Arbitration CAS 2008/A/1453 Elkin Soto Jaramillo & FSV Mainz 05 v/ CD Once Caldas & FIFA, preliminary decision of 8 February 2008

Panel: Mr Michael Beloff QC (United Kingdom), President; Mr Hendrik Willem Kesler (Netherlands); Ms Margarita Echeverria Bermudez (Costa Rica)

Football
Request for a stay
Irreparable harm
Likelihood of success
Balance of interests between the parties

1. **According to the CAS jurisprudence, as a general rule, when deciding whether to stay the execution of the decision appealed against, it is necessary to consider whether the measure serves to protect the applicant from irreparable harm, the likelihood of success on the merits of the appeal and whether the interests of the Appellant outweigh those of the Respondent. It is then necessary to compare the disadvantage to the Appellant of immediate execution of the decision with the disadvantages for the Respondent in being deprived such execution – the so-called balance of convenience or interest. The Appellant must make at least a plausible case that the facts relied upon by him and the rights which he seeks to enforce exist and that the material criteria for a cause of action are fulfilled.**

2. **A player can suffer irreparable harm when a sporting sanction is imposed upon him in the course of a contractual dispute with his former club. Months of suspension lost can never be recovered and this fact becomes particularly important in a footballer's life which is relatively short. Moreover, if the stay were not granted, but the player were to win the appeal, it is not clear how his damage could ever be compensated, and by whom. The new club of the player can also suffer irreparable harm because it will be deprived of the services of the player for the period of the sanction. It is again not clear how this damage could ever be compensated, and by whom.**

3. **The condition of likelihood of success is fulfilled if it can be demonstrated that the chances of the appellant to win over the substance is, *prima facie*, reasonable in the sense that it cannot be definitely discounted.**

4. **With regard to the balance of interests between the parties, the deterrent effect of a sanction is not undermined if its imposition is merely postponed and not cancelled.**

5. **The conditions for the stay of a decision are cumulative.**

The first Appellant ("the Player") is a Colombian professional football player.

The Second Appellant is a football club affiliated to the German Football Association ("the German club") to which in turn is a member of FIFA.

The First Respondent is a football club affiliated to the Colombian Football Association ("the Colombian club"), which in turn is also a member of FIFA.

The Second Respondent, Fédération Internationale de Football Association (FIFA), is the world governing body of football which is registered in Zurich, Switzerland.

On 5th January 2005, the Player and the Colombian Club signed a one year employment contract, valid from 5th January 2005 until 3rd January 2006.

On 19 October 2005 the Player and the Colombian club signed a one-year employment contract, valid from 3 January 2006 until 3 January 2007 ("the original employment contract"). The second paragraph of clause 2 provided that the employment contract would be automatically renewed for one year if neither of the Parties notified a non-extension by letter to the other party at least 30 days before its expiry.

On 16 January 2006 the Player signed a letter asking for a licence to play for Barcelona Sporting Club, Ecuador ("the Ecuadorian club") for one year and asserting, *inter alia* that after the loan period with the Ecuadorian club, he intended to renew his contract with the Colombian club (" the January letter"). The last paragraph states [in translation]

> *"once the period of the temporary licence from work has elapsed, my services as a professional football player of [the Colombian club] will recommence on the same terms on which they have been suspended and on the same condition, so that the contract will be in force until (3) January 2008".*

The interpretation of that letter is in issue.

The Colombian club asserts that on the same day the Player signed a document called *"Otrosí al contrato de trabajo a término fijo de tres (03) años suscrito entre la Corporación Deportiva Once Caldas y Ekin Soto Jaramillo"* (Annex to the three-year employment contract sighed between Corporation Deportiva Once Caldas and Elkin Soto Jaramillo) ("the January Contract"). The authenticity of the January Contract is in issue.

On 18 January 2006 the Player signed a one-year employment contract with the Ecuadorian Club valid from the date of the signature until 31 December 2006.

In September 2006, the Colombian club proposed to the Player that he sign a one-year employment contract dated 18 September 2006 that would be valid for one-year after the loan of the Player to the Ecuadorian Club, i.e. from 3 January 2007 until 2 January 2008 ("the September proposal"). The Player rejected the proposal and never signed the proffered document.

On 30 November 2006 i.e. more than 30 days prior to the expiry of the original employment contract with the Colombian club, the Player notified the Colombian club that he renounced the extension of his contract with the Colombian club for one further year, in accordance with the second paragraph of clause 2 of the original employment contract.

On 1 December 2006 the Colombian club refused to acknowledge the non-renewal of the original employment contract referring to the January letter.

According to a letter from the German club to the Colombian club dated 18 January 2007 the Colombian club offered the player at the end of December 2006 *"as a free player"*.

On 5 January 2007 the Player signed an employment contract with the German club valid for one year and a half, until 30 June 2008.

On 5 January 2007 the German Football Association (DFB) asked first the Ecuadorian Football Federation to issue the international transfer certificate (ITC) for the Player, as he was last registered with Barcelona SC.

On 12 January 2007, the DFB contacted FIFA and informed the latter that it had neither received the requested ITC nor any response from the Ecuadorian Football Federation.

On 16 January 2007 the DFB requested the Colombian Football Association to issue the ITC for the Player.

The Colombian Football Association declined to issue the ITC on the ground that the Player still had a contract with the Colombian club since he had extended his original employment contract in the January Contract.

On 1 February 2007, the Single Judge of the Players' Status Committee (PSC) authorised the DFB to register the Player with the German club.

On 28 September 2007 the FIFA Dispute Resolution Chamber (DRC) held that the Player had breached his contract with the Colombian club without just cause, and held that he was therefore liable to pay the Colombian club compensation in the amount of EUR 300,000. It further imposed a restriction of four months on his eligibility to play in official matches ("the restriction"). The German club was declared jointly and severally responsible for the payment of the compensation to the Colombian club.

On 18 December 2007 the decision was notified to the Player.

The decision of the DRC found that the Player had a subsisting contract with the Colombian club was founded primarily on the January letter:

> *"10. The Chamber then started extensive deliberations as to whether the employment relationship between the player and CD Once Caldas had been renewed or extended beyond 3 January 2007. In this respect, the Chamber first and foremost took note that the player had signed declaration (declaration of suspension)*

according to which the employment contract with CD Once Caldas would be suspended during the loan period for one year and that the contract would be extended under the same conditions for one more year until 3 January 2008. The player never contested having signed this declaration of suspension. Furthermore, the Chamber took note that the club had accepted the declaration of suspension by including the annotation "acceptado" and countersigning it. The Chamber particularly referred to the fact that the declaration of suspension mentioned the new date of the ordinary expiration of the contract , i.e. 3 January 2008."

"11. In respect, the Chamber was eager to emphasise that it could not follow the argumentation of the player and the German club that the declaration of suspension cannot be considered an extension of contract but solely a unilateral and informative declaration. In fact, as mentioned before, it bears the signature of both Parties and clearly indicates the new date of expiry of the contractual relationship. Even if it should originally have been a unilateral proposal from the player, the club had explicitly accepted it in writing by means of the relevant annotation."

"15. […] Furthermore, the Chamber emphasised that the declaration of suspension alone would already be a sufficient document to prove the extension of the contractual relationship until 3 January 2008. […]".

The decision of the DRC that the Player had a subsistence contract with the Colombian club was founded secondarily on the January Contract:

"14. Bearing in mind the above, and in particular also the fact that the Columbian club had, upon request, immediately produced the original copy of the document which was now on file, the members of Chamber unanimously deemed that they had no genuine reasons to doubt on the authenticity of the relevant document. Effectively, the quite singular signature of the player appears to be identical to other signatures of the player on other documents on file, the expiry date of the extended contract is the same like mentioned in the declaration of suspension (3 January 2008), both documents mention that the contract is extended under the same conditions and both documents bear the same type face. […]".

On 4 January 2008, the Player filed with the Court of Arbitration for Sport (CAS) an appeal against the Decision. The Player applied for the Decision of the DRC to be set aside and asked for a stay of execution of the restriction.

By letter of 18 January 2008, FIFA sent its reply resisting the Player's request for a stay of execution of the restriction.

No submission on stay was made by the Colombian Club.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS derives from Art. 47 of the Code of Sports-related Arbitration ("the Code") and from Art. 60 ff of the FIFA Statutes.

2. It follows that, in principle, CAS has jurisdiction to decide the present dispute as is accepted by all parties.

Applicable law

3. Art. R58 of the Code provides as follows:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

4. Art. 60 para 2 of the FIFA Statutes provides as follows:

   "The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

5. The FIFA Regulations necessarily apply.

6. As the seat of the CAS is in Switzerland, this arbitration is subject to the rules of the Swiss private international law (LDIP). Article 187 para. 1 LDIP provides that the arbitral tribunal decides in accordance with the law chosen by the parties or, in the absence of any choice, in accordance with the rules with which the case has the closest connection.

7. No choice of applicable law having been made by the parties, the general rule in Art. R58 of the Code applies. Therefore the rules and regulations of FIFA apply primarily and Swiss law applies subsidiarily. The contractual relationship (actual or alleged) between the Player and the Colombian club is *prima facie* governed by the Colombian law, which may therefore also be relevant.

Admissibility

8. The statement of appeal filed by the Player was lodged within the deadline provided by Art. 61 of the FIFA Statutes, namely 21 days from the notification of the Decision. Furthermore, it complies with the requirements of Art. R48 of the Code.

9. It follows that the appeal is admissible.

Application for a stay

10. The Player's application to stay the Restriction must be dealt with as a request for provisional and conservatory measures in accordance with Art. R37 of the Code.

11. Article 17 of the FIFA Regulations on Status and Transfer of Players 2005 version which governs this dispute provides at para. 3.

"In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the Protected Period. ***The sanction shall be a restriction of four months on his eligibility to pay in Official Matches … In all cases these sporting sanctions shall take effect from the start of the following season of the new club*** *…".*

12. According to the CAS jurisprudence, as a general rule, when deciding whether to stay the execution of the decision appealed against, it is necessary to consider whether the measure serves to protect the applicant from irreparable harm, the likelihood of success on the merits of the appeal and whether the interests of the Appellant outweigh those of the Respondent. It is then necessary to compare the disadvantage to the Appellant of immediate execution of the decision with the disadvantages for the Respondent in being deprived such execution – the so-called balance of convenience or interest. The Appellant must make at least a plausible case that the facts relied upon by him and the rights which he seeks to enforce exist and that the material criteria for a cause of action are fulfilled (CAS 98/200, pp. 38-41; CAS 2000/A/274, published in the Digest of CAS Awards II, p. 757; CAS 2003/A/523, para. 7.4; CAS 2004/A/578; CAS 2004/A/691; CAS 2004/A/780; CAS 2005/A/916).

13. Taking each of the criteria in turn, the Player contends

(i) the potential harm to him will be irreparable. If the stay is sustained, but he is finally successful in his appeal, he will never recover that which he has lost i.e. 4 months of his career with the German club. He also adds that such suspension will impact further on his chances of first team football in the next season, and notes that he is recovering from serious injury.

(ii) He has a plausible case on the merits. Of the two documents relied on in support of the proposition that his original employment contract with the Colombian club was extended beyond 3rd January 2007 (its original expiry date), the first January letter was a unilateral declaration of intent and not a mutually agreed extension, the second *January Contract* which on its face was such a mutual agreement was a forgery.

(iii) as to the balance of convenience, the Colombian club would suffer none; their interest in the matter is financial.

14. In response, FIFA contends:

(i) the Player would not suffer any irreparable harm by dismissal of his request for a stay, since the suspension would not affect his financial position:

"the Appellant would still have the possibility to claim for the reparation of potential financial damages allegedly incurred due to the suspension of the player".

(ii) *"the player's chances of success on the merits of the appeal are nearly non existent",* since the January letter signed by both Parties is itself contractual, and the January contract is *prima facie* valid.

(iii) the interests of FIFA as the governing body of football, and the importance of the principle of the maintenance of contractual stability outweigh any interest that the Player may have in his application for stay since the deterrent effect of the suspension sanction will be undermined, if it is not maintained forthwith.

Analysis

15. The Panel considers that the Player would suffer irreparable damage if the stay were not granted. It is by no means clear to us against whom the Player could claim compensation if it were not granted, but the Player were to win the appeal. The Colombian club? The DRC? Suffice it to say that the matter is at best moot. In any event the Player is ready, willing and able to play now; months lost can never be recovered; a footballer's professional life is relatively short. The German club too will be deprived for the same period of his services that of which they wish to make use. Again it is unclear to us how it could ever be compensated, and by whom for that loss.

16. Without of course reaching any final conclusion on the merits of the Player's case, we find that it is arguable, and cannot definitely be discounted.

(1) Two interpretations of the January letter it could be contractual but it could be no more than declaration of intent are possible. Whenever the Colombian club counter-signed the January letter – a matter of controversy – the implications of any such countersignature are also contentious. Issues are raised as to whether the January letter in any event complied with the formal requirements:

(i) for amendment of the original contract; and

(ii) of the FIFA Regulations; and

(iii) of Colombian law.

Indeed were the January letter contractual the question arises as to why the September proposal was thought necessary by the Colombian club.

(2) No mention was made of the January contract in the Colombian club letter of 1st December 2006; in due course the Panel may need to know why not. Issues are also raised in this context of formal validity of the January contract, if authentic.

17. In our view on these matters the evidence and submission are required before the Panel can reach a firm view on the merits of the appeal.

18. As to the balance of interests between the parties we consider that the deterrent effect of the sanction will not be undermined if its imposition is merely postponed and not cancelled. The disadvantages sustained by the Player in the event of immediate execution of the restriction seem thus to outweigh the disadvantages for FIFA if such execution is stayed.

19. It follows from the above that the three cumulative conditions for the stay of the restriction are met. As a consequence, the application for a stay of the disciplinary Decision is to be allowed. We are gratified to note that this conclusion is consistent with the main-stream of CAS jurisprudence e.g. CAS 2003/O/482, CAS/2004/A/780 to which we have had careful regard.

The Court of Arbitration for Sport rules:

1. The application by Elkin Soto Jaramillo and FSV Mainz 05 to stay the decision issued on 28 September 2007 by the FIFA Dispute Resolution Chamber is allowed.

(…)