



Arbitration CAS 2008/A/1677 Alexis Enam v. Club Al Ittihad Tripoli, award of 20 May 2009

Panel: Mr Jean-Paul Burnier (France), President; Mr Rafik Dey Daly (Tunisia); Mr Guido Valori (Italy)

Football

Breach of the employment contract without just cause within the Protected Period

Res judicata

Nature of the damage suffered by the club

Joint and several liability of the new club

Standing to be sued of the club with respect to the sporting sanctions

1. The principle of *res judicata* ensures that whenever a dispute has been defined and decided upon, it becomes irrevocable, confirmed and deemed to be just (*res judicata pro veritate habetur*). The three elements of a *res judicata* are the same persons, the same object and the same cause. The *exceptio res judicata* is only admissible if all three elements are concurrently present.
2. The damage that a club may suffer when the player breaches his contract is of a triple nature. The “material damage” (*damnum emergens*) represents the actual reduction in the economic situation of the party who has suffered the damage. The “loss of profits” (*lucrum cessans*) represents the profit which could reasonably have been expected but that was not earned because of the breach. Finally, “non-pecuniary loss” refers to those losses which cannot immediately be calculated, as they do not amount to a tangible or material economic loss.
3. According to article 17 para. 2 of the FIFA Regulations, the player’s new club is jointly and severally liable with the player for the payment of the applicable compensation. This liability is independent of any possible inducement by or involvement of the new club to a breach of contract.
4. Under Swiss law, the defending party has standing to be sued (*légitimation passive*) if it is personally obliged by the “disputed right” at stake. In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it. While a club has standing to be sued with respect to the financial aspect of a case, it is not the case with respect to the sporting sanctions imposed to the player, as nothing is claimed against the club nor sought from it.

Alexis Enam (the “Player” or “Appellant”) is a Cameroonian professional football player, born on 25 November 1986 in Ambam.

Club Al Ittihad Tripoli (the “Club” or “Respondent”), is a Libyan football club, member of the Libyan Football Federation (LFF) which is member of Federation International de Football Association (FIFA).

On 17th September 2005 Club Al Ittihad Tripoli and the Player signed a professional player employment contract (the “Employment Contract”) valid for two years i.e. until 16th September 2007.

The Cameroonian Football Federation (CFF) summoned the Player to participate with the hopes Cameroonian National Team in a qualifying match for the Olympic Games 2008 against the hopes Guinean National Team, which took place on 3rd June 2007 at Garoua, Cameroon. Through a letter dated 3rd May 2007, CFF requested from the Club the release of the Player for the period of preparation and for this match.

The Club accepted to release the Player for five days from 31st May 2007 to 4th June 2007 and a document named “Application breaks” was signed between the Parties on 22nd May 2007.

The Player did not return to Libya after the match with the Cameroonian National Team in the aforementioned time limit. Thus, the Club on 9th and 17th of June, through LFF, contacted and requested FIFA’s intervention to the CFF in order to ensure the Player to return to Libya to play with the Club upcoming matches in the African Champions League.

On 21st June 2007, FIFA informed CFF of the applicable provisions of Regulations pertaining to the release of players for association team and in particular of the fact that association teams must ensure that players are able to return to their clubs on time after the match.

On 25th June 2007, CFF explained that the Player was blocked in Cameroon because of passport problems, the passport expired and the issuance of a new one took longer than expected. Further, it stated that the Player, in spite of having signed a two years contract with the Club, never had permanent residence papers, so that he needed to have a new visa each time he travelled out of Libya. Moreover the CFF promised that once the Player would obtain his new passport and visa, he would immediately join the Club.

On 5th July 2007, FIFA wrote to CFF and asked to urge the Player on to immediately resume duty with his Club.

In its subsequent correspondence dated 10th July 2007, CFF informed that, as a result of its intervention, the Player received a new passport ahead of schedule. However, CFF explained that “as a consequence”, the Player travelled with the Cameroon Olympic Team to Algeria on 7th July 2007 in order to participate with that team in the All Africa Games and that he would return on 25th July 2007 at the latest, after the aforementioned Games.

On 12th July 2007, FIFA wrote once again to CFF and emphasized again that it should ensure that the Player resumes duty with the Club. FIFA also stressed that the CFF should have informed the Player and the Club about the call-up of the Player to participate in All Africa Games, according to FIFA's Regulations for the Status and Transfer of Players (the "Regulations").

The CFF replied, by letter dated 17 July 2007, that it properly understood the contents of FIFA's letter and that it had instructed the coaches to immediately release the Player from the All Africa Games, so that he can return to his club. The CFF maintained that the Club, through the Player, had been informed about the Player's participation to the All Africa Games, on condition that he obtained a new passport.

The Libyan Club, confirmed in its correspondence dated 21st July 2007, that it did not give permission to the Player to participate in the All Africa Games and that his return to the Club was supposed to be on 4th June 2007.

On 1st August 2007, the Player sent the Club a letter, with copy to FIFA, in which he informed that he suffered an injury during the All Africa Games which resulted in a disability to play for six weeks. The Player remitted a copy of a medical report confirming his statements issued by the doctor of the Association team of Cameroon.

In the meantime, on 2nd August 2007, the Club submitted a corresponding claim against the Player and the CFF with FIFA Dispute Resolution Chamber (DRC) related to the contractual dispute arisen between the Parties. The Club maintained that the Player had breached the Employment Contract applicable between them.

On 11th December 2007 the Single Judge of the Players' Status Committee, on the basis of the first claim lodged by the Club, decided that the Player had not resumed duty with the Club in a timely manner. Likewise, the Single Judge held that the CFF repeatedly breached the pertinent applicable provisions of the Regulations. Therefore, the claim of the Club was accepted and, in application of Articles 1 and 6 of the Annex 1 of the Regulations, both the Player and the CFF were sanctioned. Notably a ban was imposed on the CFF to call up the Player for the next match played by the Association team of Cameroon and the Player had to pay the amount of USD 2 000 to the Club.

On 18th December 2007, the Player signed a new employment contract with the Tunisian Club Africain, valid for three years.

On 24th December 2007, the Tunisian Football Federation (TFF) requested LFF to issue the International Transfer Certificate for the Player in order to register him as a professional for its member the Tunisian Club Africain, which was refused, on 29th December 2007, by LFF because of the dispute pending before FIFA.

On 31st December 2007, the TFF and the Tunisian Club Africain contacted FIFA and requested its assistance in obtaining the International Transfer Certificate.

On 22nd January 2008, the Single Judge of the Players Status Committee authorized TFF to provisionally register the Player with the Tunisian Club Africain with immediate effect.

On the basis of the abovementioned claim before the DRC, the Player explained, by letter dated 12 September 2007, that he had never received the relevant permanent residence papers for his stay in Libya and that he took advantage of the call-up of the CFF and of his stay in Cameroon in order to get a new passport, that during this period he was contacted by the Tunisian Club Africain and informed his club about his intention to sign with a new club at the expiration of their contract.

On 7th May 2008, the DRC issued the challenged decision. It pointed out that it was not competent to hear the claim against the FFC, concluded that the Player was unable to demonstrate that he had valid reasons for failing to return to the Club in due time and to honour his contract until its expiry date and considered that, by failing to duly return, the Player had breached, without just cause, his employment contract. Applying article 17 para. 1 of the Regulations, the FIFA DRC therefore decided to condemn the Player to pay to the Club a compensation in the amount of USD 45 000 for breach of contract without just cause within the protected period. Furthermore, in application of article 17 para. 2 of the Regulations, the Tunisian Club Africain was deemed jointly and severally liable for the payment of this amount.

The Player was also sanctioned by a restriction of 4 months of his eligibility to play in official matches due to the breach of the contract during the protected period.

This decision has been faxed by FIFA to LFF, CFF and TFF on 30th September 2008.

According to the Player, this decision was communicated by TFF to him on 2nd October 2008.

Following the notification to the Player of the DRC decision of 7th May 2008, Alexis Enam submitted the case before the CAS pursuant to article 61 para. 1 of the FIFA Statutes. On 6th October 2008 the Player filed an appeal proceedings before CAS in which it mainly requires the quash of the decision of the DRC dated on 7th May 2008.

Together with his statement of appeal, the Player also filed, on 6 October 2008, a request for a stay. The President of Appeals Arbitration Division of the Court of Arbitration for Sports (CAS) rejected this request by order dated 14th November 2008 and decided that the cost for this order on request for a stay would be determined in the final award.

By letter dated 25 October 2008, the Appellant confirmed that his statement of appeal has to be considered as a combined statement of appeal and appeal brief and limited his request for a stay to the imposed sporting sanction.

On 16th December 2008, FIFA's renounced to his right to intervene in accordance with article 41.3 of the Code.

On 12th February 2009, the Parties were invited by the CAS to state whether they preferred a hearing to be held in this matter or that a Panel issues an award on the basis of written submissions.

By letter of 17th February 2009, the Player informed CAS that he preferred the Panel not holding a hearing and issuing an award on the basis of written submissions.

On 23rd February 2009, CAS noted that the Club has not expressed its position on this issue and informed the Parties that the Panel has decided not to hold a hearing.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from article R47 of the Code which stipulates that:

“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”.

2. Article 62 para.1 of the FIFA Statutes reads as follows:

“FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players’ agents”.

3. Article 63 para. 1 and 2 of the FIFA Statutes is the following:

“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.

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

The appeal relates to a decision of FIFA DRC which decided in the last instance. Consequently FIFA’s internal proceedings have been exhausted.

Admissibility

4. The DRC’s decision was notified on 30 September 2008; the Appellant however underlines that he received the challenged decision on 2 October 2009.
5. The Player filed its statement of appeal before CAS on 6th October 2008, within 21 days from notification of the DRC Decision.

6. On 27th October the Player informed the CAS that the statement of appeal had to be considered as the appeal brief.
7. The appeal brief of the Player is also in accordance with article R48 and R51 of the Code.
8. Thus, the appeal is admissible which is not disputed.
9. Accordingly that CAS has jurisdiction to treat this dispute. The mission of the Panel derives from article R57 of the Code, according to which a panel has full power to review the facts and the law of the case. Furthermore, the same article provides that a panel may issue a new decision, which replaces the decision challenged, or set the decision aside and refer the case back to the previous instance.

Applicable law

10. Article R58 of the Code reads 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 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”.
11. Then, article 62 para. 2 of the FIFA Statutes provides as follows:
“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”.
12. The Employment Contract does not contain any choice-of-law clause and the Parties have not otherwise specifically agreed on the applicable law. The Panel will therefore decide according to the various regulations of FIFA and if necessary to Swiss Law in addition.

The merits of the appeal

13. The appeal challenges the merits of the DRC Decision in respect to the following issues:
 - the *res judicata* principle considering FIFA proceedings;
 - the compensation of USD 45 000 regarding the breach of contract;
 - the restriction of four months of eligibility;
 - the costs and fees of procedure.

A. *The res judicata principle considering FIFA proceedings*

14. First of all, the Panel notes that jurisprudence (cf. notably CAS 2006/A/1029) establishes the three elements of a *res judicata* which are:
 1. The same persons – *eadem personae*;
 2. The same object – *eadem res*;
 3. The same cause – *eadem causa petendi*.

For the *exceptio res judicata* to be successfully admissible, it is necessary that all three elements be concurrently present. In the absence of one of these elements, it cannot be said that the object is the same – *nisi omnia concurrunt, alia res est*.

15. The plea of *res judicata* is founded on the principle of public interest – *interest rei publicae ut sit finis litium*. It was founded to safeguard the certainty of rights which have already been adjudicated upon and defined by a judgment. *Res judicata* eliminates the possibility of pending disputes prejudicing the rights which have already been established by a judgement. The principle of *res judicata* ensures that whenever a dispute has been defined and decided upon, it becomes irrevocable, confirmed and deemed to be just – *res judicata pro veritate habetur*.
16. In the present case, it appears that in the Single Judge of the Players' Status Committee's decision and in DRC Decision, the Parties and the object are not the same. Indeed, in the Single Judge of the Players' Status Committee's decision, the parties were the Club and CFF, whereas in the DRC Decision, the Parties were the Club and the Player.
17. In the same way, the legal question before the Single Judge of the Players' Status Committee was different from the question treated by the DRC.
18. The single Judge decision dealt with a disciplinary sanction linked to the non return of the Player in the Club after the game of 3rd June 2007 with his national team (sanctions in accordance with the Annex 1 of the Regulations) and also about his participation in the All Africa Games which was unauthorized by the Club.
19. The issue before DRC was about the breach of the Employment Contract by the Player, in accordance of article 17 of the Regulations and prejudice suffered by the Club.
20. Moreover, the Single Judge of the Players' Status Committee's decision, i.e. a disciplinary sanction, has been executed and is not disputed. Therefore, it is not up to the CAS to review the decision of the Single Judge of the Players' Status Committee.
21. Consequently, the Panel considers that the principle of *res judicata* has been respected and that it will study the DRC Decision about the breach of contract during the protected period and its consequences.

B. The breach of contract

22. The Employment Contract of the Player was running from 17 September 2005 until 16th September 2007 (see above).
23. Thus the Panel considers that, by failing to return to the Club after the game with the Cameroonian National Team, the Player has breached his contract.
24. Consequently, the main issue for the Panel is to determinate the date of the breach of the Employment Contract in order to calculate the compensation to be paid to the Club.
25. Considering the FIFA's file and particularly the letters of the Player and the CFF, the Panel considers that the Employment Contract has been breached by the Player on the 6th July 2007.
26. On 25th June 2007, CFF explained that *"the player was blocked in Cameroon because of passport problems, that the passport expired and the insurance of a new one takes longer than expected"*. Furthermore, on 10th July 2007, CFF explained that *"because of the frequent use of player's Enam passport, which the Libyan Football Federation wrote in their letter of 28 June 2007, the Player easily ran short of pages and had to apply for a new passport"*. CFF added *"So last week Enam had a new passport"*.
27. After having presumed the good faith of the Player as to the expiry of his passport, the Panel, regarding the letter of CFF dated 10th July 2007 considers that, from the week ending on Friday 6th July, the Player was able to return to Libya, which he did not. On the contrary, the Player travelled with the National Team to Algeria on 7th July to participate in the All Africa Games. In the same letter CFF concluded by *"he would be released 25 July 2007, after the games"*.
28. The Panel considers that the non return of the Player constitutes a fault which provides the basis for the breach of the Employment Contract.

C. Financial compensation for the breach of contract

29. Thus, the main issue in this appeal concerns the consequences of the breach by the Player of his Employment Contract with the Club. In its analysis, the Panel has taken into consideration the triple nature of the damage that a club may suffer by a breach of a contract. The "material damage" (*damnum emergens*) represents the actual reduction in the economic situation of the person who has suffered damage. The "loss of profits" (*lucrum cessans*), represents the profit which could reasonably have been expected but that was not gained as a result of breach. Finally, "non-pecuniary loss" refers to those losses which cannot immediately be calculated, as they do not amount to a tangible or material economic loss.
30. The DRC decided that an amount of USD 45 000 had to be paid to the Club by the Player for the unjustified breach of contract on the basis of article 17 para. 1 of the Regulations.

31. The first consequence of terminating a contract without just cause is that the party in breach is required to pay compensation. According to article 17 para. 1 of the Regulations, *“unless otherwise provided for the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria”*, some of which are also provided in the same article.
32. As nothing is provided for in the Employment Contract, the Panel thus refers to the criteria provided for in article 17 of the Regulations.
33. The Panel having not been provided with any information on the relevant national law, it is inclined to decide that this criterion is not relevant for the determination of the compensation in relation with this dispute (see, for instance, CAS 2007/A/1358, para. 103 and CAS 2008/A/1568, para. 6.45). With respect to the specificity of sport, the Panel notes that it *“shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of Parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football”* (CAS 2008/A/1568, para. 6.46). In addition, the Panel will consider the following objective criteria:
 - a) time remaining until the end the Employment Contract;
 - b) remuneration and other benefits of the Player under the existing contract and/or the new contract;
 - c) sporting prejudice for the Club;
 - d) costs supported by the Club.
34. Preliminary, the Panel notes that he would not take into account the salary of the Player in his new club, Tunisian Club Africain, because of the date of signature of the employment contract with this new club which happened after the contractual end of the Employment Contract with the Club.
 - a) Time remaining until the end the Employment Contract
35. Considering the date of the breach of the contract retained by the Panel (cf. n. 28), the remaining time was 73 days until the end of the contract, on 730 days of the total period of the Employment Contract.
 - b) The remuneration of the Player for the remaining period
36. The remuneration of the Player was USD 200 000 for the two years of the Employment Contract. Thus, the salary for the time remaining to go until the end of the contract represents the amount of USD 20 000 i.e. $(73 \times 200\,000 / 730)$.

37. As no element has been provided by the Club with respect to the financial value of the other benefits provided for by the Contract (bonuses, payment in kind), it will not be taken into account by the Panel.

c) The sporting prejudice for the Club

38. Before FIFA, the Club argued that the Player was absent for important matches of African Champions League 2007 and also for important matches of Libyan Cup causing it a lot of damage.

39. After studying the calendar of the games and the sporting results of the Club in African Champions League and in Libyan Cup from June 2007 to September 2007, i.e. during the absence of the Player and until the end of its Employment Contract, it appears that the non return of the Player does not cause a sporting prejudice. On one hand, the Club won the Libyan Cup on 15th July 2007 after three matches without the Player, on the other hand, the Club reached the semi-finals of the African Champions League and lost the qualification for the final of this competition after the end of the Employment Contract.

d) Costs supported by the Club

40. Before FIFA, the Club maintained that he has brought a new player Mr. Mohamed Coubageat for replacing Alexis Enam. The employment contract of Mr. Mohamed Coubageat started on 1st July 2007.

41. The Panel considers that the link between the recruitment of Mr. Mohamed Coubageat and the non return of Alexis Enam is not evidenced and consequently may not be taken into consideration.

42. The Panel underlines that the Club did not justify and add up the costs of others expenses due to the non return of the Player and that, with respect to the amounts it claimed before FIFA, the Club did not bring the evidence which established additional damages which have not already been taken into account.

D. *The joint and several liability of Tunisian Club Africain*

43. The DRC decided that the *“Tunisian Club Africain is jointly responsible for the payment of the above-mentioned amount”*.

44. The Panel notes that Tunisian Club Africain did not appeal against the DRC Decision and, therefore, has not challenged explicitly its joint and several liability in respect of such compensation as the Player is ordered to pay to the Club.

45. The Panel decides to confirm the position of the DRC Decision in this regard.
46. For the sake of completeness, the Panel specifies that, according to article 17 para. 2 of the Regulations, Tunisian Club Africain, as the Player's new club, is jointly and severally liable with the Player for the payment of the applicable compensation. This liability is independent of any possible inducement by or involvement of Tunisian Club Africain to a breach of contract, as confirmed by the CAS (cf. CAS 2006/A/1100; CAS 2006/A/1141 and CAS 2007/A/1298, 1299 & 1300).

E. The restriction of four months of eligibility

47. Pursuant to CAS jurisprudence, summarised by the Panel in charge of the cases CAS 2007/A/1329 & 1330: *"Under Swiss law, applicable pursuant to Articles 60.2 of the FIFA Statutes and R58 of the CAS Code, the defending party has standing to be sued (légitimation passive) if it is personally obliged by the "disputed right" at stake (see CAS 2006/A/1206 [...]). In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it (cf. CAS 2006/A/1189 [...]; CAS 2006/A/1192 [...])"* (CAS 2007/A/1329 & 1330, para. 27).
48. In its statements of appeal, the Appellant named the Club Al Ittihad as Respondent but not FIFA, who is not a party to this case.
49. The Panel deems that while the club has standing to be sued with respect to the financial aspect of this case (it would clearly be affected by what the Appellant is seeking [the annulment of an order to pay it USD 45,000]), this is not the case with respect to the imposed sporting sanctions.
50. Indeed, with respect to the annulations of the sporting sanction, the Appellant is not claiming anything against the club nor seeking anything from it. The Appellant is seeking something only against FIFA and this relief affects FIFA only and, indirectly, the new club of the Appellant, the Tunisian "Club Africain".
51. Therefore, the Panel considers that the Respondent has no standing to be sued (*légitimation passive*) and could not be summoned as respondent on this regards. This claim shall therefore be dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed on 3rd October 2008 by the Appellant against the decision handed down on 7th May 2008 by the FIFA Dispute Resolution Chamber is partially upheld.
2. The decision issued on 7th May 2008 by the FIFA Dispute Resolution Chamber is partially reformed in the sense that Mr Alexis Enam is ordered to pay to Club Al Ittihad an amount of USD 20,000, plus interest at 5% per annum starting on 2nd November 2008 until the effective date of payment.
3. (...).
4. (...).
5. All other or further claims and counterclaims are dismissed.