal Offer, regardless of the question whether it is binding on the parties, is not the final employment contract that would be registered with the EFA, which may have triggered the Player's understanding that the Formal Offer was not binding.

81. As to the Player's testimony that he consulted two persons about the binding nature of the Formal Offer prior to entering into an employment contract with Smouha and that both persons allegedly assured him that it was not binding, the Sole Arbitrator finds that although such testimony did not strike him as being untruthful, the value thereof is nonetheless very limited in the absence of any witness statements being presented by these two persons in order to corroborate the Player's testimony. The Player's testimony that he informed Smouha of the fact that Ismaily had provided him with a visa to enter Egypt, but that no questions were asked in this respect by Smouha, is of no relevance in this respect.

82. Notwithstanding the above considerations and whether the *essentialia negotii* are complied with, the Sole Arbitrator finds that an agreement was concluded between the Player and Ismaily that – at least indirectly – imposed certain duties on either party. The Sole Arbitrator however does not consider it necessary to take a decision on whether the Formal Contract actually comprises a final and binding employment contract, because he finds that neither of the contractual parties – neither the Player, nor Ismaily – followed up on the Formal Offer.

83. Looking at the terms of the Formal Offer, the Sole Arbitrator observes that it does not contain any language on what the next step in the process would be (*i.e.* would Ismaily obtain a visa for the Player, or was this his own duty; would Ismaily provide flight tickets to the Player in order to come over to Egypt, or was this his own duty, etc.). In fact, the Formal Offer does not impose any positive duties on the Player at all, but it does impose a duty on Ismaily, namely that "[t]*he player will be given 20,000 USD as a sign fee"*.

84. The Sole Arbitrator however notes that it remained undisputed that such sign-on fee was never paid by Ismaily to the Player. The Sole Arbitrator finds this difficult to reconcile with Ismaily's position that a final and binding employment contract was concluded. One cannot blow hot and cold at the same time; either there was a final and binding employment contract in which case Ismaily was obliged to comply with its own duties thereunder and pay USD 20,000 to the Player, or there was not.

85. Furthermore, as alluded to above, the Player indeed did not come to Egypt to undergo the medical examination, but Ismaily – although it arranged a visa – did not arrange for the Player to come over to Egypt to undergo the medical examination. The Player testified that Ismaily had told him to buy his own ticket. Be it as it may, both parties remained inactive, and there is no documentary evidence on file showing that either party requested the other party to make an effort in this respect. The question is therefore whether it was the responsibility of the Player to go to Egypt on his own expense or if Ismaily should have made certain arrangements in this respect. The Formal Offer does not provide any clarity. In the absence of such contractual language or any other proof that would evidence that it was indeed the Player's obligation to do so, the Sole Arbitrator finds that it could not be legitimately expected by Ismaily that the Player would travel from Ghana to Egypt on his own expense.

86. Without drawing any conclusions in this respect, the Sole Arbitrator notes that the conclusion of a transfer agreement between Ismaily and Asante Kotoko was subject to the Player's successful passing of the medical examination, whereas the Formal Offer was not. The Sole Arbitrator finds it counterintuitive that Ismaily entered into a final and binding employment contract with the Player, while it was not yet certain if the Player could register for Ismaily with Asante Kotoko's consent. Indeed, in case no transfer agreement could finally be concluded with Asante Kotoko, a scenario that indeed materialized, Ismaily actually induced the Player to breach his employment contract with Asante Kotoko by concluding an employment contract with him.

87. Finally, the Sole Arbitrator observes that there is no evidence on file indicating that Ismaily ever attempted to urge the Player to report himself to its premises, or that it contacted Smouha in this regard. The only evidence that may indicate that Ismaily considered itself to be bound by the Formal Offer was the claim that it lodged with the FIFA DRC more than one year after the Formal Offer was accepted by the Player. Indeed, under such circumstances and as argued by the Player, it appears that Ismaily lacked the desire of bringing the transfer to a closure.

88. Summarising, in view of the fact that Ismaily failed to comply with the payment of the sign-on fee in the amount of USD 20,000, because it failed to make arrangements for the Player to travel to Egypt in order for him to undergo the medical examination and because Ismaily never urged the Player to report himself, all being circumstances that preceded the Player's signature of the employment contract with Smouha by which action the Player was perceived to have breached the Formal Offer by the FIFA DRC in the Appealed Decision, the Sole Arbitrator finds that the party breaching the Formal Offer that was accepted by the Player was actually Ismaily, or that Ismaily and the Player were at the very least jointly responsible.

89. Under such circumstances, the Sole Arbitrator finds that Ismaily did not incur any damages and is not entitled to receive any compensation for breach of contract from the Player.

iii) Shall the sporting sanctions imposed on the Player by the FIFA DRC be withdrawn?

90. By means of the Appealed Decision, the FIFA DRC imposed a restriction of four months on the Player's eligibility to play in official matches.

91. The Player requests the Sole Arbitrator to set this part of the Appealed Decision aside.

92. The Club did not address this part of the Player's appeal in its submissions.

93. The Sole Arbitrator notes that FIFA indicated in its letter to the CAS Court Office dated 13 March 2017 that only FIFA has standing to defend the point of the imposition of sporting sanctions in a litigation. The question of the imposition of sporting sanctions, including the Player's request for provisional measures, is outside the scope of the Panel's power of review.

94. The Sole Arbitrator observes that this question has been discussed in CAS jurisprudence:

> *"Pursuant to the jurisprudence of the CAS, a party has standing to be sued ("légitimation passive") in CAS proceedings only if it has a stake in the dispute, because, for example, something is sought from it (e.g. CAS 2014/A/3831; CAS 2014/A/3850). Nothing can be requested from Mr. Mangane in the present dispute, and indeed there is nothing Mr. Mangane can do in order to alleviate the burden of the Appellant. The only body that would have the authority to withdraw the sanction in the present case, assuming successful complaint, would be the FIFA. CAS jurisprudence has established that FIFA disciplinary proceedings 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/or with the decisions rendered by FIFA's decision-making bodies. As a consequence, in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party for failing to comply with a previous FIFA decision, only FIFA has standing to be sued, and not the (previously) opposing party in the original dispute before the competent FIFA bodies such as the FIFA Dispute Resolution Chamber. Consequently, it is well established that an appeal against a sporting sanction inflicted by a FIFA decision-making body must be directed against FIFA (and the decision-making body), that is, the body that has the power to impose and enforce disciplinary sanctions on clubs that have contravened, for example, Article 12bis of the FIFA RSTP or, more frequently, Article 64 of the FIFA Disciplinary Code (e.g. CAS 2007/A/1367; CAS 2012/A/3032)"* (CAS 2015/A/4310, para. 63 of the abstract published on the CAS website).

95. The Sole Arbitrator fully adheres to this view. Although the precedent cited above concerns the imposition of sporting sanctions by the FIFA Disciplinary Committee on the basis of a violation of Article 64 FIFA Disciplinary Code, the Sole Arbitrator finds that the reasoning also applies to situations where sporting sanctions are imposed by the FIFA DRC, as indeed also appears from the reference to Article 12bis FIFA RSTP in the precedent cited.

96. Applying the above reasoning to the matter at hand, the Sole Arbitrator finds that there is nothing that can be requested from Ismaily by the Player in respect of the sporting sanction

imposed. Indeed, the only body that would have authority to withdraw the sanction would be FIFA, whereas FIFA is not called as a respondent.

97. Consequently, notwithstanding the fact that the Player is not held liable for breaching the Formal Offer, a situation which would normally justify the cancellation of the sporting sanctions imposed, due to the Player's procedural failure to involve FIFA as a respondent in the proceedings before CAS, the Sole Arbitrator finds that he is prevented from withdrawing the sporting sanctions imposed on the Player. For the same reason, the Sole Arbitrator considers that the Player's request for a stay of the sanction shall be rejected.

B. Conclusion

98. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Sole Arbitrator finds that:

i) The FIFA DRC was not prevented from adjudicating on and deciding the matter at hand because the two-year statute of limitation was not violated.

ii) Ismaily is not entitled to receive any compensation for breach of contract from the Player.

iii) The sporting sanctions imposed on the Player by the FIFA DRC cannot be withdrawn.

99. All other and further motions or prayers for relief are dismissed.

100. In order to avoid any doubts, the Sole Arbitrator deems it necessary to add some clarifying remarks as to the legal implications of the present arbitral award.

101. As clarified, the present award is issued in an appeal arbitration proceeding between the Player and Ismaily (*i.e.* two parties), whereas the Appealed Decision was issued between Smouha, the Player, Asante Kotoko and Ismaily (*i.e.* four parties).

102. The Sole Arbitrator took note of a recent judgment of the Swiss Federal Tribunal following the issuance of an arbitral award by CAS in a situation where two parties initially lodged an appeal against a decision of the FIFA DRC where both were held jointly and severally liable for the payment of a certain amount to a third club. One of the two appeals was deemed withdrawn because of a failure to pay the advance of costs, while the other appeal was upheld and the matter was referred back to the FIFA DRC.

103. The Swiss Federal Tribunal clarified the following:

"[…] *The joint defendants remain independent from each other. The behavior of one of them, and in particular his withdrawal, failure to appear or appeal, is without influence upon the legal position of the others (judgment 4P.226/2002 of January 21, 2003 at 2.1; Hohl, op. cit., n. 525; Schaad, op. cit., p. 76 f.; Gross and Zuber, op. cit., n. 19 ad Art. 71 CPC). As to the judgment to be issued, it may be different as to one of the joint defendants or the other (Jeandin, op. cit., n. 11 ad Art. 71 CPC). The independence of joint defendants*

will continue before the appeal body: a joint defendant may independently appeal the decision affecting him regardless of another's renouncing his right to appeal the same decision; similarly, he will not have to worry about the appeals of the other joint defendants being maintained if he intends to withdraw his own (Schaad, op. cit., p. 281 ff.). Among other consequences, this means that the res judicata effect of the judgment concerning joint defendants must be examined separately for each joint defendant in connection with the opponent of the joint defendants because there are as many res judicata effects as couples of claimant/defendant (Schaad, op. cit., p. 317 ff.)

In the light of these principles, the Appellant was blatantly wrong to deny that the CAS had any jurisdiction to address the Respondent's appeal against the DRC decision of June 15, 2011, on the basis of the Player's appeal against the same decision. Indeed, the withdrawal had no impact on the appeal proceedings between the Respondent and the Appellant. In other words, the Respondent could argue before the CAS, among other things, that the DRC was wrong to find the Player in breach of his contract with the Appellant by demonstrating, for instance, that the contract had not become enforceable between these two parties, with a view to establish the extinction of the Player's obligation which had been jointly imposed upon the Respondent by Art. 17(2) RSTP (judgment 4A_304/2013 of March 3, 2014 at 3). It is immaterial that this may result in an award incompatible with the enforceable decision of the DRC as to the fate of the Player sued by the Appellant" (judgment 4A_6/2014 of 28 August 2014, para. 3.2.2).

104. Applying this reasoning to the matter at hand, the Sole Arbitrator notes that also here two parties were held jointly liable by the FIFA DRC (*i.e.* the Player and Smouha). Smouha is however not a party to the proceedings in the matter at hand, and has in fact filed its own independent appeal before CAS with CAS 2017/A/4977 Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & FIFA.

105. Therefore, notwithstanding the outcome of the arbitration initiated by Smouha, since Smouha and Asante Kotoko are no parties to the present arbitration before CAS, the outcome of the present arbitration is only relevant in the relation between the Player and Ismaily, and does not affect the relation between any other parties that were involved in the proceedings leading to the Appealed Decision. Indeed, both Smouha and Asante Kotoko were made aware of the Player's independent appeal, but neither of them sought to be involved in the present arbitration by way of an intervention, or otherwise.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 31 January 2017 by Mr Abdul Aziz Yusif against the decision issued on 13 October 2016 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially upheld.

2. The items 3, 5 and 6 of the decision issued on 13 October 2016 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association are annulled; the other elements of the decision of 13 October 2016 are confirmed.

(…)

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