



Arbitration CAS 2008/A/1620 Konyaspor Club v. Kaies Ghodbane, award of 23 February 2009

Panel: Mr Hendrik Kesler (The Netherlands), President; Mr Michele Bernasconi (Switzerland); Mr Türker Arslan (Turkey)

Football

Validity of a disciplinary sanction for failure to comply with a FIFA decision

Lack of standing to be sued (légitimation passive)

Scope of CAS power with regard to the designation of the respondent by the appellant

- 1. 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) and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it. A player has no standing to be sued if the appellant – a club – is seeking something only against FIFA, i.e. against the sanction it has been charged with, and the relief requested affects FIFA – and the club – only, but not the player.**
- 2. The last paragraph of article R48 of the CAS Code is meant to help the appellant when it fails to provide some of the elements of its Statement of appeal but it is not meant to cure a major procedural mistake. The CAS Court Office has no duty and no power to check whether an appellant has named the right respondent and, hence, art. R48 cannot be invoked by the appellant in such a situation. However, it is up to the appointed panel to examine the file and determine whether the summoned respondent lacks standing to be sued.**

The Appellant is Konyaspor Club, a football club in Konya, Turkey, hereinafter referred to as the Appellant.

The Respondent is Mr Kaies Ghodbane, a professional football player from Tunisia, hereinafter referred to as the Respondent.

The circumstances stated below are a summary of the main relevant facts, as established on the basis of the written submissions of the parties and all the evidence submitted and examined in the cause of the proceedings before FIFA, the Swiss Federal Court and CAS.

On 27 January 2006 the aforementioned parties signed a standard employment contract with a term from 27 January 2006 to 31 May 2007, which was registered at the Turkish Football Federation.

On 19 September 2006 the Respondent filed an action against the Appellant with FIFA and demanded salary payment as per the relevant due dates, accommodation costs and bonus for in total an amount of USD 502,000.

On 8 June 2007 the Dispute Resolution Chamber of FIFA (DRC) decided that the claim of the Respondent was partially accepted.

The Appellant was ordered to pay to the Respondent -the player Kaies Ghodbane- the total amount of EUR 394,242 within 30 days as from the first date of notification of the decision of the DRC.

This decision letter was - on the basis of Art. 13 para 5 of the Rules governing the procedures of the Player's Status Committee and the Dispute Resolution Chamber - rectified in the sense that the total amount had to be meant in USD and not EUR.

Although the Appellant submitted an appeal against the DRC decision dated 8 June 2007, notified 11 October 2007, that appeal was not accepted by the CAS because it did not comply with the formalities as foreseen in the Code of Sports Related Arbitration (the "Code").

By letter from the CAS administration dated 23 November 2007 said decision was submitted to the attorney-at-law of the Appellant.

Due to the fact that no (admissible) appeal was filed against the DRC decision with CAS, the FIFA Disciplinary Committee decided on 29 January 2008 that the Appellant was ordered to pay a fine of CHF 25,000 because it did not comply with the Decision of the FIFA DRC to pay the amount within 30 days. This decision of the FIFA Disciplinary Committee was notified on 20 February 2008.

However, as a result of this rectification -mentioned in para 2.6 above- the FIFA Disciplinary Committee decided on 26 March 2008 that the earlier Decision -rendered 29.01.2008- to the Appellant was declared null and void.

On 5 March 2008 the Appellant filed a complaint at the Swiss Federal Court against CAS and the Respondent regarding the formal issues about the filing of a non accepted appeal.

The Swiss Federal Court however decided on 9 May 2008 not to hear the case and to dismiss it in all aspects.

On 6 May 2008 FIFA requested the Appellant once again to pay the outstanding amount by 20 May 2008. Although this time limit had been extended to 26 May 2008, no payment was made by the Appellant.

Therefore the FIFA Disciplinary Committee rendered a new decision, decided on 16 June 2008, where the Appellant was fined with CHF 20,000 plus costs for not paying the outstanding amount. This last decision of the FIFA Disciplinary Committee is the subject of the present appeal and the Panel will therefore refer to it as the "Appealed Decision".

On 18 July 2008 -within the deadline of 21 days- the Appellant filed its statement of appeal with the CAS administration. On 26 July the Appellant filed its appeal brief together with a completion of its Statement of appeal.

On 7 August 2008 the Respondent filed its answer within the period as foreseen in R55 of the Code.

On 28 July 2008, the CAS Court Office informed FIFA of the appeal filed by the Appellant, pointing out that they were not directed against FIFA and asking whether FIFA intended anyway to intervene as a party in the arbitration pursuant to Articles R54 and R41.3 of the Code.

On 29 July 2008 FIFA wrote to the CAS, stating as follows:

“As this appeal is not directed against FIFA we renounce our right to intervene in the present Arbitration proceeding”.

LAW

CAS jurisdiction

1. The jurisdiction of the CAS to decide the present appeal, which is undisputed, derives from Art. R. 47 of the CAS Code and articles 60, 61 of the FIFA Statutes. Moreover, it is confirmed by the Order of Procedure, duly signed by the Parties.
2. It follows that the CAS has jurisdiction to decide the present dispute.

Respondent's lack of standing to be sued

3. 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).
4. In the Statements of appeal, the Appellant named as Respondent Mr Kaies Ghodbane, i.e. the Player who had been party to the previous financial case before the DRC of FIFA. The FIFA DRC decision was rendered on 8 June 2007 and notified to the Parties on 11 October 2007. As mentioned above, although the Appellant lodged an appeal against the decision of the DRC, that appeal was not admitted by the CAS.
5. In continuation the Appellant tried to submit a case against CAS before the Swiss Federal Tribunal, but this particular Tribunal decided on 9 May 2008 that the filing of the Appellant

was dismissed. Therefore the decision of the FIFA DRC dated 8 June 2007 became final and irrevocable.

6. The following FIFA disciplinary proceedings before the FIFA Disciplinary Committee (the “FIFA DC”) concerned only the consequences for the Appellant of not complying with the final FIFA DRC decision.
7. The Panel notes that:
 - The Respondent was not party to the FIFA disciplinary proceedings leading to the Appealed Decision and is not affected by the Appealed Decision;
 - The Appellant is not claiming anything against the Respondent - Mr Ghodbane- nor seeking anything from him;
 - In the Statement of appeal, the Appellant explicitly states that the subject of the appeal is: *“it is consisted of the appeal of Dispute Solution Chamber’s Decision dated 16.06.2008 and a request for stopping the execution of the mentioned Decision during this appeal judgement”*.
 - There is only one FIFA Decision dated 16.06.2008 and that is the Appealed Decision, i.e. the decision of the FIFA DC fining the Appellant with CHF 20,000.
8. The FIFA disciplinary proceedings, in the Panel’s view, are primarily meant to protect an essential interest of FIFA and FIFA’s members, i.e. the full compliance with the decisions rendered by the bodies of FIFA and/or by CAS.
9. In the present matter the appeal filed against the Appealed decision concerns only the validity of a disciplinary sanction of the Appellant under FIFA rules, i.e. within the power of FIFA to impose sanctions and the appropriateness of such sanctions. In other words, the Appellant is seeking today something only against FIFA, i.e. against the sanction it has been charged with, and the relief requested effects FIFA – and the Appellant – only, but not the Respondent.
10. The Panel than finally considered *ex officio* the content of R48 of the CAS Code.
11. Article R48 of the CAS Code set forth the requirements in the Statement of appeal, including therein the name and the full address of the “Respondent” and, in the last paragraph, provides as follows:

“If the abovementioned requirements are not fulfilled when the Statement of appeal is filed, the CAS Court Office shall grant once only a short deadline to the Appellant to complete his Statement failing which it shall be deemed withdrawn”.
12. In the Panel’s view, the above quoted provision is meant to help the Appellant when he fails to provide some of the elements of his Statement of appeal but it is not meant to cure a major procedural mistake such as that of the Appellant. Indeed, if an appellant forgets to specify a Respondent, the CAS Court Office will ask the Appellant to provide such name within a short deadline, in order to be able to notify the Statement of appeal to the named Respondent.

13. However, once an appellant does name a respondent, even if it's the wrong respondent, the CAS Court Office must register such respondent's name into the CAS docket and summon it into the proceedings. This means that the arbitration procedure has been set in motion and that the summoned party has the opportunity to appear before the CAS, in particular to claim its lack of standing to be sued and ask for legal costs, or else it may risk that the Panel does not recognize its right not to be involved in the arbitration.
14. In other words, in the Panel's opinion, the CAS Court Office has no duty and no power to check whether an appellant has named the right respondent and, hence, art. R48 cannot be invoked by the appellant in such a situation. It is up to the appointed Panel to examine the file and determine whether the summoned respondent lacks standing to be sued (CAS 2007/A/1329 and CAS 2007/A/1330).
15. Finally, the Panel notes that CAS did ask FIFA whether it wanted to intervene in this matter. As mentioned above, FIFA denied to participate. However, also at this point of time and even though the Appellant has been informed about FIFA's position, it did not react.
16. Therefore only FIFA, and not the Respondent, could be considered as the legitimate Respondent to the appeal brought before this Panel. In other words, the Respondent does not have standing to be sued (*légitimation passive*).
17. In addition to the issue of the Respondent's lack of standing to be sued, the Panel notes that the Appellant did not submit any convincing legal arguments which could induce the Panel to follow the submissions brought forward by the Appellant and to set aside the Appealed Decision.
18. Accordingly, the Panel finds that the Appellant erred in filing the present appeal against Mr Ghodbane as Respondent, because the Respondent lacks standing to be sued in connection with this case. As a result, the Panel holds that the appeal from Konyaspor Club brought against Mr Ghodbane must be rejected.
19. Based on the foregoing the Panel finds that the appeal brought by the Appellant against Mr Ghodbane with respect to the Appealed Decision of the FIFA DC must be rejected. Accordingly, all other prayers for relief are dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed by Konyaspor Club against the Decision issued on 16 June 2008 by the FIFA Disciplinary Committee is rejected.

(...)

4. All other motions or prayers for relief are dismissed.