



Arbitration CAS 2008/A/1716 Adrian Mititelu Marin v. Romanian Football Federation (RFF), award of 27 January 2011

Panel: Mr Bernhard Welten (Switzerland), Sole Arbitrator

Football

Corruption

Invalidity of a sanction against an official for an alleged offence related to the reputation of a federation

The facts as well as the existing criminal investigations or procedures related to a bribery scandal have to be considered in order to determine whether the statements made by a club official are offending the honor and reputation of a football federation therefore justifying a disciplinary sanction. In this respect, if the probability of the reality of the statements showing a possible corruption within a national football federation involving referees appears bigger than the probability of such statements being made just to offend a referee's reputation, a club official cannot be found guilty and sanctioned for bringing – most probably – true facts to the public.

Adrian Mititelu Marin (the “Appellant”) is the President of Football Club Universitatea Craiova (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 3 October 2008 the RFF league A football game between Football Club Universitatea Craiova and FC Arges was played.

On 5 October 2008 the newspaper “Prosport” published two statements as being made by the Appellant regarding the performance of the referee Aurel Bogaciu as follows:

“There is somebody within the RFF, I will not name him, who sent Bogaciu to destroy us. A referee told me how Constantin performs the delegations, but I’m going to have a discussion with Mircea Sandu, because it is outrageous. It’s not possible that refereeing be rewarded as it once was, with water melons and tomatoes”.

“I’m capable of going to FIFA and UEFA headquarters and protesting with a placard tied around my neck. They destroyed us, we scored a valid goal and the expulsions were completely ungrounded”.

On 7 October 2008 Mr. Adalbert Kassai, RFF Secretary General, filed a report to the RFF Disciplinary Commission, amongst others regarding the Appellant’s statement made regarding the performance

of the referee Aurelian Bogaciu at the match between F.C. Arges and “U” Craiova. He asked the Disciplinary Commission to analyze the case and decide in accordance with the provisions of the RFF Statutes and Rules.

With decision no. 311 of 15 October 2008, signed on 20 October 2008, the RFF Disciplinary Commission sanctioned the Appellant based on art 52 par. 5 RFF Disciplinary Rules with a six month suspension and a fine of RON 300’000.

With Appeal of 23 October 2008 the Appellant appealed against the decision of the RFF Disciplinary Commission of 15 October 2008.

With decision of 30 October 2008 the RFF Appeals Commission partially approved the appeal and reduced the sanctions against the Appellant. Based on art. 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 20 November 2008, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (the “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 30 October 2008. Together with this 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 to 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 28 November 2008 the Appellant filed its appeal brief in accordance with Art. R51 of the Code. He requested an annulment of the decision no. 39 of the RFF Appeal Commission of 30 October 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 3 December 2008 the CAS set the Respondent a deadline of 20 days to send a written answer to the appeal.

By letter of 11 December 2008 the CAS stated that it did not receive any letter from the Respondent regarding the choice on the formation of the Panel. The parties were advised that the President of the CAS Appeals Arbitration Division would decide whether the matter should be submitted to a Sole Arbitrator.

By letter of 8 January 2009 the CAS stated that it did not receive any answer from the Respondent to the appeal filed. The parties were advised that pursuant to Art. R55 of the Code the arbitration procedure would proceed nevertheless. The parties were asked to reply within a deadline of 15 days if they wished a hearing to be held in this case.

On 14 January 2009 the Appellant informed the CAS that he preferred that a hearing be held.

On 18 February 2009 the CAS informed the parties that Bernhard Welten had been appointed as Sole Arbitrator in this case.

By letter of 18 March 2009 the Appellant was asked to send the CAS a complete version of the RFF Disciplinary Regulations and Statutes in English within 10 days.

By letter of 19 March 2009 the Appellant stated that such requested documents were official documents and therefore it was only the RFF who could provide such official documents.

By letter of 20 March 2009 the CAS asked the Respondent to send the CAS the complete RFF Disciplinary Regulations and Statutes in English.

By letter of 25 March 2009 the CAS asked the Respondent to send the CAS a complete copy of its case file for this matter within 10 days.

By Order of 26 March 2009 the Sole Arbitrator dismissed the Appellant's request for provisional and conservatory measures filed on 20 November 2008.

By letter of 6 May 2009 the Appellant requested, in considering the latest developments in refereeing in Romania, that he may complement his arguments and file further documents.

By letter of 29 January 2010 the CAS sent the parties four questions to be answered within a deadline of 12 February 2010 and advised the parties to enclose relevant documents to these questions within the same deadline. Further it stated that the Sole Arbitrator decided that he was sufficiently well informed not to hold a hearing; however the parties were invited to file any final written submissions and submit any final evidence by 12 February 2010.

By letter of 15 February 2010 the Appellant responded to the questions asked by the CAS. No further statement or proofs were filed. The Respondent did not send any communication.

LAW

CAS Jurisdiction

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 30 October 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 this 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.

Admissibility

5. The contested decision was rendered on 30 October 2008 and according to the copy of the decision in the file this decision was sent to the Appellant by fax on 13 November 2008. The statement of appeal was filed on 20 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 primarily 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 Article R58 of the Code, the Sole Arbitrator shall subsidiarily apply Romanian law.

Merits of the Dispute

8. The whole disciplinary procedure against the Appellant started based on two statements made public in “Prosport” on Sunday, 5 October 2008, in relation to the football game of his team, FC Universitatea Craiova, against FC Arges of 3 October 2008:

"There is somebody within the RFF, I will not name him, who sent Bogaciu to destroy us. A referee told me how Constantin performs the delegations, but I am going to have a discussion with Mircea Sandu, because it is outrageous. It is not possible that refereeing be rewarded as it once was, with watermelons and tomatoes".

"I am capable of going to the FIFA and UEFA headquarters and protesting with a placard tied around my neck".

9. The Sole Arbitrator did not receive a copy of the said article in its original language nor was a copy included in the case file sent from the Respondent.
10. As the RFF Appeals Commission did not consider the statements as bringing prejudice to football in general, there is no need to clarify the situation if the newly introduced article 52 par. 5 of the RFF Disciplinary Regulations was already in force or not; it relates to the prejudice brought to football in general. The main articles being applied were Article 52 par. 1, 2 and 4 of the RFF Disciplinary Regulations; however, the decision of the Appeals Commission to apply Article 52 par. 4 of the RFF Disciplinary Regulations is contradictory to the reasoning that the statements in "Prosport" do not bring any prejudice to the image of football in general. Article 52 par. 4 RFF Disciplinary Regulations states: *"Statements that are in any way prejudicial to the image of football, such as those relating to irregularities ..."*.
11. The RFF Appeals Division did therefore mistakenly refer to Art. 52 par. 4 of the RFF Disciplinary Regulations.
12. Art. 52 par. 1 and 2 RFF Disciplinary Regulations state:
 1. *A person that affects another person's honor, 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:*
 - a) ...
 - 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".*
13. Neither the RFF Disciplinary Commission nor the RFF Appeals Commission refer to any former sanctions of the Appellant. The Appellant himself filed two translations of decisions of the RFF Disciplinary Commission of 6 and 22 May 2008. The RFF Disciplinary Commission and the Appeals Commission did, however, not consider these as first offences in the sense of Art. 52 par. 2 lit. b) RFF Disciplinary Regulations, probably because they happened in the former season.

14. In the case at hand it is questionable if the statements cited before are to be considered as affecting another person's honor, reputation, dignity or public image via mass media. At least the second statement is clearly giving an opinion about facts of the game. It is obvious that different persons with different interests see such scenes in a different light. Such discussion led within certain boundaries is a part of the football game and in the case at hand it therefore cannot be considered as affecting another person's honor, reputation, dignity or public image.
15. Regarding the question if the first statement really belongs to the Appellant who denies this, no further documents were produced in this procedure. Article 106 RFF Disciplinary Regulations places the burden of proof fully on the RFF. Without sending a copy of the original article published by Prosport on 5 October 2008 or any further statement, e.g. a confirmation of the journalist, the RFF has failed to meet its burden of proof.
16. In any case such statement cannot be seen as offending Mr. Bogaciu's reputation and honor as he is mentioned to be a victim of a person within RFF. The reproaches are made against Mr. Constantin who was the president of the Referee Central Commission within RFF. If such statement is affecting Mr. Constantin's honor and reputation does not have to be argued based on the facts brought to public knowledge in early 2009, even though, based on art. 52 RFF Disciplinary Regulations improper statements are sanctioned.
17. In spring 2009 the bribery scandal in Romanian football was made public by the news media, amongst other e.g. the Southeast European Times (http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2009/05/05/feature-01). It is mentioned that Mr. Cornel Penescu, owner and president of FC Arges, which was the adversary of the Appellant's team in the game of 3 October 2008, had bribed top referees in order to secure favorable outcomes for his team. Amongst others also Mr. Aurelian Bogaciu was put under preventive arrest and charged with accepting a EUR 3'700 bribe from Mr. Penescu.
18. In April 2009 several newspapers and online media informed that the Romanian football referee Gheorghe Constantin was taken in custody for almost a month in relation to the bribery scandal and he finally resigned as president of the Referee Central Commission within RFF.
19. Based on these facts which were confirmed in the Appellant's written answer to the CAS on 15 February 2010 and even if no final decision seems yet to be issued in these criminal investigations or procedures related to the bribery scandal, the Sole Arbitrator, in weighing the probability of the statements showing the reality of a possible corruption being found within the RFF and probably involving referees against the probability of such statements being made just to offend Mr. Bogaciu's reputation, considers the first probability as being bigger based on the facts presented. By letter dated 2 December 2010, the Appellant replied to the Sole Arbitrator's question that the *"persons involved in the bribing scandals have been formally indicted and sent to trial pending a decision of the court. One of the matches for which they were formally indicted and sent to trial is the match our team played, match suspected of being 'interfered with' by the referees"*. Neither the Respondent nor Mr. Bogaciu made any statements or filed any proofs which would show that the Appellant's statements are only offending the honor and reputation of the referee.

Therefore, in case the Appellant made even the first statement, he cannot be found guilty and sanctioned for bringing – most probably – true facts to the public.

20. 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 Adrian Mititelu Marin on 20 November 2008 is upheld and the decision issued by the RFF Appeals Commission on 30 October 2008 is annulled.
2. There is no sanction imposed on Mr. Adrian Mititelu Marin. 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.