



Arbitration CAS 2008/A/1717 Cornel Penescu v. Romanian Football Federation (RFF), award of 12 May 2011

Panel: Mr Bernhard Welten (Switzerland), Sole Arbitrator

Football

Disciplinary proceedings due to public statements made by a club's president

Public statements affecting honor, reputation, dignity or public image

According to Art. 52 par. 1 and 2 RFF Disciplinary Regulations, a person affects another person's honour, reputation, dignity or public image, when using offensive words. A referee is certainly used to hear criticism by the losing team and its staff after a game. The discussion about the performances of the teams and referees is a part of the football game and therefore, even if the statement of a team's president can be criticised as outrageous, it is not to be seen as affecting another person's honour, reputation, dignity or public image in the sense of the RFF Disciplinary Regulations.

Cornel Penescu (the "Appellant") is the President and owner of Football Club Arges SA (the "Club"), a Romanian football club. In the season 2008/09 the Club played in the league A of the Romanian Football Federation of which it is a member.

The Romanian Football Federation (the "Respondent" or RFF) governs the sport of football in Romania and is a member of the Fédération Internationale de Football Association (FIFA).

On 13 October 2008 "Gazeta Sporturilor" and "ProSport" published on their websites a statement as being made by the Appellant in the context of the 11th round of the Romanian championship and the upcoming game FC Vaslui v. FC Arges SA:

"There is no point for us to go and play at Vaslui, as it's well known how referees treat us there. We have the experience of the last two games in Vaslui, when Draganescu conducted the matches and, especially in the second game, he was obviously ruling to our disadvantage. I think it will be the same this time. I don't know who will officiate, but there are signals indicating that the hosting team will be again favoured by referees. These being the circumstances, what is the point in our turning up for the match? This way we will avoid spending money, getting irritated and being treated as fools".

On 14 October 2008 "ProSport" also published this declaration in its newspaper.

On 14 October 2008 Mr. Adalbert Kassai, RFF General Secretary, filed a report with the RFF Disciplinary Commission regarding the Appellant's statement regarding the refereeing of the

upcoming game between FC Vaslui and FC Arges SA. He asked the Disciplinary Commission to analyze the case and decide in accordance with the provisions of the RFF Statutes and Rules.

On 15 October 2008 the “TOP” newspaper published statements made by the Appellant in a press release. The Appellant denied having made the statements published by “Prosport” and “Gazeta Sporturilor”; he states that “all the nonsense wrote (rect. written) in the central press are lies”.

On 21 October 2008 the Appellant filed a statement with the RFF Disciplinary Commission. He states that the statements regarding the match between FC Vaslui and his team, printed in the central press, were never given by him in the form presented but that the central press tries to generate a scandal.

With decision no. 330 of 22 October 2008 the RFF Disciplinary Commission sanctioned the Appellant based on article 52 par. 5 RFF Disciplinary Rules with a six-month suspension and a fine of RON 300’000.

On 23 October 2008 the Appellant requested “*the documents containing the grounds*” of the decision and filed a “*petition for appeal*”.

By Appeal dated 4 November 2008 the Appellant appealed against the decision of the RFF Disciplinary Commission of 22 October 2008.

By decision dated 6 November 2008 the RFF Appeals Commission partially upheld the appeal and reduced the sanctions against the Appellant. Based on article 52 par. 1, 2 and 4 RFF Disciplinary Rules the Appellant was sanctioned with a suspension of six months and a fine of RON 150’000.

On 25 November 2008, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS) pursuant to Article R47 of the Code of Sports-related Arbitration (the “Code”) against the decision of the RFF Appeals Commission (the “Decision”) of 6 November 2008. Together with his statement of appeal the Appellant requested a stay of the appealed decision.

On 28 November 2008 the CAS informed the Appellant regarding the deadline to file the appeal brief in accordance with Art. R51 of the Code and set the Respondent a deadline of five days to agree that the case be submitted to a Sole Arbitrator and seven days to send an answer to the requested provisional and conservatory measures.

On 8 December 2008 the Appellant filed its appeal brief in accordance with Art. R51 of the Code. He requested an annulment of the decision no. 40 of the RFF Appeals Commission of 6 November 2008, therefore lifting the ban of six months regarding any football related activity as well as the obligation to pay a fine of RON 150’000.

On 10 December 2008 the CAS granted the Respondent a deadline of 20 days to file a written answer to the appeal.

By Order of 26 March 2009 the Sole Arbitrator dismissed the Appellant’s request for provisional and conservatory measures filed on 25 November 2008.

By letter of 3 December 2010 the Appellant sent back the signed Order of Procedure which stated that the Sole Arbitrator had decided that he was sufficiently well informed not to hold a hearing. Further the Appellant stated that he had no evidence regarding the criminal procedures in the referee bribing scandals. The Respondent did not send any communication.

LAW

CAS Jurisdiction / Admissibility

1. The jurisdiction of the CAS, which is not disputed by the parties, derives from art. R47 of the Code and art. 57 RFF Statutes: *"CAS has competence to resolve any disputes between FIFA, UEFA, regional confederations, national federations, leagues, clubs, players, officials, licensed player's agents or match agents, if FIFA/UEFA/RFF statutes do not provide otherwise. The appeal must be lodged with CAS within 21 days from communication of the decision"*.
2. Art. 88 RFF Disciplinary Regulations states *"The competence regarding the settlement of disciplinary cases belongs to the commissions with jurisdictional attributions of RFF/CFA, as follows:*
...
d) the decisions of the Appeal Commission of RFF may be appealed against before CAS within a deadline of 21 days of the date of the ruling of the decision".
3. Based on the RFF Statutes respectively art. 88 RFF Disciplinary Regulations the final line of the Appeals Commission's decision of 6 November 2008 states: *"Appealable with CAS within 21 days from communication"*. Based on the above, the Sole Arbitrator is satisfied that the CAS has jurisdiction to hear his matter.
4. Based on art. R57 of the Code the Sole Arbitrator has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.
5. The contested decision was rendered on 6 November 2008. The statement of appeal was filed on 25 November 2008 to the CAS and therefore within the 21 day deadline. Accordingly, the appeal is admissible.

Applicable law

6. Based on art. R58 of the Code, the Panel is required to decide the dispute:
"according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has

issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

7. In this case, the Sole Arbitrator shall apply the provisions of the RFF Statutes and Regulations. In the absence of a choice of rules of law by the parties and pursuant to art. R58 of the Code, the Sole Arbitrator shall subsidiarily apply Romanian law.

Merits of the Dispute

8. The disciplinary procedure against the Appellant started based on the statements made public by “Prosport” and “Gazeta Sporturilor” on 13 and 14 October 2008, in relation to the football game of 19 October 2008 of the Appellant’s team FC Arges against FC Vaslui.
9. The Sole Arbitrator did not receive a copy of the said articles in its original language nor was a copy included in the case file sent from the Respondent. In the RFF case file there was, however, a copy of the original article included in “TOP” newspaper of 15 October 2008.
10. As the RFF Appeals Commission did not consider the statement published by “Gazeta Sporturilor” and “Prosport” on 13 respectively 14 October 2008 as bringing prejudice to football in general, there is no need to clarify the situation if the newly introduced article 52 par. 5 RFF Disciplinary Regulations was already in force or not; it relates to the prejudice brought to football in general. The main article being applied in the appealed decision of 6 November 2008 was article 52 par. 1, 2 and 4 RFF Disciplinary Regulations. The first instance, RFF Disciplinary Commission, interpreted the statement somehow differently and applied the newly introduced art. 52 par. 5 RFF Disciplinary Regulations as it considered the before mentioned statement as bringing prejudice against football in general. The Sole Arbitrator is mainly looking at the appealed decision of the RFF Appeals Commission and therefore checking in this award if the facts of the case are to be considered as affecting another person’s honour, reputation, dignity or public image.
11. Art. 52 par. 1, 2 and 4 RFF Disciplinary Regulations state:
 - “1. *A person that affects another person’s honour, reputation, dignity or public image, using offensive gestures, words or any another means, shall be sanctioned as follows:*
 - a) ...
 - b) *If the author is an official, he shall be suspended for one to two months.*
 2. *If the deeds under paragraph 1 are committed via mass media, the sanctions shall be as follows:*
...
 - b) *If the author is a club official or is assimilated to the club (financer, sponsor, etc.), he shall be sanctioned with the interdiction to carry out football-related activities for a period of four to six months, in the case of the first infringement; for each of any following infringement, said official shall be sanctioned with the interdiction to carry out football-related activities for a period of one to two years, while his club shall be sanctioned with a three-point deduction in the championship in which takes part the team in the upper category.*

...

4. *In the case of sanctions applied to officials as per the provisions under paragraph 2 letter b) of this article, the fine applied is LEI 150'000 for the first offence; each of the following offences will be sanctioned by doubling the former sanction".*
12. The starting point for the Sole Arbitrator is to decide on the contested facts and to have a factual basis on which the correct application of the RFF Disciplinary Regulations can be checked. In the case at hand it is contested by the Appellant that the statement published in the news on 13 and 14 October 2008 was made in this way by him. However, he does not contest having made a statement; all he contests is the content of the statement printed in the news. As the Appellant did not agree with the statement published, he prepared a press release which was sent out on 14 October 2008. The major points of this press release were printed in the "TOP" newspaper of 15 October 2008. The Appellant explains in detail what he mentioned to the journalist and that his alleged statements published on 13 and 14 October 2008 in "Gazeta Sporturilor" and "ProSport" are lies.
13. The RFF Appeals Commission did not consider this press release, meanwhile the RFF Disciplinary Commission did read the article in the "TOP" newspaper as well as listen to the recorded statement which lead to the articles published by "Gazeta Sporturilor" and "ProSport" on 13 and 14 October 2008. The Sole Arbitrator states that in the file at hand no such recording is included and from the published statements of 13 and 14 October 2008 only a translation from a different statement is included. For the rest the statement to be judged here was cited in the report of 14 October 2008 and in the decision of the RFF Disciplinary Commission of 22 October 2008.
14. The Sole Arbitrator not receiving the proofs of such statement made by the Appellant has therefore to judge based on the parties' allegations. It is not contested that the Appellant has spoken to the media; all that is contested is the content of such telephone discussions with a journalist. This is supported by the fact that the Appellant prepared a press release on 14 October 2008 which was published in "TOP" newspaper. Even if this newspaper is directly or indirectly controlled by the Appellant or his Club – as stated by the RFF Disciplinary Commission – it would not make sense for the Appellant to prepare such a press release in the event that he in fact made the statement as printed by "Gazeta Sporturilor" and "ProSport" and cited by the RFF instances. Only the CD or tape mentioned in the RFF Disciplinary Decision (*"The Commission listened to the audio recording and reached the conclusion that Mr. Penescu Cornel did formulate the statements mentioned on the two websites and in the ProSport newspaper"*) on which such telephone statement apparently was recorded, could bring sufficient proof. The burden of proof regarding facts being considered as relevant to impose disciplinary measures against the Appellant is clearly given to the Respondent and its organs (see article 106 RFF Disciplinary Regulations). Considering this, the facts at hand leave at least doubts whether the Appellant really did make the statements as published by "Gazeta Sporturilor" and "ProSport" on 13 and 14 October 2008 and cited by the RFF Disciplinary Commission. The Sole Arbitrator, in applying the burden of proof rule, holds therefore in favour of the Appellant that the statement in question was most probably not as strong as it was published by the two newspapers and the RFF Disciplinary Commission; the RFF failed to meet its burden of proof.

15. Based on art. 52 par. 1 and 2 RFF Disciplinary Regulations a person affects another persons honour, reputation, dignity or public image, when using offensive words. The only person the Appellant referred to in the statement published by “Gazeta Sporturilor” and “ProSport” on 13 and 14 October 2008 was referee Draganescu. In the file received from the Respondent the Sole Arbitrator could not find any complaint (oral or written) respectively any statement from Mr. Draganescu regarding the Appellant’s statement. Based on this and in carefully reading and judging – based on the comments made before – the wording of the statement cited in the decision of the RFF Disciplinary Commission, the Sole Arbitrator is of the opinion that such statement – even without considering the doubts regarding its content made by the Appellant – did not offend Mr. Draganescu. A referee is certainly used to hear criticism by the losing team and its staff after a game. The discussion about the performances of the teams and referees is a part of the football game and therefore, even if the Appellant’s statement can be criticised as outrageous, it is definitely not to be seen as affecting another person’s honour, reputation, dignity or public image as it is stated in art. 52 para. 1 RFF Disciplinary Regulations.
16. Based on the arguments laid down before the Appellant cannot be sanctioned in any way and his appeal is therefore fully accepted.

The Court of Arbitration for Sport rules:

1. The appeal filed by Cornel Penescu on 25 November 2008 is upheld and the decision issued by the RFF Appeals Commission on 6 November 2008 is annulled.
2. There is no sanction imposed on Mr. Cornel Penescu. Any fine paid to the Romanian Football Federation has to be returned to him.
3. (...).
4. All further and other claims for relief are rejected.