4A_558/2011[1]

Judgment of March 27, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs),
Federal Judge Kolly,
Federal Judge Kiss (Mrs),
Clerk of the Court: Leemann.

Appellant,

Francelino da Silva Matuzalem, c/o Gianpaolo Monteneri , Monteneri sports law & management IIc,
Represented by Dr. Hansjörg Stutzer and Dr. Patrick Rohn,

v.

Respondent,
Fédération Internationale de Football Association (FIFA),
Represented by Mr Christian Jenny,

Facts:

A.
A.a Francelino da Silva Matuzalem, in Rome (The Appellant), borne on June 10, 1980 is a professional football player of Brazilian citizenship. He presently plays with the football club SS Lazio Spa in Rome.

The Fédération Internationale de Football Association (FIFA; Respondent) is an association governed by Swiss law (Art. 60 ff ZGB[2]) headquarted in Zurich.

Real Saragossa SAD is a Spanish football club. It is a member of the Spanish football federation which in its turn belongs to FIFA.

A.b On June 26, 2004 the Appellant entered into an employment contract with the Ukrainian football club FC Shakhtar Donetsk for the time from July 1st, 2004 until July 1st, 2009. On July 2, 2007 the Appellant terminated his employment contract with FC Shakhtar Donetsk without notice yet not for just cause[3] nor for sporting just cause[4].

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[1] Translator's note: Quote as Francelino da Silva Matuzalem *v.* Fédération Internationale de Football Association (FIFA), 4A_558/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

[2] Translator's note: ZGB is the German abbreviation for the Swiss Civil Code.

[3] Translator's note: In English in the original text.

In a letter of July 16, 2007 Real Saragossa SAD undertook to hold the Appellant harmless for any possible damage claims as a consequence of the premature termination of the contract.

On July 19, 2007 the Appellant entered into a new employment contract with Real Saragossa SAD and undertook to play with them for the next three seasons until June 30, 2010.

At the end of the 2007/2008 season Real Saragossa SAD descended into the second Spanish football league.

Pursuant to a July 17, 2008 agreement Real Saragossa SAD transferred the Appellant temporarily for the 2008/2009 season to the SS Lazio Spa football club in Rome. On July 22, 2008 the Appellant accepted this temporary transfer and entered into an employment contract with the Italian club for the period between July 22, 2008 and June 20, 2011.

At the end of the 2008/2009 season Real Saragossa SAD returned to the first league.

On July 23, 2009 Real Saragossa SAD agreed to the definitive transfer of the Appellant to football club SS Lazio Spa against payment of a transfer fee of € 5.1 million. On the same day the SS Lazio Spa entered into a new employment agreement with the Appellant which substituted the July 22, 2008 contract and set a fixed contractual duration until June 30, 2004 as well as a salary of € [figure omitted] net per season (in addition to some unspecified bonuses).

A.c In a decision of November 2, 2007, the Dispute Resolution Chamber of FIFA awarded Shakhtar Donetsk damages as a consequence of the illicit termination of the contract in the amount of € 6.8 million with interest at 5% from 30 days after the award. On May 19, 2009 the Court of Arbitration for Sport (CAS) annulled the decision of November 2, 2007 in part and ordered the Appellant and football club Real Saragossa SAD severally to pay € 11'858'934 with interest at 5% from July 5, 2007.

A Civil law appeal by the Appellant and Real Saragossa SAD against the CAS award of May 19, 2009 was rejected by the Federal Tribunal in a judgment of June 2, 2010[5] to the extent that the matter was capable of appeal.

B.
B.a On July 14, 2010 the Deputy Secretary of the Disciplinary Committee of FIFA informed the Appellant and Real Saragossa SAD (a) that disciplinary proceedings were commenced against them because they had not complied with the CAS award of May 19, 2009, (b) that the corresponding sanctions according to Art. 64 of the FIFA Disciplinary Code (2009 edition) would be imposed and (c) that the case would be decided during the next meeting of the Disciplinary Committee.

The FIFA Disciplinary Code applicable at the time (2009 edition) provided among other things for the following:

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[4] Translator's note: In English in the original text.

[5] Translator's note: Full translation available at http://www.praetor.ch/arbitrage/facts-not-reviewed-by-federal-tribunal-claims-of-violation-of-du/

"*Article 22 Ban on taking part in any football-related activity*
A person may be banned from taking part in any kind of football-related activity (administrative, sports or any other).
...
Section 8. Failure to respect decisions
Article 64 [only]
1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS:
a) will be fined at least CHF 5,000 for failing to comply with a decision;
b) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;
c) (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.
2. If the club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.
3. If points are deducted, they shall be proportionate to the amount owed.
4. A ban on any football-related activity may also be imposed against natural persons. ...[6]"

On July 26, 2010 Real Saragossa SAD advised the Disciplinary Committee that it was in serious financial difficulties which could lead to insolvency and bankruptcy; the requirements for a sanction according to Art. 64 of the FIFA Disciplinary Code were not met as the club was attempting to settle the debt.

On August 20, 2010 the Appellant sent to the Disciplinary Committee a copy of his letter of August 19, 2010 by which he had requested payment of the amount due to FC Shakhtar Donetsk by Real Saragossa SAD and also of the statement by which Real Saragossa SAD held him harmless on July 16, 2007.

In a decision of August 31st, 2010 the Disciplinary Committee found the Appellant and football club Real Saragossa SAD guilty of breaching their obligations under the CAS award of May 19, 2009 (§ 1 of the award). Furthermore the Disciplinary Committee ordered the Appellant on the basis of Art. 64 of the FIFA Disciplinary Code to pay a fine of CHF 30'000 severally with the club (§ 2 of the award and disposed a last time limit of 90 days to pay the amount due (award § 3), under penalty for the Appellant of a prohibition of any activity in connexion with football without the necessity of any further decision by the Disciplinary Committee (award § 4):

"*4. If payment is not made by this deadline, the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player Matuzalem Francelino da Silva and/or six (6) points be deducted from the first team of the club Real Zaragoza SAD in the domestic league championship. Once the creditor has filed this/these requests, the ban on taking part in any football-related activity will be imposed on the player Matuzalem Francelino da Silva and/or the points will be deducted automatically from the first team of the club Real Zaragoza SAD without further formal*

[6] Translator's note: In English in the original text.

decisions having to be taken by the FIFA Disciplinary Committee. The association(s) concerned will be informed of the ban on taking part in any football-related activity. Such ban will apply until the total outstanding amount has been fully paid. ...[7]"

On September 1st, 2010 Real Saragossa SAD paid € 500'000 into an account opened in the name of the FC Shakhtar Donetsk. There were no further payments by either Real Saragossa SAD or the Appellant.

B.b The Appellant and Real Saragossa SAD appealed the decision of the FIFA Disciplinary Committee of August 31st, 2010 to the Court of Arbitration for Sport (CAS). In an award of June 29, 2011 the CAS rejected the appeal by Real Saragossa SAD (award § 1) and the Appellant's (award § 2) and confirmed the decision of the Disciplinary Committee of FIFA of August 31st, 2010 (award § 3). The CAS rejected all other submissions (award § 4) and disposed of the costs of the proceedings (award § 5 and 6).

In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the CAS arbitral award of June 29, 2011.

The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS did not take a position in the appeal proceedings.

D.
On October 24, 2011 the Federal Tribunal stayed the enforcement of the arbitral award.

E.
On January 25, 2010 the Appellant submitted a reply to the Federal Tribunal and the Respondent submitted a rejoinder on February 10, 2012. Furthermore on February 29, 2012 the Appellant sent to the Federal Tribunal a fax of February 24, 2010 from the Respondent concerning the bankruptcy proceedings initiated in the meantime against football club Real Saragossa SAD.

Reasons:

1.
According to Art. 54 (1) BGG[8] the Federal Tribunal issues its judgment in an official language[9], as a rule in the language of the decision under appeal. If the decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The award under appeal is in English. As it is not in an official language and the Parties used German in front of the Federal Tribunal, the decision of the Federal Tribunal shall be issued in German.

[7] Translator's note: In English in the original text.
[8] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.
[9] Translator's note: The official languages of Switzerland are German, French and Italian.

2.
In the field of international arbitration a Civil law appeal is allowed pursuant to the requirements of Art. 190-192 PILA[10] (SR 291) (Art. 77 (1) (a) BGG).

2.1 The seat of the Arbitral tribunal is in Lausanne in this case. At the relevant time the Appellant had his domicile outside Switzerland. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

2.2 A Civil law appeal within the meaning of Art. 77 (1) BGG may in principle only seek the annulment of the decision under appeal (see Art. 77 (2) BGG ruling out the applicability of Art. 107 (2) BGG to the extent that it empowers the Federal Tribunal to decide the case itself). The Appellant's submission that the CAS award of June 29, 2001 should be annulled is sufficient and appropriate here.

2.3 Only the grievances limitatively contained at Art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) PILA the Federal Tribunal reviews only the grievances brought forward and reasoned in the appeal; this corresponds to the duty to submit reasons in support of the appeal according to Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with references).

The Appellant argues that the award under appeal violates the right to be heard (Art. 190 (2) (d) PILA) and public policy (Art. 190 (2) (e) PILA). Therefore he submits some admissible grievances in this respect. However he does not explain to what extent a complete annulment of the CAS award of June 29, 2011 under appeal would be justified (see BGE 117 II 604 at 3 p. 606). Paragraph 1 of the award rejected the appeal by Real Saragossa SAD. Nothing in the appeal is aimed at that first paragraph. To the extent that it aims at paragraph 1 of the award under appeal, the matter is not capable of appeal.

3.
The Appellant argues a violation of the right to be heard (Art. 190 (2) (d) PILA).

He claims exclusively a violation of his right to be heard in the proceedings in front of the FIFA Disciplinary Committee; however he does not claim that in the CAS proceedings he would not have had the possibility to participate in the proceedings. His argument is not persuasive as he claims that, contrary to what was held in the award under appeal, it would have been impossible to cure in the appeal proceedings in front of the CAS the allegedly insufficient hearing in the disciplinary proceedings, irrespective of the full power of review of the CAS (see R57 (1) of the CAS Code). Contrary to what the Appellant seems to assume, the principle of the right to be heard (Art. 190 (2) (d) PILA) contains no entitlement to a double degree of arbitral proceedings or to two degrees of jurisdiction (see judgment 4A_530/2011 of October 3, 2011 at 3.3.2; 4A_386/2010 of. January 3, 2011 at 6.2 with references).

4.
The Appellant argues a violation of public policy within the meaning of Art. 190 (2) (e) PILA.

[10] 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.

4.1
Public policy (Art. 190 (2) (e) PILA) has both substantive and procedural contents (BGE 132 III 389 at 2.2.1 p. 392; 128 III 191 at 4a p. 194; 126 III 249 at 3b p. 253 with references). The substantive adjudication of a dispute violates public policy only when it disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order. Among such principles are the rule of *pacta sunt servanda*, the prohibition of abuse of rights, the requirement to act in good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables (BGE 132 III 389 at 2.2.1; 128 III 191 at 6b p. 198 with references). However the enumeration is not exhaustive (judgment 4A_458/2009 of June 10, 2010 at 4.1, in: SJ 2010 I p. 417). The promise of bribes would also violate public policy to the extent that it can be proved (BGE 119 II 380 at 4b p. 384 f.; judgment 4P.208/2004 of December 14, 2004 at 6.1). Furthermore the Federal Tribunal held that a judgment which would violate, albeit indirectly, such a fundamental principle of law as the prohibition of forced labour, would violate public policy (judgment 4A_370/2007 of February 21, 2008 at 5.3.2). A breach of public policy is thus conceivable in case of a violation of Art. 27 ZGB (see judgment 4A_458/2009 of June 10, 2010 at 4.4.3.2, in: SJ 2010 I p. 417; 4A_320/2009 of June 2nd, 2010 at 4.4; 4P.12/2000 of June 14, 2000 E. 5b/aa with references). The arbitral award under appeal is moreover annulled only when its result contradicts public policy and not merely its reasons (BGE 120 II 155 at 6a p. 167).

4.2
The Appellant argues that he would in fact be subject to a prohibition of working as a football player worldwide and forever should the creditor so request, because he would not be in a position to pay to its previous employer FC Shakhtar Donetsk the damages of € 11'858'934 with interest at 5% since July 5, 2007. He sees there a grave violation of the freedom of profession guaranteed at Art. 27 (2) of the Federal Constitution (BV) and in international treaties, as well as an excessive limitation of personal freedom as substantiated in Art. 27 of the Swiss Civil Code (ZGB). Contrary to the view expressed in the award under appeal, the Federal Tribunal did not forestall in its judgment of June 2, 2010 the issue as to whether the threat of the imposition of disciplinary measures may be a grave violation of personality rights, which could lead to a violation of public policy by the award under appeal. The Federal Tribunal merely pointed out that the Appellant's obligation to a five years employment contract was not illicit from the point of view of privacy protection and also that it could not be found that the Appellant was bound too tightly simply because he would have to answer for the damages arising as a consequence of a breach of contract (judgment 4A_320/2009 of June 2, 2010 at 4.4). The aforesaid judgment did not decide the compatibility with public policy of disciplinary measures imposed by a federation in case of a failure to pay damages (also see as to the comparable issue of contractual damages, judgment 4A_458/2009 of June 10, 2010 at 4.4.8, in: SJ 2010 I p. 417 in which the Federal Tribunal specifically left open the issue of the violation of public policy by a sanction issued by the competent FIFA body as a consequence of failure to pay).

4.3
4.3.1 As a fundamental legal value, the personality of the human being requires the protection of the legal order. In Switzerland it is protected constitutionally through the guarantee of the right to personal freedom (Art. 10 (2) BV[11], which entails all liberties constituting the elementary manifestations of the unfolding of personality, in addition to the right to physical and mental integrity or to freedom of

[11] Translator's note: BV is the German abbreviation for the Swiss Federal Constitution.

movement (BGE 134 I 209 at 2.3.1 p. 211; 133 I 110 at 5.2 119; all with references). The free unfolding of personality is also guaranteed among other by the constitutional right to economic freedom, which contains in particular the right to choose a profession freely and to access and exercise an occupational activity freely (Art. 27 (2) BV; see BGE 136 I 1 at 5.1 p. 12; 128 I 19 at 4c/aa p. 29).

The free unfolding of personality is not protected merely against infringement by the state but also by private persons (see Art. 27 (f) ZGB which substantiates personal freedom in private law in Switzerland). It is generally recognized therein that a person may not legally pledge to relinquish his freedom entirely and that there are limits to the curtailment of one's freedom. The principle anchored at Art. 27 (2) ZGB belongs to the important generally recognized order of values, which according to dominant opinion in Switzerland should be the basis of any legal order.

4.3.2 A contractual curtailment of economic freedom is considered excessive within the meaning of Art. 27 (2) ZGB according to Swiss concepts when the obligee is subjected to another person's arbitrariness, gives up his economic freedom or curtails it to such an extent that the foundations of his economic existence are jeopardized (BGE 123 III 337 at 5 p. 345 f. with references; see also judgement 4P.167/1997 of November 25, 1997 at 2a). Whilst public policy must not be identified with mere illegality (Bernard DUTOIT, Droit international privé suisse, 4. ed. 2005, nr. 8 to Art. 190 PILA p. 678) and its violation is to be assessed more restrictively than a breach of the prohibition of arbitrariness (BGE 132 III 389 at 2.2.2 p. 393), a commitment may be excessive to such an extent that it becomes contrary to public policy when it constitutes an obvious and grave violation of privacy (see judgement 4A_458/2009 of June 10, 2010 at 4.4.3.2, in: SJ 2010 I p. 417; 4A_320/2009 of June 2nd, 2010 at. 4.4; 4P.12/2000 of June 14, 2000 at 5b/aa with references; see also Eugen BUCHER, Berner Kommentar, 3rd ed: 1993, nr. 26 to Art. 27 ZGB; Walter/Bosch/Brönnimann, Internationale Schiedsgerichtsbarkeit in der Schweiz, 1991, p. 236; Anton HEINI, in: Zürcher Kommentar zum IPRG, 2nd ed:. 2004, nr. 45 to Art. 190 PILA; Wolfgang PORTMANN, Einseitige Optionsklauseln in Arbeitsverträgen von Fussballspielern, Causa Sport 2006 p. 209).

4.3.3 The limits to legal commitments due to the protection of privacy do not apply only to contractual agreements but also to the statutes and decisions of legal persons (BUCHER, a.a.O., nr. 18 to Art. 27 ZGB; see already BGE 104 II 6 at 2 p. 8 f). Sanctions imposed by a federation, which do not merely ensure the correct course of games but actually encroach upon the legal interests of the person concerned are subject to judicial control according to case law (BGE 120 II 369 at 2 p. 370; 119 II 271 at 3c; 118 II 12 at 2 p. 15 ff.; see already BGE 108 II 15 E. 3 p. 19 ff). This applies in particular when sanctions issued by a federation gravely impact the personal right to economic development; in such a case the Federal Tribunal has held that the freedom of an association to exclude its members is limited by their privacy right when it is the body of reference for the public in the profession or the economic branch concerned (BGE 123 III 193 at 2c/bb und cc p. 197 ff.). This corresponds to the view that was adopted in particular for sport federations (BGE 123 III 193 E. 2c/bb p. 198 with references; see also BGE 134 III 193 at 4.5 p. 200). In such cases the right of the association to exclude a member is not reviewed merely from the point of view of an abuse of rights but also by balancing the interests involved with a view to the infringement of privacy in order to assess whether some important reason is at hand (BGE 123 III 193 at 2c/cc p. 198 f.; see also BGE 134 III 193 at. 4.4).

These principles also apply to associations governed by Swiss law and headquarted in Switzerland which – like FIFA – regulate international sport. The measures taken by such sport federations which

gravely harm the development of individuals who practice the sport as a profession are licit only when the interests of the federation justify the infringement of privacy.

4.3.4 As a professional football player the Appellant violated his contractual obligations towards the Ukrainian association FC Shakhtar Donetsk and was therefore ordered to pay damages severally with the football club which hired him at a time when his contract was still in force (see judgment 4A_320/2009 of June 2nd, 2010). The Federation sanction under dispute, which the CAS based on the Appellant being legally bound by the sanctions contained at Art. 64 of the FIFA Disciplinary Code, is in service of private enforcement of the decision granting damages if the claim remains unpaid. Upon a simple request by the creditor the Appellant should undergo a ban from all professional activities in connexion with football until a claim in excess of € 11 million with interest at 5% from the middle of 2007 (*i. e.* € 550'000 yearly) is paid. This is supposed to uphold the interest of a member of FIFA to the payment of damages by the employee in breach and indirectly the interest of the sport federation to contractual compliance by football players. The infringement in the Appellant's economic freedom would be suitable to promote the willingness to pay and to find the funds for the amount due; however if the Appellant rightly says that he cannot pay the whole amount anyway, the adequacy of the sanction to achieve its direct purpose – namely the payment of the damages – is questionable. Indeed the prohibition to continue his previous economic and other activities will deprive the Appellant from the possibility to achieve an income in his traditional activity which would enable him to pay his debt. Yet the sanction of the Federation is however not necessary to enforce the damages awarded: the Appellant's previous employer can avail itself of the New York Convention on the Recognition and Enforcement of Arbitral Awards of June 10, 1958 (SR 0.277.12) to enforce the award, as most states are parties to that treaty and in particular Italy, which is the Appellant's present domicile. The sanction issued by the Federation is also illegitimate to the extent that the interests which the world football federation seeks to enforce in this way do not justify the grave infringement in the Appellant's privacy. The abstract goal of enforcing compliance by football players with their duties to their employees is clearly of less weight as the occupational ban against the Appellant, unlimited in time and worldwide for any activities in connexion with football.

4.3.5 The threat of an unlimited occupational ban based on Art. 64 (4) of the FIFA Disciplinary Code constitutes an obvious and grave encroachment in the Appellant's privacy rights and disregards the fundamental limits of legal commitments as embodied in Art. 27 (2) ZGB. Should payment fail to take place, the award under appeal would lead not only to the Appellant being subjected to his previous employer's arbitrariness but also to an encroachment in his economic freedom of such gravity that the foundations of his economic existence are jeopardized without any possible justification by some prevailing interest of the world football federation or its members. In view of the penalty it entails, the CAS arbitral award of June 29, 2011 contains an obvious and grave violation of privacy and is contrary to public policy (Art. 190 (2) (e) PILA).

5.

Paragraphs 2-6 of the CAS arbitral award of June 29, 2011 must be annulled and the appeal upheld to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the Respondent will pay the costs and compensate the other party (Ar. 66(1) and Art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1.
The appeal is admitted to the extent that the matter is capable of appeal and paragraphs 2-6 of the CAS award of June 29, 2011 are annulled.

2.
The judicial costs set at CHF 25'000 shall be borne by the Respondent.

3.
The Respondent shall pay to the Appellant CHF 30'000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, March 27, 2012.

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

The Presiding Judge:	The Clerk:
KLETT (Mrs)	LEEMAN