

4A_460/2008¹

Judgement of January 9, 2009

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge KISS (Mrs),

Clerk of the Court: WIDMER.

A. _____,

Appellant,

Represented by Dr Hansjörg STUTZER and Mrs Arlette PFISTER

v.

1. Fédération Internationale de Football Association (FIFA),

Respondent,

Represented by Mr Christian JENNY

2. World Anti-Doping Agency (WADA),

Respondent,

Represented by Mr François KAISER and Mr Claude RAMONI

¹ Translator's note: Quote as A. _____ *v.* FIFA and WADA, 4A_460/2008. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

Facts:

A.

A. _____ (the Appellant), domiciled in Rio de Janeiro (Brazil) is a professional football player and belongs to the Brazilian Football Confederation (Confederação Brasileira de Futebol; CBF). In 2007, he played for club B. _____ and in 2008 for club C. _____. He participated in the international club competition “Copa Libertadores de América” several times. He played five times at the international level for the National Brazilian Team. Fédération Internationale de Football Association (FIFA, Respondent 1) is the World Football Organisation based in Zurich. It purports to control the game of football worldwide through the national federations that are its members. For that purpose, it adopts rules and provisions and ensures their application. The World Anti-Doping Agency (WADA, Respondent 2) is a Foundation under Swiss law. Its main premises are in Montreal, Canada. The purpose of Respondent 2 is the worldwide fight against doping in all forms of sport. On June 14, 2007, the Appellant was submitted to a doping check during a game between B. _____ and D. _____. The test result was positive. The Superior Tribunal de Justiça Desportiva do Futebol (STJD) suspended the Appellant provisionally for thirty days on July 9, 2007. On July 24, 2007, the Disciplinary Committee of CBF barred the Appellant from playing for one-hundred and twenty days. The Appellant appealed to the STDJ, which overturned the decision of the Disciplinary Committee on August 2, 2007. It followed the Appellant’s argument that he was the victim of a contamination and did not act negligently. Whereupon it put an end to the Appellant’s provisional suspension.

B.

Both Respondents appealed the decision of the STJD to the Court of Arbitration for Sport (CAS) on September 6 and 11, 2007 and demanded a ban of two years for the Appellant. The CAS was composed of party appointed arbitrators Peter LEAVER and José Juan PINTÒ with Prof. Massimo COCCIA as Chairman. In a letter of December 6, 2007 the parties were advised that the CAS considered that it had jurisdiction in the

appeal, but that the reasons in this respect would be contained in the final award. In an award of September 11, 2008, the CAS found that it had jurisdiction to decide the appeal by the Respondents, to the extent that they were aimed at the CBF and at the Appellant. Admitting the appeal (the CAS²) overturned the decision of the STJD of August 2, 2007 and ordered the Appellant banned from December 6, 2007 until November 7, 2009.

C.

In a Civil law appeal, the Appellant submits that the CAS arbitral award of September 11, 2008 should be fully annulled and the CAS declared to have no jurisdiction in the case. The Respondents submit that the appeal should be rejected. The CAS refers to its award of September 11, 2008.

Reasons:

1.

A stay of enforcement was granted *ex parte*. Today's decision puts an end to that decision and renders moot the Appellant's request for a stay.

2.

The decision under appeal is in English. The Appellant used German in the federal proceedings and the Respondents used German and French respectively. Since the language of the decision under appeal is not an official language of Switzerland, the Federal Tribunal issues its decision in the language of the appeal in conformity with its practice (see Art. 54 (1) BGG³).

² Translator's note: Added for clarity.

³ Translator's note: BBG is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

3.

A Civil law appeal against arbitral awards is possible under the requirements of Art. 190-192 PILA⁴ (Art. 77 (1) BGG). According to Art. 77 (3) BGG the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal. In this respect, the strict requirements for reasons still apply, which the Federal Tribunal developed under the aegis of Art. 90 (1) (b) OG⁵ (see BGE 128 III 50 at 1c p. 53), as the LTF did not intend to make any changes in this respect (BGE 134 III 186 at 5). The seat of the arbitral tribunal is in Lausanne. The Appellant and Respondent 2 have their domicile or their seat outside Switzerland. Since the parties did not exclude in writing the provisions of chapter 12 PILA, they are to be applied (Art. 176 (1) and (2) PILA).

4.

An appeal is allowed against interlocutory and partial decisions with regard to jurisdiction. Such decisions may no longer be appealed at a later stage (Art. 92 BGG). The letter from the CAS Secretariat of December 6, 2007 through which the parties were advised that the CAS considered that it had jurisdiction in the case and that the reasons in this respect would be contained in the final award cannot be considered as a formal decision on jurisdiction. Rather it contained an indication to the parties that the CAS would take the case. It cannot be held that further to the December 6, 2007 letter, the Appellant should have demanded the reasons and that having failed to do so an appeal would no longer be possible against the admission of jurisdiction. To decide whether the appeal is admissible or not the decisive element is only that the CAS did not decide on its jurisdiction in a partial award notified separately within the meaning of Art. 186 (3) PILA but dealt with jurisdiction in the final award. The appeal is therefore admissible.

⁴ Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

⁵ Translator's note: OG is the German abbreviation for the previous Statute organising the Federal courts, which was substituted by the LTF.

5.

Based on Art. 190 (2) (b) PILA, the Appellant challenges the jurisdiction of the CAS.

5.1 The Federal Tribunal exercises full judicial review on the grievances relating to jurisdiction according to Art. 190 (2) (b) PILA, including the preliminary issues of material law from which the determination of jurisdiction depends. However, the Federal Tribunal reviews the factual findings of the award under appeal in the framework of the jurisdictional grievances only when some admissible grievances within the meaning of Art. 190 (2) PILA are brought forward against such factual findings or, exceptionally, when new evidence may be taken into account (BGE 134 III 565 at 3.1; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 with references).

5.2 The CAS found that it had jurisdiction because the CBF is a FIFA member and is accordingly bound by the FIFA Statutes. Art. 1 (2) and Art. 5 of the CBF Statutes correspondingly state that the Statutes, Rules, Regulations, Decisions and the FIFA Code of Ethics are to be complied with. As a professional player, the Appellant belongs to the Brazilian Football Confederation. Therefore he is subject to its rules, which he acknowledged in his employment contract of January 16, 2007 and that includes FIFA Rules. According to Art. 61 of the FIFA Statutes, FIFA and WADA have standing to appeal the final doping decisions of the members. Thus the CAS reached the conclusion that the STJD, although independent in its jurisdictional activity, is an organ of the CBF, thus providing FIFA and WADA with a right to appeal its decisions.

5.3 The Appellant holds the view that the proceedings at hand relate to a purely national, Brazilian factual context without any international connection. The STJD would be an independent Brazilian Sport Court which decided the matter finally. Its decision is not a CBF decision, thus neither FIFA nor WADA are entitled to appeal the decision to the CAS. The CAS would have no jurisdiction to decide an appeal against the award on the basis of R47 of the Sport Arbitration Code (CAS-Code). The necessary statutory base in the CBF Statutes would not be available here.

6.

6.1 R47 of the CAS-Code reads as follows:

“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.”

Art. 61 (1) of the FIFA Statutes (2007 edition) provides:

“Appeals against final decisions passed by FIFA, particularly the judicial 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.”

According to Art. 61 (5) and (6) of the FIFA Statutes, FIFA and WADA have the right to appeal to the CAS against any internally final decision in doping matters.

6.2 These FIFA rules are binding for the Appellant. As a professional football player playing at the international level, he is a member of the Brazilian Football Association CBF, which for its part is a member of FIFA. Accordingly, the FIFA Rules, particularly the jurisdiction of the CAS according to Art. 61 of the FIFA Statutes, apply also to the Appellant. The CAS accurately acknowledged that. The Appellant is of the opinion that the requirement of R47 of the CAS-Code, according to which an appeal against a decision of an Association may be made to the CAS “insofar as the Statutes or Regulations of the said Body so provide” is not met because the Rules of the Brazilian Association do not provide for any appeal to the CAS. (The Appellant) cannot be followed. Art. 1 (2) of the CBF Statutes provides, among other things, that a player belonging to the CBF must follow the FIFA Rules. Such a general reference to the FIFA Rules and thus to the appeal rights of FIFA and WADA contained in the FIFA Statutes is sufficient to establish the jurisdiction of the CAS pursuant to R47 of

the CAS-Code, by analogy with case law which holds valid the global reference to an arbitration clause contained in the statutes of an association (Decision 4P.253/2003 of March 25, 2004 at 5.4, ASA-Bull. 2005 p. 128 ff., 136, and 4P.230/2000 of February 7, 2001 at 2a, ASA-Bull. 2001 p. 523 ff., 528 f., with references; also see BGE 133 III 235 at 4.3.2.3 p. 245 and 129 III 727 at 5.3.1 p. 735, with references).

6.3 The Appellant further argues that the STJD would be an independent Sport Court. Its decision would therefore not have to be considered as appealable decisions of a FIFA member within the meaning of Art. 61 of the FIFA Statutes. The argument fails simply because the factual findings of the lower court bind the Federal Tribunal (Art. 105 (1) BGG; at 5.1 in the beginning). The CAS concluded as a matter of fact that the STJD is an organ of the CBF on the basis of a letter from the President of the STJD of September 13, 2007, in which he said among other things: “it (the STJD) is just one of the bodies of the CBF...”⁶. Against that factual finding, the Appellant raises no grievance within the meaning of Art. 190 (2) PILA. The Federal Tribunal must therefore assume that the STJD is an organ of the CBF, and that accordingly the CAS rightly held the decision of the STJD as a decision from a FIFA member within the meaning of Art. 61 of the FIFA Statutes. That the STJD exercises its jurisdictional activity independently and enjoys independence in its organisation changes nothing to the foregoing. The decisive factor is that the STJD is an organ of the CBF and that it is institutionalised by the CBF Statutes.

6.4 The Appellant’s grievance that the CAS should not have accepted to entertain the appeals by FIFA and WADA proves to be unfounded. Therefore the appeal must be rejected.

7.

In accordance with the outcome of the proceedings, the Appellant must pay the costs and compensate the Respondent (Art. 66 (1) and Art. 68 (2) BGG).

⁶ Translator’s note: In English in the original text.

For these reasons, the Federal Tribunal pronounces:

1. The appeal is rejected.
2. The judicial costs, set at CHF 5'000.- shall be borne by the Appellant.
3. The Appellant shall pay to the Respondents an amount of CHF 6'000.- for the proceedings in front of the Federal Tribunal.
4. This decision shall be notified to the parties and to the CAS.

Lausanne, January 9, 2009

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

The Presiding Judge:

The Clerk:

KLETT

WIDMER