

4A_426/2017¹

Judgment of April 17, 2018

First Civil Law Court

Federal Judge Kiss, Presiding

Federal Judge Klett

Federal Judge Niquille

Clerk: Carruzzo (Mr.)

L ._____, represented by Ms. Carole Wahlen,
Appellant,

v.

International Federation of Football Association (FIFA), represented by Mr. Antonio Rigozzi ,
Respondent.

Facts and Reasons:

1.

1.1. The International Federation of Football Associations (FIFA), an association under Swiss law with its registered office in Zurich, is the governing body of football worldwide. In its capacity as organizer of the next FIFA World Cup, whose finals will take place in Russia from June 14 to July 15, 2018 (hereinafter: the World Cup), it issued a Regulation on the FIFA World Cup Russia 2018, which entered into force in March 2015 (hereinafter: the Regulation).

The Organizing Committee of the World Cup (hereinafter: the Organizing Committee), appointed by the FIFA Executive Committee, is responsible for the organization of this competition (Article 3.1 of the Regulations). Its decisions are final and without appeal under Art. 3.4 of the Regulations. The World Cup takes place in two phases: the preliminary competition and the final competition. The first phase, which has been completed, has allowed, in particular, the designation of five national teams of the African Football Confederation (CAF) who will play in the final phase of the World Cup in Russia with twenty-seven other teams divided into eight groups of four teams by means of a draw which was made on December 1, 2017. Cameroon participated in the third round of the play-off phase, from October 2016 to November 2017. During this period, they faced, in round-robin matches, three other African teams similarly placed in Group B - Algeria, Zambia and Nigeria - in six successive matches played on October

¹ Translator's Note:

Quote as Club L._____ v. FIFA, 4A_426/2017.

The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

9, 2016, November 12, 2016, September 1, 2017, September 4, 2017, October 7, 2017, and November 11, 2017. At the end of this preliminary competition, the Cameroon team placed third in the group, with seven points, thus ranking behind the Nigeria (thirteen points) and Zambia (eight points) but ahead of Algeria (four points). Therefore, only the Nigerian team was admitted to the circle of five CAF teams who qualified for the final competition. L._____ (hereinafter: the Club) is a Cameroonian football club affiliated with the Cameroonian Federation of Football (hereinafter: FECAFOOT). The present case, which divides the Club and FIFA, is in the much broader context of the difficulties that FECAFOOT has been experiencing since 2013 and which are at the root of many disputes.

1.2. By letter of September 12, 2016, addressed to the President of the Organizing Committee, the Club requested the postponement of the Algeria-Cameroon match of October 9, 2016 and all other upcoming matches of the third round of group B "until legality is restored within our association". According to it, as FECAFOOT was not validly represented by the so-called Mr. N._____, all acts conducted by that person on behalf of the association were invalid, in particular the designation of Cameroon's national team A, which raised fears that the team competing in the match against Algeria was not "representative" of FECAFOOT. Responding to this letter by letter of September 20, 2016, the Secretary General of FIFA told the Club that this case seemed to be of an exclusively internal character not falling under the competence of the FIFA bodies, so that it could not intervene in this case. She added that "FIFA's policy is to communicate only through its member associations".

1.3. On October 6, 2016, the Club filed a statement of appeal with the Court of Arbitration for Sport (CAS). On October 21st, it filed its appeal brief, requesting, in essence, the annulment of the FIFA decision of September 20, 2016, and the rescheduling of the Algeria-Cameroon match of October 9, 2016, and all the other matches Cameroon was scheduled in and set to be played by a non-representative FECAFOOT team, including the Cameroon-Zambia match of November 12, 2016, to allow the participation of a representative team of FECAFOOT in these matches. The President of the CAS Appeals Division appointed a judge from Canton Vaud as a sole arbitrator (hereinafter: the Arbitrator), who decided to render a separate award on the admissibility of the appeal, challenged by FIFA, and a preliminary question on the merits. The parties then exchanged written submissions on these preliminary issues before being called to a hearing held on May 17, 2017. By judgment of June 26, 2017, the Arbitrator dismissed the plea of lack of jurisdiction *ratione personae* raised by FIFA. On the other hand, admitting the objection of lack of jurisdiction *ratione materiae* raised by the same party, he found that he was not competent to hear the appeal filed by the Club and thus terminated the procedure. In summary, the Arbitrator held, on the first point, that there was no basis for declaring that Mr. N._____ lost his power to represent the Club as President within the framework of the appeal proceedings and, on the second point, that Art. 3.4 of the Rules, properly interpreted, constituted a *lex specialis* to the more general provisions of the FIFA Statutes (hereinafter: the Statutes) and had to exclude an appeal to the CAS from decisions of the Organizing Committee. It resulted in the inadmissibility of the appeal, which made it unnecessary to proceed to the examination of the legal interests and standing.

1.4. On August 25, 2017, the Club (hereinafter: the Appellant) lodged a civil law appeal to the Federal Tribunal requesting the annulment of the award of June 26, 2017, the finding of jurisdiction *ratione materiae* of the CAS and the referral of the case to the arbitral tribunal to make a new award within the considerations of the forthcoming federal judgment. Qualifying the challenged award as an interim

decision within the meaning of Art. 190(3) PILA,² the Club accused the arbitrator of having wrongly declared himself incompetent (Art. 190(2)(b) PILA and ATF 140 III 477), also alleging a violation of public policy of Art. 190(2)(e) PILA in this context.

At the end of its submission of November 27, 2017, FIFA mainly concluded that the appeal was inadmissible and, alternatively, requested its dismissal. The CAS declined to file observations as to the appeal. The Appellant, in his reply of December 13, 2017, and the Respondent, in its rejoinder of January 9, 2018, persisted in their respective conclusions.

2.

Contrary to the Appellant's opinion, the Arbitrator, who declared himself incompetent after considering the question of prior jurisdiction, did not issue an interim award, but a final award (ATF 143 III 462 at 3.1 p. 466 and references; Judgement 4A_452/2007³ of February 29, 2008, at 1.2). Therefore, all the grievances restrictively set out in Art. 190(2) PILA were theoretically admissible against the award of June 26, 2017. This is not the case in respect of the grievance of arbitrariness, which does not apply to international arbitration; therefore, the following remark by the Appellant "...I draw your attention to the fact that the prohibition of arbitrariness has been invoked repeatedly in the context of the appeal of August 25, 2017" (Reply, p. 3, para 6(e)), is not relevant. Moreover, it goes without saying that only the grievances that were raised and reasoned by the Appellant (Art. 77(3) LTF⁴) will be examined by this Court.

3.

3.1 According to Art. 76(1)(b) LTF the appellant must in particular have an interest worthy of protection in the annulment of the decision under appeal. A legally protected interest consists in the practical use that admitting the appeal would have for the appellant, by preventing it from undergoing some damage of an economic, ideal, substantive or other nature that would be caused by the decision under appeal (ATF 137 II 40 at 2.3 p. 43). The interest must be present, that is, it must exist not only at the time the appeal is made but also when the decision is issued (ATF 137 I 296 at 4.2 p. 299; ATF 137 II 40 at 2.1 p. 41). The Federal Tribunal finds the matter incapable of appeal when the legally protected interest is lacking at the time the appeal is made. However, if the interest disappears during the proceedings, the appeal becomes moot (ATF 137 I 23 at 1.3.1 p. 24 ff. and the cases quoted). The requirement of a present interest is exceptionally derogated when the dispute on which the decision under appeal is based may arise again at a later time under identical or analogous circumstances, when its nature makes it impossible to adjudicate it before it loses its relevance, and when, as a matter of principle, there is a sufficiently important public interest in the resolution of the issue in dispute (ATF 137 I 23 at 1.3.1 p. 25; ATF 136 II 101 at 1.1 p. 103; ATF 135 I 79 at 1.1 p. 81).

² Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

³ Translator's Note: The English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/interpretation-of-an-arbitration-clause>

⁴ Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

3.2. Whatever the Appellant supports, the explanations provided under Chapter 1(c) of its appeal (p. 3 and 4) fail to support the contention that he had an interest worthy of protection (within the meaning of the case law recalled above) in the annulment of the award under appeal at the time he filed its appeal (August 25, 2017). In any event, such an interest, even if it had been established, has clearly disappeared since then.

3.2.1.

3.2.1.1. The Appellant, in filing its appeal, alleges it was particularly affected by the award of June 26, 2017, to the extent that the declaration of lack of jurisdiction *ratione materiae* of the CAS prevented it “from ruling on the merits of the case, in particular, on the annulment of the decision of FIFA dated September 20, 2016, in relation to the problem of non-representativity of the Cameroon national team for the 2018 World Cup in Russia.” According to the Appellant, this issue was crucial as, at the time of filing the appeal, several qualification matches remained to be played in the context of the third round of the World Cup and it was still possible, if necessary, to replay the matches that had already been played.

It must be noted from the outset that the interest alleged by the Appellant rests exclusively on the assumption that the national team of Cameroon that participated in the preliminary phase of the World was not “representative.” This is based on the simple fact that its players had been designated, at least indirectly, by a national federation – FECAFOOT – which has at its head a representative (the President M. _____), who was not validly elected. Indeed, if Cameroon had advanced a representative team that would have started the third qualifying round and had been serious contenders for qualification for the World Cup final competition, the Appellant would not have had the interest required to request the annulment of an arbitral award in which the CAS had refused to enter into an appeal aimed at rescheduling games played and to play with this team in this context. However, this assumption (*i.e.* the non-representativity of the national team line-up during the competition preliminary ruling) is merely an assumption in support of which the Appellant has not put forward any concrete evidence, and the existence of some causal link between the (correct or not) way in which leaders of a national federation are appointed and the representativeness of the team constituted by this federation to represent their country at the World Cup is not evident. Apart from the lack of interest that the President of FECAFOOT, legitimate or not, would have had to deprive the national selection of its best players, even if it means accommodating a predictable elimination of this team at a discount, the Appellant did not demonstrate, or even allege, that one or another player who otherwise would have been a pillar of the team was voluntarily removed from national selection. It does not further specify how, in his view, players should be selected so that Cameroon's national A-team could be fit to be called ‘representative’.

3.2.1.2. The Appellant argues next that the erroneous interpretation of the Statutes and Rules by the arbitrator seriously prejudices it, as “it explains the decisions of the Organizing Committee of the 2018 World Cup could not be the subject of an appeal to the CAS.” Moreover, the Appellant, who, as a football club, is not a member of FIFA (see Art. 11(1) of the By Laws), does not explain how it would nevertheless have an interest worthy of protection to challenge decisions taken by a part of that association – the Organizing Committee, which constitutes a permanent Committee of FIFA (Art. 39(1)(d) and Art. 43 of the Statutes) – and intended for its members, *i.e.* national associations, with certain exceptions (Art. 11(1), (5) and (6) of the Statutes). Therefore, it goes without saying that it cannot argue any interest worthy of protection against annulment of an award where the Arbitrator did not enter into the merits of the appeal

of a decision by which FIFA had informed the Appellant, in accordance with its case law, that it could not intervene in this matter, while reminding it that it is its policy to communicate only through the member association to which the applicant club is affiliated.

3.2.1.3. The Appellant argues, however, that there was a significant financial interest *in casu*, expecting that opposing teams participating in the elimination phase may require the disqualification of the national team of Cameroon on the grounds that it was formed by FECAFOOT, unduly represented by Mr. _____, which would have the effect of depriving it of significant sums allocated to the federations as well as to the clubs directly on the occasion of the organization of the World Cup. The Appellant does not demonstrate, nor even claim, that its opponents in Group B for the third round required the disqualification of the Cameroon national team. Also the financial risk invoked in connection with such a request is purely hypothetical, such that it cannot be held that there is an interest worthy of protection before the Federal Tribunal.

3.2.1.4. In these circumstances, it must be concluded that the action is inadmissible. Indeed, the Appellant has not successfully demonstrated that at the time of filing its appeal it was particularly touched by the decision and had an interest worthy of protection in its annulment (Article 76(1)(b) LTF).

3.2.2. If it was not already inadmissible at the time, *quod non*, the present action would have become irrelevant since then.

It is indeed clear that the third round of the preliminary competition for Group B ended on November 11, 2017, with the last match of this group (Zambia-Cameroon), and that assured the qualification of Nigeria for the final competition. In these circumstances, we cannot determine a current interest that the Appellant could still have to admit its requests. Aside from putting forward an alleged financial interest, the existence of which would lie entirely on its own statements, the Appellant explains that four games could still be subject to rescheduling, so that twelve points could be awarded for the games and that would completely boost Cameroon's chances of qualifying for the finals of World Cup starting June 14, 2018.

In theory and from a strictly chronological point of view, the Appellant's suggestion would be possible so long as the final competition of the World Cup had not already started. However, if one looks at it more closely and considers the actual situation, it is pure idealism. In order to implement it, on the assumption that the present appeal is allowed, the CAS must reinstate the case, examine the question of the interest and standing of the appellant club, and then the merits which would undoubtedly take some time. It would then be required to reopen the entire elimination phase as it concerns Cameroon, which would require replaying Group B third-round games that had been played over a period of more than one year. Moreover, the Appellant does not indicate why only four of the six matches of this group should be replayed, nor does it explain how the other three teams, especially the one qualified for the final game, would consider such a solution, resulting from difficulties only of interest to the FECAFOOT. It is not realistic to imagine for a moment that we can postpone, even for a relatively short period of time, a final competition for which a complicated draw was completed on December 1, 2017, which concerns thirty-two national teams that are impatient to play against each other for a period of a month fixed long in advance taking into account a busy international calendar, teams that furthermore having planned their training in this regard. It is still without counting the requirements related to the organization of such an

event, whether it is temporary contribution of human resources and infrastructure necessary for its good operation, not to mention the media coverage of a competition of global importance and huge advertising benefits. There is therefore no need to spend any more time in order to exclude the solution recommended by the Appellant. It follows that, if it had not been held inadmissible, the appeal submitted for the consideration of this Tribunal, should in any case be declared moot, as there is no current interest on the part of the Appellant to be admitted.

3.2.3. In its rejoinder (page 3), the Appellant claims to have alleged in a very detailed way the particular circumstances of the case in dispute which should enable the Federal Tribunal to exceptionally hear the matter, in derogation of the current interest requirement. However, nothing as submitted confirms the allegations challenged by the Appellant. In particular, the Appellant does not cite any part of its appeal where it clearly invoked this exception and indicated how these conditions would be met in its opinion. No doubt it seeks to repair this omission in its rejoinder, but it does so in vain in view of the case law on this issue (Judgment 4A_450/2017 of March 12, 2018, at 2.2).

4.

The Appellant is unsuccessful and must pay the costs of the federal proceedings (Art. 66(1) LTF) and the legal costs of the respondent (Art. 68(1) and (2) LTF).

For these reasons, the Federal Tribunal pronounces:

1. The matter is not capable of appeal.
2. The judicial costs, fixed at CHF 5'000, shall be borne by the Appellant.
3. The Appellant shall pay the Respondent CHF 6'000 for its legal costs.
4. This judgment is to be communicated to the representatives of the parties and to the Court of Arbitration for Sport.

Lausanne, April 17, 2018

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

Presiding Judge:
Kiss

Clerk:
Caruzzo