



Arbitration CAS 2014/A/3586 Al-Masry SC v. Warri Wolves FC, award of 11 December 2014

Panel: Mr Olivier Carrard (Switzerland) President; Mr Rui Botica Santos (Portugal); Mr François-Charles Bernard (France)

Football

Transfer (international)

Party induced to enter into a contract by the fraud of the other party

Inadmissibility of the appeal to the CAS due to the non-exhaustion of prior legal remedies

1. According to Article 28 of the Swiss Code of Obligations, a party that was induced to enter into a contract by the fraud of the other party cannot be held to be bound by the contract, even if its error is not fundamental.
2. Article R47 of the CAS Code provides that a sports decision can be appealed before the CAS according to the appeals procedure only if the Appellant has exhausted the legal remedies available to him prior to the appeal. If the Appellant did not raise the claim before the FIFA Players' Status Committee it is deemed that the Appellant has not exhausted internal remedies and the Appellant's claim is therefore inadmissible.

I. THE PARTIES

1. Al-Masry SC ("Al-Masry" or the "Appellant") is an Egyptian football club with its registered office in Port Said, Egypt. The Appellant is affiliated to the Egyptian Football Federation (EFA), which in turn is affiliated to the Fédération Internationale de Football Association (FIFA).
2. Warri Wolves FC ("Warri Wolves" or the "Respondent") is a Nigerian football club with its registered office in Abuja, Nigeria. The Respondent is affiliated to the Nigerian Football Federation, which in turn is affiliated to FIFA.

II. THE FACTS

3. On 6 January 2012, Warri Wolves entered into an employment contract with Nigerian player J. ("the Player"), which provides, *inter alia*, the following: "*The club is desirous of engaging the services of the footballer for a period of 2 years commencing from the 2012 to 2014 football season, the footballer has agreed to take engagement upon the terms and subject to the conditions appearing*".

4. On 29 August 2012, Warri Wolves and Al-Masry concluded a transfer agreement (“the Agreement”) regarding the transfer of the Player to Al-Masry for the amount of USD 200’000 payable upon receipt of the player’s International Transfer Certificate (ITC).
5. Article 3 of the Agreement provided as follows: *“If the First party [i.e. Al-Masry] fails to pay the stated transfer amounting to 200,000 USD to the Second party [i.e. Warri Wolves], Warri Wolves FC will be entitled to return back the player”*.
6. Article 6 of the Agreement reads as follows: *“The Agreement is submitted to the jurisdiction of the FIFA. Any dispute must be submitted exclusively to the FIFA bodies”*.
7. On 31 August 2012, Al-Masry’s Manager acknowledged that his club had to pay the transfer fee to Warri Wolves within ten days of receipt of the Player’s ITC.
8. On 1 September 2012, Al-Masry and the Player entered into a three-year employment contract.
9. By e-mail dated 25 September 2012, Al-Masry’s Executive Manager confirmed the Appellant’s commitment to pay the transfer fee to Warri Wolves and explained that the payment’s delay was due to the fact that its president was abroad.
10. On 31 October 2012, Warri Wolves lodged a claim with FIFA against Al-Masry requesting the payment of USD 200’000 corresponding to the above-referenced transfer fee, arguing that such amount was never paid by Al-Masry. In addition, Warri Wolves requested the payment of 5% interest *“for the delay amounting to 1.693,99 USD since 1st September 2012 and the lawyer’s fees of 2.700,25 for starting this case”*.
11. Al-Masry never responded to the claim lodged by Warri Wolves, despite having been informed by FIFA that, in the absence of a reply, a decision would be taken on the basis of the information and evidence at disposal.
12. On 27 July 2013, Al-Masry’s Executive Manager addressed a letter to Warri Wolves relating to a Nigerian player named Good Inky Eliskhko (i.e. not the Player) and referring to Article 3 of the player’s contract. He stated the following: *“So, we hereby notify you that we are obliged to the stipulation of this Article [i.e. Article 3] and the return of the Player to his Club, Warri Wolves FC without any financial obligation for the player or his club, Warri Wolves FC”*.
13. On 20 November 2013, the FIFA Players’ Status Committee rendered a decision (“the appealed decision”) ordering Al-Masry to pay Warri Wolves the amount of USD 200’000 plus 5% interest *p.a.* on said amount as of 31 October 2012.
14. On 11 December 2013, Al-Masry requested FIFA the grounds of the appealed decision.

15. On 12 December 2013, the Vietnamese Football Federation requested the ITC relating to the Player to the EFA.
16. On 23 December 2013, the EFA rejected the ITC's request based on the fact that *"the contract between the former club and the professional player [had] not expired"*.
17. On 24 December 2013, An Giang FC ("An Giang"), a football affiliated to the Vietnamese Football Federation, addressed to the FIFA a provisional license request on behalf of the Player.
18. On 2 April 2014, FIFA notified the parties the grounds of the appealed decision. FIFA considered sufficiently proven that Al-Masry breached the Agreement and, consequently, held that Al-Masry had to pay Warri Wolves the amount of USD 200'000 plus 5% interest on said amount as of 31 October 2012

III. PROCEDURE BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

19. On 23 April 2014, the Appellant filed its Statement of Appeal with the CAS against the above-referenced decision of FIFA in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2013 edition) (the "Code").
20. On 3 May 2014, the Appellant filed its Appeal Brief with the CAS in accordance with Article R51 of the Code.
21. On 23 May 2014, the Respondent filed its Answer in accordance with Article R55 of the Code.
22. On 30 May 2014, the CAS Court Office acknowledged receipt of the Respondent's answer and invited the parties to inform it whether they would prefer a hearing to be held in this matter or for the Panel to issue an award based solely on the parties' written submissions.
23. By e-mail dated 5 June 2014, the Respondent informed the CAS Court Office about its preference for a hearing to be held in this matter.
24. By letter dated 16 June 2014, the Appellant informed the CAS Court Office that it did not consider necessary to hold a hearing in this matter.
25. On 7 August 2014, the CAS Court Office informed the parties that the Panel had been constituted as follows: Mr Rui Botica Santos, who was nominated by the Appellant, Mr François-Charles Bernard, who was nominated by the Respondent, and the President, Mr Olivier Carrard.
26. On 22 August 2014, the CAS Court Office informed the parties that the Panel had decided to hold a hearing and to request FIFA to produce a copy of the case file of the procedure that was pending before the Players' Status Committee between the parties.

27. On 28 August 2014, the Appellant's counsel, Mr Ettore Mazzilli, informed the CAS Court Office that he would no longer represent the Appellant in these arbitration proceedings.
28. On 29 August 2014, the CAS Court Office invited the parties to inform whether they would be available for attending the hearing on 8 October 2014.
29. On 3 September 2014, the Appellant informed the CAS Court Office that it was not available on the proposed date, arguing that it was allegedly very difficult to appoint a new counsel further to Mr Mazzilli's resignation.
30. On 4 September 2014, FIFA provided a copy of the case file of the procedure that was pending before the Players' Status Committee between the parties.
31. On 9 September 2014, the CAS Court Office informed the parties that the Panel considered that the hearing had to be held on 8 October 2014, pointing out that one month was sufficient time for the Appellant to appoint a new Counsel and to prepare the hearing. Additionally, the CAS Court Office informed the Appellant that if no further objection was raised within two days, the hearing would be finally held on 8 October 2014. No further objection was filed by the Appellant in this respect.
32. On 23 September 2014, the CAS Court Office called the parties and their witnesses to appear at the hearing on 8 October 2014 and invited them to provide it with the names of all persons who were supposed to attend the hearing.
33. On 1 October 2014, the CAS Court Office informed that it had not received any communication from the Appellant and invited the latter, once again, to provide it by 2 October 2014 with the names of all persons who were supposed to attend the hearing on its side.
34. On 3 October 2014, the Appellant requested the CAS Court Office an extension of its time limit for communicating the names of the persons who would attend the hearing on its side in order to "*select its representatives to attend the hearing*".
35. On the same day, the CAS Court Office responded that the time limit for the Appellant to provide the names of the persons attending the hearing was extended until 7 October 2014 and that the hearing would be in any case maintained.
36. The hearing was held on 8 October 2014 at the CAS headquarters in Lausanne, Switzerland. All the members of the Panel were present. Mr Antonio de Quesada, Legal Counsel to the CAS and Mr Pierre Ducret, *ad hoc* Clerk, assisted the Panel at the hearing.
37. The following persons attended the hearing:
For the Respondent:
- Mr Aydin Doganay, Counsel.

Despite having been duly called for to such purpose, the Appellant did not appear at the hearing. Pursuant to Article R57 of the Code, the Panel decided nevertheless to go ahead with the hearing.

38. At the beginning of the hearing, the Panel asked the Respondent's Counsel whether the *in limine litis* claim contained in his Answer was maintained given the information contained in the case file communicated by FIFA. As explained below, the Respondent alleged that the Appellant had failed to timely request the grounds for the appealed decision.
39. The Respondent's Counsel responded that after having reviewed the case file communicated by FIFA, such claim did no longer make sense and it shall be deemed withdrawn.
40. After his opening statement, the Respondent's Counsel answered the questions from the Panel.
41. After the closing statement, the Respondent's Counsel expressly declared that he was satisfied with the way the proceedings and the hearing were conducted and that the Respondent's right to be heard had been fully respected.

IV. OVERVIEW OF THE SUBMISSIONS OF THE PARTIES

42. The following outline of the parties' submissions is illustrative only and does not necessarily comprise every contention put forward by the parties. However, the Panel has considered all the factual allegations, legal arguments and evidence submitted by the parties in the present proceedings.

A. Al-Masry (Appellant)

- i) The Appellant was induced to enter into the Transfer Agreement by wilful deceit of the Respondent*
43. Relying on Article 28 of the Swiss Code of Obligations ("SCO"), the Appellant contends that it was wilfully deceived by the Respondent. The Appellant affirms that, contrary to the Respondent's declaration at the time of the negotiation of the Agreement, the Player was no longer bound by an employment contract with the Respondent.
44. The Appellant therefore considers that the Agreement is null and void with *ex-tunc* effect.
45. As a consequence, the Appellant considers that it shall not pay the transfer fee foreseen in Article 2 of the Agreement.

ii) *The Appellant shall not pay any transfer fee in accordance with the principle of pacta sunt servanda*

46. Alternatively, the Appellant argues that, further to the Port Said tragedy, it has been put under “huge pressure” from political and football stakeholders in Egypt. As a result, it had decided not to participate to the 2012/2013 season¹.

47. This decision was immediately communicated to the Respondent. However, the latter allegedly refused to receive the Player back in contradiction with the terms of Article 3 of the Agreement. The Appellant had therefore no other choice than to ensure that the Player could be registered for the 2012/2013 season with another club, i.e. El Daklyeh.

48. The Respondent’s claim for payment of the transfer fee was therefore to be considered as a *venire contra factum proprium*.

iii) *The Appellant can deduct an amount of USD 10’000 from the transfer fee based on the solidarity mechanism*

49. The Appellant contends that in any event it can deduct an amount of USD 10’000 from the transfer fee on the grounds of solidarity mechanism as foreseen in Article 21 of the FIFA Regulations on the Status and Transfer of Players.

B. Warri Wolves (Respondent)

i) *The Appellant failed to timely request the grounds of the appealed decision*

50. The Respondent claims that the Appellant failed to timely request the grounds for the appealed decision. As a result, the latter could not be appealed before the CAS. However, as mentioned above, in view of the case file communicated by FIFA, the Respondent withdrew this claim during the hearing.

ii) *The Player was still under contract with the Respondent when the Agreement was signed with the Appellant*

51. The Respondent explains that the Player was still under contract with Warri Wolves when the Agreement was signed with the Appellant.

iii) *The Appellant admitted that it was liable for the payment of the transfer fee to the Respondent*

52. Finally, the Respondent explains that the Appellant admitted several times that it was liable for the payment of the transfer fee stipulated in the Agreement.

¹ On 1 February 2012, a massive riot occurred at Port Said Stadium in Port Said, Egypt, following an Egyptian Premier League football match between Al-Masry and Al-Ahly clubs. At least 72 people were killed.

V. THE PARTIES' REQUESTS FOR RELIEF

53. The Appellant submitted the following requests for relief:

- "1. To fully accept the present Appeal.*
- 2. To establish that the Appellant shall not pay to the Respondent any amount related to this matter under appeal.*
- 3. Therefore, to set aside the decision under appeal of the FIFA Players' Status Committee passed in Zurich, Switzerland on 20 November 2013 ("the "Decision") as far as it did not reject any claims of Warri Wolves Football Club.*
- 4. As consequence of the above, to state that the Appellant shall not pay any costs at all related to the proceedings in front of the FIFA Players' Status Committee leading to the Decision.*
- 5. For the effect of the above, to state that the Respondent shall be condemned to pay any and all costs of the present arbitral proceedings including, without limitation, attorney's fees as well as any eventual further costs and expenses for the witnesses and experts.*

In this respect, the Appellant reserves the right to provide to the CAS all relevant documentation attesting the incurred amounts".

54. The Respondent submitted the following requests for relief:

- 1. "To consider that the Decision passed by the FIFA Players' Status Committee in Zurich, Switzerland, on 20 November 2013 is came into force,*
As Consequence, conclude that the Appellant is deemed to have waived his right to file an appeal;
- 2. To Fully confirm the Decision, specifically condemn the Appellant to pay to the Respondent the amount of USD 200,000 plus 5% interest p.a. on the said amount until the date of effective payment as from 31 October 2012 as from the date of notification of the Decision;*
- 3. For the effect of the above, to state that the Appellant shall be condemned to pay any and all costs of the present arbitral proceedings including, without limitation, attorney's fees as well as any eventual further costs and expenses for witnesses and experts.*

In this respect, the Respondent reserves the right to provide to the CAS all relevant documentation attesting the incurred amounts".

VI. LEGAL DISCUSSION

A. Jurisdiction of the CAS

55. Article R47 of the CAS Code reads as follows:

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.

56. According to Article 67(1) of the FIFA Statutes (2013 edition) provides as follows:

Appeals 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.

57. The jurisdiction of CAS, which is not disputed by the parties, derives from Article 67(1) of the FIFA Statutes and Article R47 of the Code.

58. It therefore follows that CAS has jurisdiction to decide over this case.

B. Admissibility

59. Pursuant to Article R49 of the CAS Code:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.

60. The Statement of Appeal was filed on 23 April 2014, i.e. within the time limit of twenty one days set out by Article 67(1) of the FIFA Statutes.

61. It follows that the appeal is admissible.

C. Applicable Law

62. Article 187 of the Swiss Private International Law Act ("PIL") provides – inter alia – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected"*.

63. This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PIL. In particular, such provision enables the parties to mandate the arbitrators to settle the dispute in application of provisions of law that do not originate in a particular national law, such as sports regulations or the rules of an international federation (cf. BUCHER, *Commentaire romand – Loi sur le droit international privé*, 2011, Art. 187, §2; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage*

international, 2nd ed., 2006, §636, p. 405; BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2nd ed., 2010, §1265, p. 363; CAS 2009/A/1781, §10; CAS 2008/A/1639, §20).

64. According to the legal doctrine, the choice of law made by the parties can be tacit (BERGER/KELLERHALS, op. cit., §1269, p. 364) and/or indirect, by reference to the rules of an arbitral institution (KAUFMANN-KOHLER/RIGOZZI, op. cit., §617, p. 400; BUCHER, op. cit., Art. 187, §43).

65. Furthermore, Article R58 of the CAS Code provides as follows:

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 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.

66. In the present case, the parties have not made an express choice of law. However, in agreeing to submit any dispute to FIFA bodies, the parties have submitted to the conflict-of-law rules contained in the FIFA regulations, in particular to Article 66(2) of the FIFA Statutes, which provides that CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

67. In light of the foregoing, the “*applicable regulations*” under Article R58 of the CAS Code are primarily FIFA Regulations and, additionally, Swiss law.

D. Merits

68. In view of the above, the main issues to be resolved by the Panel are as follows:

- a. Was the Player still under contract with the Respondent when the Agreement was negotiated by the parties?
- b. Does Article 3 of the Agreement impose any obligation to the Respondent?
- c. Can the Appellant rely on the solidarity mechanism to claim a deduction of USD 10’000 from the transfer fee?

a. Was the Player still under contract with the Respondent when the Agreement was negotiated by the parties?

69. Article 28 SCO reads as follows: “*A party induced to enter into a contract by the fraud of the other party is not bound by it even if his error is not fundamental*”.

70. In the present case, the employment contract signed by the Respondent and the Player on 6 January 2012 clearly states that the club wished to engage him “*for a period of 2 years commencing from the 2012 to 2014 football season*”. Furthermore, the Appellant has not filed any evidence in order to prove that the Player’s employment contract with the Respondent was no longer in force when the Agreement was signed.

71. It results that the Player was still under contract with the Respondent when the Agreement had been negotiated by the parties. This means that the Agreement is perfectly valid.
72. In light of the above, the Appellant's argument that it was wilfully deceived by the Respondent is ill-founded.

b. Does Article 3 of the Agreement impose any obligation to the Respondent?

73. Article 3 of the Agreement provided as follows: *"If the First party [i.e. Al-Masry] fails to pay the stated transfer amounting to 200,000 USD to the Second party [i.e. Warri Wolves], Warri Wolves FC will be entitled to return back the player"*.
74. Contrary to the Appellant's contention, the above provision does not impose any obligation on the Respondent. Indeed, as clearly stated in Article 3, the Respondent was only *entitled* – i.e. not *obliged* – to have the Player back if the Appellant did not pay the transfer fee.
75. Moreover, the Panel notes that the Appellant's Manager acknowledged on 31 August 2012 and, again, on 25 September 2012, that the Appellant had to pay the Respondent the transfer fee of USD 200'000.
76. Furthermore, the fact that the Respondent did not seek the Player's return does not prevent it from asking the payment of the transfer fee to the Appellant. Contrary to the Appellant's contention, the Respondent's claim cannot be deemed as a *venire contra factum proprium*.
77. Finally, the Panel observes that the Appellant's behavior shows that it considered to be contractually bound with the Player. Firstly, the Appellant seems to have entered into a loan agreement during the 2012/2013 season with another Egyptian club, i.e. El Daklyeh. Secondly, on 23 December 2013, the EFA rejected the ITC's request made by the Vietnam Football Federation based on the fact the contract between the Appellant and the Player had not then expired.
78. In conclusion, the Panel finds that Article 3 of the Agreement does not impose any obligation on the Respondent and that the Appellant must therefore fulfill the payment obligation stipulated in the Agreement (i.e. the payment of the transfer fee).

c. Can the Appellant rely on the solidarity mechanism to claim a deduction of USD 10'000 from the transfer fee?

79. Article R47 of the CAS Code provides that a sports decision can be appealed before the CAS according to the appeals procedure only *"if the Appellant has exhausted the legal remedies available to him prior to the appeal"*.
80. The Appellant contends that even if the Panel finds it liable for the payment of the transfer fee, an amount of USD 10'000 corresponding to 5% of the transfer fee, should be deducted.

81. However, the Panel notes that the Appellant did not raise any claim in this relation before the FIFA Players' Status Committee. As a matter of fact, the Appellant never responded to the claim lodged against it by the Respondent. As a result, the appealed decision does not deal with the solidarity contribution asked by the Appellant.
82. In light of the foregoing, the Panel considers that the Appellant has not exhausted internal remedies. The Appellant's claim is therefore inadmissible.

d. Conclusion

83. Based on the foregoing, and after taking into due consideration all the evidence produced and all the arguments made, the Panel finds that:
- 1) The Player was still under contract with the Respondent when the Agreement was negotiated and, then, signed with the Appellant. The Agreement is therefore valid.
 - 2) Article 3 of the Agreement does not impose any obligation on the Respondent.
 - 3) As a result, the Appellant must pay the transfer fee in the amount of USD 200'000 to the Respondent plus a 5% of interest *per annum* on the said amount until the date of effective payment as from 31 October 2012.
 - 4) The Appellant's claim for a solidarity contribution to be deducted from the transfer fee is inadmissible.
 - 5) In light of the foregoing, the appeal shall be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Al-Masry SC on 23 April 2014 against the Decision of the FIFA Players' Status Committee dated 20 November 2013 is dismissed.
 2. The Decision of the FIFA Players' Status Committee dated 20 November 2013 is confirmed.
- (...)
5. All other motions or prayers for relief are rejected.