

4A_326/2010¹

Judgment of February 23, 2011

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: Leeman.

X. _____,

Appellant,

Represented by Mr. Michael Bader and Mrs Elena Valli

v.

Fédération internationale de Football Association (FIFA),

Respondent,

Represented by Mr. Christian Jenny,

Facts:

A.

A.a X. _____ (The Appellant) is a legal person incorporated in Y [name of the country omitted].

The Fédération Internationale de Football Association (FIFA; Respondent) is a nonprofit corporation under Swiss law with headquarters in Zurich.

A.b In October 2006 the Respondent suspended the membership of the Appellant for interference by the authorities in football matters among other reasons. On March 9, 2007, the Respondent lifted the aforesaid suspension provisionally and under certain conditions. A few days later it issued a so called

¹ Translator's note :

Quote as A.X. _____ v., FIFA 4A_326/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

“Road Map”² with a view to normalizing the situation as to the game of the Football in [name of country omitted].

Differences of opinion rose within the Appellant in the meantime between two groups, both claiming to be legally entitled to act for the Appellant. Both groups eventually conducted parallel general meetings.

Among others a general meeting of the Appellant took place on November 15, 2008 in the presence of representatives of the respondent. The creation of Q._____ Ltd. and the dissolution of the Appellant were decided. Subsequently the Respondent and the Government of Kenya stated that henceforth they would recognize Q_____ as sole national Football Federation of Z_____ [name of country omitted].

B.

On March 18, 2009 the Appellant initiated arbitration proceedings in front of the Court of Arbitration for Sport against the Respondent. It submitted essentially that the Appellant should be recognized as legal representative of the game of football in [name of country omitted]. Furthermore the Respondent should be enjoined from any further collaboration with Q_____ and ordered to disclose certain financial transactions.

A Hearing took place in Lausanne on January 26, 2010.

In an award of April 27, 2010 the CAS rejected the Appellant’s request. The CAS based its decision in particular on the fact that the decisions of the general meeting of the Appellant of November 15, 2008 and the subsequent acts and decisions of Q_____ and of the Respondent had never been challenged in Court.

C.

In a Civil law appeal, the Appellant submitted that the Federal Tribunal should annul the CAS arbitral award of April 27, 2007 and send the matter back to the CAS for a new decision.

The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS submits that the appeal should be rejected.

² Translator's note: In English in the original text.

D.

On July 2010 the Federal Tribunal upheld the Respondent's request for security for cost. Subsequently, the Appellant deposited the amount of CHF 5000 with the Federal Tribunal as requested for security for costs.

Reasons:

1.

In the field of international arbitration a Civil law appeal is possible under the requirements of Art. 190-192 PILA³ (SR 291) (Art. 77 (1) (a) BGG⁴).

1.1 The seat of the arbitral tribunal is in Lausanne in this case. At least one of the parties, here the Appellant, did not have its seat in Switzerland at the relevant point in time. Since the parties did not rule out the provisions of chapter 12 PILA in writing they are applicable (Art. 176 (1) and (2) PILA).

1.2 Only the grievances limitatively listed in Art. 190 (2) PILA are admissible (BGE 134 III 186 E. 5 S. 187; 128 III 50 E. 1a S. 53; 127III 279 E. 1a S. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal; this corresponds to the duty to present reasons contained in Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 E. 5 S. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 E. 3b S. 382).

1.3 The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may neither rectify nor supplement the factual findings of the arbitral tribunal even when they are blatantly wrong or based on a violation of the law within the meaning of Art. 95 BGG (see. Art. 77 (2) BGG ruling out the applicability of Art. 97 BGG as well as Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the award under appeal when some admissible arguments within the meaning of Art. 190 (2) PILA are brought against the factual findings or exceptionally when new evidence is taken into account (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; all with references). Whoever invokes an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wants to rectify or supplement them on that basis must prove with reference to the record that the corresponding allegations of facts were already made in the arbitral proceedings in accordance with procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p.

³ 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.

⁴ Translator's note : BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

473; with references). The Appellant precedes its legal arguments with a statement of facts of several pages in which it presents the background of the dispute and of the proceedings according to its own views. In doing so, it significantly departs from the factual findings of the Arbitral Tribunal or broadens them without showing any substantive exceptions to the binding character of the factual findings. Its submissions are accordingly not to be reviewed.

2.

The Appellant argues a violation of the right to be heard and of the rule of equal treatment of the parties (Art. 190 (2) (d) PILA).

2.1

2.1.1 It argues in this respect that it showed thoroughly in the arbitral proceedings that and why the general meeting of November 15, 2008 had not been regularly called and could not adopt any legally valid decisions. It then mentions various situations which in its view do not meet the requirements of Art. 60 of the Respondent's by-laws.

2.1.2 The argument is unfounded already because the Appellant does not show with reference to the record where it would have raised in the arbitration proceedings the allegations contained in the appeal, which would have been overlooked. Be this as it may, the CAS addressed the Appellant's argument according to which Q_____ was not the legal successor of the Appellant. It took in consideration in this respect that the general meeting of November 15, 2008 could not have any legal validity according to the Appellant as the legal requirement concerning the transmission of membership rights had not been complied with. Yet he CAS did not consider this decisive, particularly because according to the factual findings in the arbitration proceedings, it remained unchallenged that the decisions taken during the disputed general meeting of November 15, 2008 had not been challenged judicially by the Appellant or one of its members. The Appellant's argument that its argument as to the allegedly defective convocation and decision making process during the general meeting would have been overlooked by the Arbitral Tribunal would therefore be unfounded anyway.

2.2 The Appellant further argues that the Arbitral Tribunal did indeed admit a report of the Reconciliation Committee and a letter from the Minister for Youth and Sport into the arbitral proceedings but disregarded them and failed to mention them in a single word of the award under appeal. In this respect also it merely quotes from the aforesaid exhibits without showing with reference to the record which of its factual allegations made in the arbitral proceedings in accordance with procedural rules should have been proved thereby. A violation of the right to be heard is therefore not shown.

2.3 The Appellant argues that the Arbitral Tribunal did not treat the parties equally as would be clear from the choice of words. Thus at paragraph 21 of the award the Arbitral Tribunal would have held with regard to the meeting of November 15, 2008 “in this meeting the formation of Q_____ was apparently agreed⁵” whilst with regard to the meeting of December 20, 2008 it would have stated at paragraph 22 “at such meeting the members of the Executive Committee were allegedly elected⁶”. By simply comparing the two sentences quoted and arguing that the CAS used the word “apparently⁷” and elsewhere “allegedly⁸” the Appellant shows no violation of the principle of equal treatment of the parties, particularly because the Arbitral Tribunal did not let the matter rest with these factual findings but explained in the reasons of the award why it considered that the decisions taken at the meeting of November 15, 2008 were legally valid. A bias of the Arbitral Tribunal would not be apparent there either. Furthermore, the Appellant rightly does not argue that there would be a ground for appeal according to Art. 190 (2) (a) PILA.

3.

The Appellant argues that the Arbitral Tribunal would have violated public policy (Art. 190 (2) (e) PILA).

3.1 The substantive review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether the arbitral award is consistent with public policy or not (BGE 121 III 331 at p. 333). The substantive adjudication of a claim violates public policy when it disregards some fundamental legal principles and is no longer consistent with the important and widely recognized values which should be the basis of any legal order according to prevailing opinions in Switzerland. The observance of contracts (*pacta sunt servanda*), the prohibition of the abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables belong to such principles. An annulment of the arbitral award is possible only when its result and not merely its reasons contradict public policy (BGE 132 III 389 at 2.2 p. 392 ff. with references).

3.2 The Appellant disregards the concept of public policy when it criticizes in front of the Federal Tribunal the reasons adopted by the Arbitral Tribunal as to applicable law and argues that the law of [name of the country omitted] was applicable to certain issues. Neither does it show a violation of public policy when it argues in an appellatory manner that irrespective of the applicable law, the convocation of a general meeting by unauthorized people and the violation of mandatory requirements for the validity of the incorporation of a company could not lead to the foundation of a company or that “a transmission of

⁵ Translator's note : In English in the original text.

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⁷ Translator's note : In English in the original text.

⁸ Translator's note : In English in the original text.

rights did not legally take place". The argument that the Arbitral Tribunal would have followed the Respondent without any further consideration of the mandatory applicable Kenyan law and would thereby have "helped the Respondent with the other violation of its own by-laws" does not show any disregard of one of the fundamental principles belonging to public policy.

4.

The appeal is unfounded and must be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings the Appellant must pay the costs and compensate the Respondent (Art. 66 (1) and Art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1.

The appeal is rejected to the extent that the matter is capable of appeal.

2.

The judicial costs set at CHF 4000 shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondent CHF 5000 for the federal judicial proceedings. That amount shall be taken from the deposit made with the Federal Tribunal.

4.

This judgment shall be notified in writing to the parties and to the Court of Arbitration of Sport (CAS).

Lausanne, February 23, 2011

In the name of the First Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge:

The Clerk:

KLETT (Mrs)

LEEMANN