



Arbitration CAS 2019/A/6087 Club Sportif Sfaxien v. José Paulo Sousa da Silva, award of 4 February 2020

Panel: Mr Alexander McLin (Switzerland/USA), Sole Arbitrator

Football

Termination agreement to an employment contract

Admissibility of the appeal

Statement of appeal as appeal brief

1. **It is not excessively formalistic for the CAS to rule that a submission sent by email only is inadmissible. The requirement that the appeal brief must also be filed by courier is not a mere administrative formality but a necessary condition for the appeal to be valid. Strict adherence to procedural requirements (especially regarding deadlines) is necessary to ensure the Parties' equal treatment and the proper application of substantive law.**
2. **Even if the statement of appeal was received within the applicable deadline, the lack of timely filing of the appeal brief by courier means that, while the appeal was initially validly filed, it must be deemed withdrawn by application of Article R51 (1) of the CAS Code. However the appellant can opt to alternatively state that his statement of appeal is to be considered as his appeal brief.**

I. PARTIES

1. Club Sportif Sfaxien (the “Club” or the “Appellant”) is a Tunisian professional football club with its head office in Sfax, Tunisia.
2. Mr. José Paulo Sousa da Silva, (the “Coach” or the “Respondent”) is a football coach from Portugal.
3. Club Sportif Sfaxien and Mr. José Paulo Sousa da Silva are collectively named the “Parties”.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all

the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

5. On 23 June 2017, the Parties concluded an employment contract (the “Contract”) by which the Club hired the Coach as “assistant coach”. The Contract was valid from the signature date and ended “*at the end of the 2018/19 sporting season*”.
6. Article 3 of the Contract provides that in the event of unilateral early termination by the Club, the Club shall pay to the Coach “*a penalty amounting to the total of three salaries*”.
7. Article 4 of the Contract provides that the Coach shall be paid a monthly salary of EUR 4,500 during the first season, and EUR 5,000 during the second season.
8. On 17 November 2017, the Parties concluded a termination agreement (the “Agreement”) whereby they mutually agreed to terminate the Contract early. Article 2.1 of the Agreement provides that the Club “*shall pay [the Coach] the amount of €20,000.00 before or on November 22, 2017, by bank transfer made to the following bank account: [followed by the Coach’s bank account details]*”.
9. Article 4 of the Agreement reads as follows:

“In case The Club Sportif Sfaxien fails to comply with the aforementioned agreement, namely the full payment or the payment in another bank account, the agreement shall be null and void and Mr. Jose Paulo Sousa Da Silva shall be entitled to claim the full payment of the total sum stipulated in the terminated Coach Agreement (all remunerations and bonuses until June 30, 2019) as well as compensation for unilateral termination of an employment agreement under FIFA regulations and the Swiss law”.
10. On 12 December 2017, the Coach lodged a claim before FIFA against the Club for breach of the Agreement, alleging he had not received payment despite a reminder sent on 1 December 2017, and despite the Club’s assertion that payment had been made on 22 November 2017.
11. As per Article 4 of the Agreement, the Coach claimed compensation based on the contract in the total amount of EUR 135,000, representing:
 - EUR 45,000 corresponding to compensation due from September 2017 through June 2018 (10 months’ worth of the EUR 4,500 monthly salary);
 - EUR 60,000 corresponding to compensation due from July 2018 through June 2019 (12 months’ worth of the EUR 5,000 monthly salary);
 - EUR 30,000 as damages pursuant to Article 337 lit. c) of the Swiss Code of Obligations (“SCO”).

The Coach also claimed interest for late payment on these amounts “*as considered appropriate*”.

12. The Club claimed that while it had initially tried to make the payment owed under the Agreement, the SWIFT code provided by the Coach was incorrect and the payment had been turned back by its bank. Once the right SWIFT code had been obtained, the payment had been made on 12 March 2018.
13. The Coach admitted that there was an error in the SWIFT code initially provided to the Club, but that the Club had not made efforts to pay the Coach in a four-month period, and that the deposit slip associated with the alleged payment made on 12 March 2018 was false.
14. The Coach informed FIFA that he signed a new employment contract with the Portuguese club CD Aves for a term running from 25 January 2018 through 30 June 2019, under which he earned a monthly salary of EUR 3,000 during the 2017/18 season and a monthly salary of EUR 4,200 during the 2018/19 season.
15. In a reasoned decision notified on 19 December 2018 (the “Appealed Decision”), the Single Judge of the FIFA Players’ Status Committee, finding that the Club had not made payment under the Agreement and therefore that the Coach was due payment until the end of the term of the Contract while deducting the amount he received from employment with CD Aves, ruled as follows:

“2. The [Club] has to pay to the [Coach], within 30 days as of the date of notification of the present decision, the amount of EUR 9,000 as outstanding remuneration, plus interest at the rate of 5% p.a. over said amount as of 12 December 2017 until the date of effective payment.

3. The [Club] has to pay the [Coach], within 30 days as of the date of notification of the present decision, the amount of EUR 39,000 as compensation for breach of contract, plus interest at the rate of 5% p.a. over said amount as of 12 December 2017 until the date of effective payment.

4. If the aforementioned amounts plus interest are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA’s Disciplinary Committee for consideration and a formal decision.

5. Any further claim lodged by the [Coach] is rejected. ...”.

16. The Decision of the Single Judge of the FIFA Players’ Status Committee was based on the applicability of the FIFA Regulations on the Status and Transfer of Players (2016 edition) (the “FIFA Regulations”), and the FIFA Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber (2017 edition) (the “FIFA Procedural Rules”), and the jurisdiction conferred to him by the FIFA Regulations.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 7 January 2019, the Appellant filed its statement of appeal according to Articles R47 and R48 of the Code of Sports-related Arbitration (the “Code”). The statement of appeal was filed in French. On the same day, the CAS Court office notified FIFA of the existence of the appeal, providing it with the opportunity to intervene.

18. In its statement of appeal, the Appellant requested that a sole arbitrator be appointed by the CAS.
19. On 14 January 2019, the Respondent stated that he agreed to the appointment of a sole arbitrator but that he objected to the use of the French language for the procedure, requesting instead to proceed in English. He also requested that his time limit to submit his answer be fixed after payment by the Appellant of his share of the advance of costs.
20. On 15 January 2019, the CAS Court Office invited the Appellant to indicate whether he consented to the use of English and suspended the deadline for filing of the appeal brief until further notice.
21. The Appellant filed its appeal brief (in French) on 15 January 2019. The CAS Court office notified the Parties of its filing but did not notify its contents pending a decision of the President of the CAS Appeals Division on language.
22. On 22 January 2019, the Appellant reiterated its position that the arbitration should take place in French.
23. On 24 January 2019, the President of the CAS Appeals Arbitration Division issued an Order on Language, pronouncing the language of these proceedings to be English, and pronouncing that the Appellant shall file a translation of its appeal brief.
24. On 2 February 2019, the Appellant provided a translation into English of its appeal brief.
25. On 25 February 2019, the CAS Court Office acknowledged receipt of payment by the Appellant of the advance of costs. It also noted that while the appeal brief had been filed in French by email on 15 January 2019 (within the applicable time limit provided by Article R51 (1) of the Code) and the English translation had been transmitted by email on 2 February 2019 (within the applicable deadline in the Order on Language), neither version of the appeal brief had apparently been filed by courier pursuant to Article R31 (3) of the Code.
26. On 26 February 2019, the Appellant stated that it had sent its appeal brief by courier and provided a document attesting to its dispatch the same day.
27. On 27 February 2019, the CAS Court Office drew the Parties' attention to the deadline provisions in Articles R31 (3), R32 (1) and R51 (1) of the Code and that given the fact that the Appealed Decision had been notified on 19 December 2018, the appeal brief should have been filed at the latest on 21 January 2019 by email (19 January 2019 being a Saturday), and on 22 January 2019 by courier. It invited the Parties to comment.
28. On 4 March 2019, the Appellant stated, in essence, that it had met the applicable deadlines under the Code, including filing its appeal brief by courier on 15 January 2019. The Respondent agreed with the CAS Court Office's initial assessment that the appeal brief's filing was seemingly not compliant with the applicable deadlines under the Code and considered as a result that the appeal should be deemed withdrawn in accordance with Article R51 of the Code.

29. On 5 March 2019, the CAS Court Office noted the Parties' positions and requested the Appellant to provide proof of its 15 January 2019 filing by courier.
30. On 7 March 2019, the Appellant provided a copy of a corresponding courier receipt ostensibly bearing a date of 15 January 2019.
31. On 8 March 2019, the CAS Court Office acknowledged receipt and noted that the receipt provided bore no reference number allowing the shipment to be tracked, and request that the Appellant provide information about the tracking number as well as the status of the shipment's delivery.
32. On 12 March 2019, FIFA notified the CAS Court Office that it was renouncing its right to intervene in the instant proceedings.
33. On 12 March 2019, the Appellant provided a letter ostensibly from the Tunisian postal service, explaining that a file sent on 15 January 2019 by the Appellant had not been delivered to its intended addressee for "*reasons beyond [its] control*", and apologizing for "*all the resulting consequences*". The receipt provided together with the Tunisian postal service's letter bore a tracking number (EE511879853TN). The Appellant expressed the position that in light of these circumstances, it had respected the relevant deadline.
34. On 21 March 2019, the Respondent provided its observations on Appellant's letter of 12 March 2019 and its annexes.
35. On 22 March 2019, the CAS Court Office informed the Parties that their submissions on the timely filing of the appeal brief were being forwarded to the President of the CAS Appeals Arbitration Division, or her Deputy, to rule on the issue in accordance with R49 of the Code.
36. On 24 April 2019, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division considered, *prima facie*, that the appeal brief had been filed in a timely manner and set a deadline for receipt of the Respondent's answer brief.
37. Also on 24 April 2019, the Parties were informed that the Arbitral Tribunal appointed to decide this appeal was constituted as Mr Alexander McLin, Attorney-at-law in Geneva, sitting as Sole Arbitrator.
38. On 20 May 2019, the Respondent filed his answer according to R55 of the Code.
39. On 3 and 4 June 2019 respectively, the Appellant and the Respondent indicated their preference for a hearing to be held.
40. On 11 June 2019, the CAS Court Office informed the Parties that the Sole Arbitrator considered himself sufficiently well informed to decide the present case on the basis of the Parties' written submissions, without the need to hold a hearing. He also requested the Appellant to produce the original receipts submitted as proof of sending the appeal brief transmitted on 26 February 2019 and 7 March 2019, as well as the documents attached to its letter of 12 March 2019.

41. On 19 June 2019, the CAS Court Office acknowledged receipt of these documents and informed the Parties that they had been transmitted to the Sole Arbitrator.
42. On 26 September 2019, the CAS Court Office provided the Parties with an Order of Procedure for their signature.
43. On 28 September and 1 October 2019 respectively, the Parties returned their duly signed Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES

44. The Appellant's submissions, in essence, may be summarized as follows:
 - The non-payment of the EUR 20,000 provided for in the Agreement is due to the fact that the Coach had provided the Club with an incorrect SWIFT code, which is admitted by the Coach. The Club paid this amount as soon as it had obtained the correct SWIFT code.
 - The termination indemnity awarded in the Appealed Decision (EUR 39,000) is too high as it does not take into account the agreed amount provided for in the Agreement, of EUR 20,000.
 - As the Coach did not remain unemployed for two months by virtue of the employment contract signed with CS Aves, his indemnity should not exceed two months' salary, or EUR 9,000.
 - The Appellant makes the following requests for relief:

"The Club Sportif Sfaxien "CSS" asks the Court of Arbitration for Sport to pronounce:

 - 1- *The appeal of the Club Sportif Sfaxien "CSS" is accepted.*
 - 2- *The decision rendered on 22-08-2018 by Players' Status Committee is cancelled in all its provisions and the request of the coach is rejected.*
 - 3- *In the alternative, reduce the indemnity to an amount equivaled to 9,000 euros.*
 - 4- *An allowance is allocated to the Club Sportif Sfaxien for its legal fees.*
 - 5- *The arbitration costs to be charged to the Respondent".*
45. The Respondent's submissions, in essence, may be summarized as follows:
 - The appeal brief is inadmissible, as its filing by courier did not occur until after the relevant deadline had elapsed. The required originals were neither sent nor received by 16

January 2019 (the day following the filing of its appeal brief in French by email), or by 22 January 2019 (the day following the filing of its appeal brief in English by email).

- The Club is in breach of the Agreement as it failed to abide by the payment obligation set forth in Clause 2 of the Agreement. The Coach did not contribute to the breach. Any inaccuracy regarding the SWIFT code could and should have been readily clarified without significant effort, and the Club never completed any of the payments provided for in the Agreement.
- The Agreement provides for a penalty clause, the amount of which is adequate and proportionate.
- The Respondent makes the following requests for relief:

“Mr Paulo Sousa respectfully requests the Sole Arbitrator to:

- (i) Set aside the FIFA PSC’s Decision under appeal and confirm that the Respondent is entitled to compensation in the amount of 135.000€, plus interest; in the unlikely event that this request is rejected,*
- (ii) Confirm the FIFA PSC’s Decision under appeal: and*
- (iii) In any event, rule that the costs of these proceedings shall be paid by the Appellant in full”.*

V. JURISDICTION

46. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

47. Articles 57 and 58 of the FIFA Statutes (2018 edition) grant the Club a right of appeal to CAS from a decision of the Single Judge of the Players’ Status Committee. In addition, the Parties have both signed the Order of Procedure, expressly consenting thereby to CAS jurisdiction.

48. The CAS, therefore, has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

49. Article 58 (1) of the FIFA Statutes (2018) states:

Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question.

50. Article 58 (2) of the FIFA Statutes (2018) states:

Recourse may only be made to CAS after all other internal channels have been exhausted.

51. The Parties received the reasoned decision of the Single Judge of the Players' Status Committee from FIFA on 19 December 2018.

52. The Appellant submitted its Statement of Appeal on 7 January 2019.

53. Article R31 (3) of the Code provides as follows:

"The request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. If they are transmitted by facsimile in advance, the filing is valid upon receipt of the facsimile by the CAS Court Office provided that the written submission is also filed by courier within the relevant time limit, as mentioned above" (Emphasis added).

54. Article R32 (1) of the Code provides as follows:

"The time limits fixed under this Code shall begin from the day after that on which notification by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. The time limits fixed under this Code are respected if the communications by the parties are sent before midnight, time of the location where the notification has to be made, on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the country where the notification is to be made, the time limit shall expire at the end of the first subsequent business day".

55. Article R51 (1) of the Code provides 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 he intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit" (Emphasis added).

56. It is uncontested that no physical, paper copy of the appeal brief reached the CAS Court Office prior to that which was dispatched by the Appellant on 26 February 2019. The question is therefore whether, as Article R31 (3) of the Code requires, the appeal brief was sent by courier within the relevant time limit, failing which, further to Article R51 (1) of the Code, the appeal "*shall be deemed to have been withdrawn*".

57. The Appellant, in its letter to the CAS dated 4 March 2019, states that it had sent the appeal brief by email on 15 January 2019. On 7 March 2019, it provided a copy of a receipt (“*Bordereau de Dépôt Rapid-Poste*”) which appears to bear a postmark of 15 January 2019, but which bears no corresponding tracking number. Further to a subsequent request by the CAS Court Office, the Appellant produced a different receipt, this time bearing a tracking number, and also bearing a postmark (and two separate date stamps) reflecting 15 January 2019. This receipt was accompanied by a letter (seemingly undated by its author but stamped with the date “11 Mar. 2019”) ostensibly from an unidentified employee of the Tunisian postal service, explaining that the document sent on 15 January 2019 and bearing the reference number “ee511879853tn”, “*for reasons beyond our control*”, had not been delivered to its intended addressee and had been archived, and extending “*our sincere apologies for all the resulting consequences*”.
58. The Appellant holds that the above explanation and documents constitute sufficient proof that the appeal brief was indeed sent within the deadline.
59. The Respondent contends that given that the only shipment that reached its destination is that sent on 26 February 2019, its corresponding receipt can be deemed to be genuine. On the other hand, the receipt that was sent to the CAS by the Appellant on 7 March 2019, and which does not bear a tracking number, appears to have been mishandled in order to create the illusion that the appeal brief was in fact sent by courier on 15 January 2019, when indeed it was not. The absence of a tracking number substantiates this position.
60. Moreover, when the CAS Court Office requested a corresponding tracking number, the Appellant produced yet another receipt, which, while it bears an EMS tracking number, is printed on a form dating back to 2017 (rather than 2018, as in the case of the two other documents), has a postmark that, while it reflects a date of 15 January 2019, appears to have been altered, and has two other date stamps (also reflecting “15 January 2019”) which are not present on the other, previously submitted documents (including the “genuine” receipt for the shipment made on 26 February 2019).
61. Finally, while the document which reached its destination and was shipped on 26 February 2019 has a tracking number that can readily retrieve data regarding its shipment in the EMS database, conversely the tracking number which was provided by the Appellant as corresponding to the alleged shipment on 15 January 2019 cannot be identified by either the EMS online tracking system, or the that of the Tunisian postal service.
62. Considering the evidence submitted to him by the Parties, the Sole Arbitrator considers that the evidence supporting the contention that the appeal brief was shipped on 15 January 2019 is disturbingly untrustworthy. He finds the Respondent’s analysis and arguments to be clear and convincing. As a result, he concludes that the requisite copies of the appeal brief were not sent to the CAS by the relevant deadline.
63. The Respondent argues that, in line with Article R51 (1) of the Code, the appeal should be deemed to be withdrawn in light of the fact that a copy of the appeal brief was not filed by courier in keeping with Article 31 (3) of the Code.

64. In recent case law, the Swiss Federal Supreme Court ruled that it was not excessively formalistic for the CAS to rule that a submission sent by email only is inadmissible (see *4A_556/2018*). It determined that the requirement that the appeal brief must also be filed by courier is not a mere administrative formality but a necessary condition for the appeal to be valid. Finally, it recalled that strict adherence to procedural requirements (especially regarding deadlines) is necessary to ensure the Parties' equal treatment and the proper application of substantive law.
65. The Sole Arbitrator notes certain relevant similarities between the instant case and that of CAS 2015/A/4246, in which a statement of appeal was ultimately deemed to have been filed after the applicable deadline despite the fact that dubious evidence had been provided, ostensibly from the post office from which it had been sent, as to its date of dispatch, while the relevant tracking system confirmed that the date of dispatch was indeed late.
66. Unlike in CAS 2015/A/4246, where the appeal was deemed inadmissible by virtue of the statement of appeal having been filed late, in the instant case the statement of appeal was received within the applicable deadline, but the lack of timely filing of the appeal brief by courier means that, while the appeal was initially validly filed, it must be deemed withdrawn by application of Article R51 (1) of the Code. While the Appellant could also have opted to alternatively state that his statement of appeal was to be considered as his appeal brief, he did not exercise this option.
67. As a result, the appeal brief is inadmissible and, as a result, the appeal is deemed withdrawn.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Club Sportif Sfaxien on 7 January 2019 against the decision issued by the Single Judge of the FIFA Players' Status Committee on 19 December 2018 is inadmissible.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.