CAS 2016/A/4843
Hamzeh Salameh & Nafit Mesan FC v. SAFA Sporting Club & Fédération Internationale de Football Association (FIFA)
24 November 2017

Football; Termination of the employment contract without just cause by the player; Determination of the law applicable to the dispute; Definition of contract of employment under Swiss law; Existence of a valid and binding employment contract based on the presence of the *essentialia negotii* in an agreement; Annulation of contract based on material error; Definition of professional football player; Termination of a contract of employment with just cause; Burden of proof; Joint and several liability of a player's new club to pay compensation; Principle of positive interest

Panel
Mr Olivier Carrard (Switzerland), President
Prof. Massimo Coccia (Italy)
Mr Jirayr Habibian (Lebanon)

Facts

Mr Hamzeh Salameh (the "Player") is a Lebanese football player, born on 3 May 1986.

Nafit Mesan FC ("Nafit Mesan") is a football club with its registered office in Amarah, Iraq. It is an affiliated member of the Iraqi Football Federation ("IFA"), which is itself affiliated with the Fédération Internationale de Football Association ("FIFA").

SAFA Sporting Club ("Safa") is a football club with its registered office in Beirut, Lebanon. It is an affiliated member of the Lebanese Football Federation ("FLFA"), which is itself affiliated with FIFA.

FIFA is the international governing body of football, with its registered office in Zurich, Switzerland.

On 17 October 2013, the Player and Safa signed a document titled "Sports Agreement" (the "Sports Agreement") valid as from 17 October 2013 until 17 October 2018 and in accordance with which Safa obliged itself, *inter alia*, *"to provide medical insurance to* [the Player] *during the term of* [the Sports Agreement]*"*, *"to pay an amount of USD 10,000 (ten Thousand Dollars) to* [the Player] *for each season during the term of* [the Sports Agreement]*"*; *"to pay a monthly salary of USD 1,000 (One Thousand US Dollars) to* [the Player] *during the term of* [the Sports Agreement]*"*. As to the applicable law, Article 7 of the Sports Agreement provides that *"the applicable rules are the regulations of the Lebanese Football Association"*.

On 23 July 2014, the Player signed an employment contract with the Nafit Mesan valid until 15 June 2015, according to which he was entitled to receive a salary of USD 125,000 payable as follows: *"40% from the total amount of the contract will be paid upon of completing the contract procedures (…); 30% from the total amount will be paid as a monthly salary (…); 30% from the total amount of the contract will be paid at the end of the above mentioned period"*.

On 25 July 2014, Nafit Mesan inserted information in the FIFA Transfer Matching System ("TMS") in the aim of obtaining the Player's International Transfer Certificate ("ITC"). On 5 August 2014, the FLFA rejected the relevant ITC request of the IFA through the TMS stating that the contract between Safa and the Player had not expired. On 2 September 2014, the IFA requested the assistance of FIFA with regard to the provisional registration of the Player for Nafit

Mesan. On 10 September 2014, the FLFA informed FIFA that it insisted on the rejection of the ITC's request for the Player since the latter was under contract with Safa until 17 October 2018. On 16 September 2014, the Single Judge of the Players' Status Committee rendered a decision authorizing the IFA to provisionally register the Player for Nafit Mesan with immediate effect. In said decision, the Single Judge concluded that Safa did not seem to be *"genuinely and truly interested in maintaining the services of the player"*, but was *"rather looking for financial compensation"*.

On 27 September 2014, Safa lodged a claim in front of FIFA against the Player and Nafit Mesan arguing that the former was to be held liable for breach of contract without just cause, and requested to be awarded compensation. Safa further claimed that Nafit Mesan was to be held jointly and severally liable for the payment of such compensation, as it induced the Player to terminate the Sports Agreement unilaterally. Moreover, Safa requested sporting sanctions to be imposed on the Player and Nafit Mesan.

On 12 January 2015, the Player and Nafit Mesan terminated their employment agreement by mutual consent. The Player then signed an employment agreement with the Omanese club Al Nasr Sports Club, valid until 31 May 2015. In June 2015, the Player returned playing for Safa.

On 17 June 2016, the FIFA Dispute Resolution Chamber (the "FIFA DRC") rendered the appealed decision in which it held that the Player acted in breach of his employment contract concluded with Safa. As a consequence, the FIFA DRC imposed on Nafit Mesan a ban from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods, as well as a four-month restriction on the Player's eligibility to play in official matches. Additionally the Player and Nafit Mesan were held jointly and severally liable to pay to Safa compensation for breach of contract in the amount of USD 312,375

Reasons

1. Article 187(1) PILA stipulates how the applicable law is to be determined in each case. The provision reads as follows: *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected"*.

   According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral tribunal (see CAS 2014/A/3850 para. 45 *et seq.* quoted by HAAS U., *Applicable law in football-related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law*, in: CAS Bulletin 2015/2, pp. 9-10). In the present case, in agreeing to arbitrate the present dispute according to the CAS Code, the Parties have submitted to the conflict-of-law rules contained therein, in particular to Article R58 of the CAS Code.

   In light of the foregoing, the Panel finds that the dispute at hand shall be decided based on the various regulations of FIFA, in particular the RSTP. Swiss law shall be applied to matters not covered by relevant FIFA regulations.

2. According to Swiss law, the individual employment contract is a contract whereby the employee has the obligation to perform work in the employer's service for either a fixed or indefinite period of time, during which the employer owes him a wage (Article 319(1) of the Swiss Code of Obligations - "CO"). The main elements of

the employment relationship are the employee's subordination to the instructions of the employer and the duty to personally perform work (Decision of the Swiss Federal Tribunal 4C.419/1999 of 19 April 2000; ATF 112 II 41).

3. The Appellants then argue that the Sports Agreement lacks the required elements to be considered as a binding employment contract. In the Appealed Decision, the FIFA DRC found that the Sports Agreement contains the *essentialia negotii* of an employment contract.

   The Panel shares the same opinion. The Sports Agreement signed by the Parties is, to all effects and purposes, a binding and valid agreement since it had all elements necessary for a *bona fide* employment contract: it establishes that the Player is a football player for Safa during a fixed period of time, and that, in exchange, Safa has to pay to the Player a staggered remuneration.

   The Panel, therefore, has no doubt that the Sports Agreement constitutes a valid and binding employment contract.

4. Moreover, referring to Lebanese and Swiss contract law, the Appellants submit that the conclusion of the Sports Agreement was vitiated by an error since the real intent of the Player was to conclude a *"unilateral agreement to i) allow* [Safa] *to register him with FLFA in light of the FLF new law, ii) to amalgamate his footballing expenses in one lump-sum payable to him if he chooses to render his services for* [Safa] *and not payable to him if she* [sic] *chooses not to do so".*

   In this respect, the Panel observes that the provisions of the Swiss Code of Obligations ("CO") on error are art. 23, 24 and 25 CO. Accordingly, a contract is not binding because of an error only if (i) the error is material and (ii) the invocation of the error is not contrary good faith.

   In the Panel's opinion, the foregoing provisions do not allow the relief sought by the Appellants, *i.e.* the conclusion that the Sports Agreement was vitiated by an error. The Panel considers that the legal argument raised by the Appellants is not supported by its findings relating to the content of the Sports Agreement. It is indeed clear from its text that the Sports Agreement constitutes an employment contract. There is therefore no doubt that the Player would have refrained from signing the Sports Agreement if his real intent was not to bind himself. The Panel further notes that the Player validly bound himself since this contract does not present any kind of unbalance that would trigger its nullity either under Swiss law or under FIFA rules.

   In conclusion, the Panel finds that the Player was bound by the Sports Agreement.

5. As to the Player's challenge of the DRC's conclusion that he be considered a professional football player, Article 2(2) RSTP reads *"A professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs (...)".* The definition of "professional" in the RSTP is clear. To be a professional, the Player must meet two cumulative requirements: a) he must have a written employment contract with a club and b) must be paid more than the expenses he effectively incurs in return for his footballing activity (CAS 2015/A/4148 & 4149 & 4150 para. 64; TAS 2009/A/1895 para. 29). Furthermore, according to CAS jurisprudence, the status of the player as a "professional" is exclusively defined in the RSTP without any reference to national regulations (see TAS 2009/A/1895 quoted in: DUBEY J.-P., *The jurisprudence of the CAS*

in football matters (except Art. 17 RSTP), CAS Bulletin, 1/2011, p. 4.).

It is not disputed by the Parties that the Player and Safa have signed a written agreement on 17 October 2013. It follows that the formal requirement (existence of written contract) set out in Article 2(2) RSTP is met.

According to CAS jurisprudence, the decisive substantive criterion for qualifying a player as a "professional" is whether the amount is "more" than the expenses effectively incurred by the player. In this respect, it is irrelevant whether it is much more or just a little more (CAS 2009/A/1781 para. 46; CAS 2006/A/1177 para. 7.4.5). The FIFA regulations do not stipulate a minimum wage. The player can still be considered as a non-amateur, even if he agrees to perform services for a meagre salary (CAS 2006/A/1027 para. 18). The annual remuneration of the Player was USD 22,000, *i.e.* a gross monthly salary of USD 1,833.

The Player submits that his monthly football-related expenses amounted to USD 2,015. However, the Panel observes that the list of expenses provided by the Player contain expenses that are not related to his football activity, namely: housing, utilities, food & nutrition, personal care items, personal clothing, internet, cell phone and gym. The only expenses that could fall into the category of football-related expenses are transportation and sport clothing, *i.e.* a total of USD 242. It results that the Player was paid more for his footballing activity than the expenses he effectively incurred to practice football. The second condition set out in Article 2(2) RSTP is therefore met.

Based on the FIFA regulations and in view of the circumstances of the case, the Panel concludes that the Player had signed a professional contract.

6. The Player being considered as a professional player, the provisions regarding the maintenance of contractual stability between professionals and clubs in Article 13 to 18bis RSTP – including the consequences of terminating a contract without just cause – do apply.

   In this regard, Article 13 RSTP, provides *"A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement"*. Article 18(5) RSTP reads that *"[i]f a professional enters into more than one contract covering the same period, the provisions set forth in Chapter IV* [Maintenance of contractual stability between professionals and clubs] *shall apply"*.

   The Player breached the Sports Agreement by entering into an employment contract with Nafit Mesan before the expiry of that concluded with Safa. Then, the question arises whether the Player had just cause to terminate the contract. In this regard, Article 14 RSTP reads *"[a] contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause"*.

   The Appellants maintain that, in any case, the Player had just cause to terminate the Sports Agreement because he had valid reason to believe that Safa did not intend to register him for season 2014/2015. They further claim that Safa did not provide a health insurance and failed to pay the remuneration stipulated in the Sports Agreement.

7. In this respect, the Panel reminds the well-established CAS jurisprudence concerning burden of proof (CAS 2016/A/4580; CAS

2015/A/309; CAS 2007/A/1380, with further references to CAS 2005/A/968 and CAS 2004/A/730). In the case at hand, the Panel observes that the Appellants' arguments that the termination of the Sports Agreement was justified are unsupported. In particular, the Panel notes that the evidence submitted by the Appellants did not contain any written records evidencing that the Player requested payment of his salaries. In this regards, the Panel recalls that according to CAS jurisprudence, a player that is not being paid his salaries has the onus of giving a proper notice to the club before unilaterally terminating a contract for just cause. If, after the player's warning, his club is still not paying the missing salaries, the player can terminate the contract (only in some exceptional circumstances – which are not given in the present case – no warning is necessary) (see CAS 2006/A/1180, CAS 2012/A/2698 and CAS 2013/A/3331).

In consideration of the above, the Panel believes the Appellants have not fulfilled their burden of proof, and that it could thus not determine with the required degree of certainty the Player had just cause to terminate the Sports Agreement.

8. Having established that the Player was not entitled to terminate the Sports Agreement and having therefore agreed with the FIFA DRC that there was a breach of contract committed by the Player, the further issue to be decided by the Panel is what amount of compensation for breach of contract Safa is entitled to receive from the Player. In addition, pursuant to Article 17(2) RSTP (second sentence) *"If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment"*.

This provision plays an important role in the context of the compensation mechanism set by Article 17 RSTP. As established by CAS jurisprudence, it is aimed at avoiding any debate and difficulties of proof regarding the possible involvement of the new club in the player's decision to terminate his former contract, and at better guaranteeing the payment of whatever amount of compensation the player is required to pay to his former club on the basis of Article 17 RSTP (see among others CAS 2013/A/3149 para. 99).

9. The Appellants claim that Safa has failed to prove that it sustained actual damage due to the breach and should therefore be denied the right to any compensation.

In this respect, the Panel observes that Safa proved that the Player breached his employment without just cause. It results that pursuant to Article 17(1) RSTP, the Player *"shall pay compensation"* to Safa, to be determined under the provisions of Article 17(1) RSTP and in light of the principle of the *"positive interest"* under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in, had the contract been fulfilled to its end (CAS 2015/A/4206 & CAS 2015/A/4209; CAS 2012/A/2698).

Turning to the calculation of the compensation, the Panel preliminarily notes that in the Sports Agreement the Parties have not agreed any contractual remedy in case of breach. As a result, the actual measure of the damages sustained by Safa should be assessed with due consideration for the factors provided in Article 17(1) RSTP. With respect to the "objective criteria", the Panel observes that the Appellants claim that the Player returned playing for Safa from 1st June 2015 to 10 January 2016 and from 24 April 2016 until

11 August 2016. The Panel considers that this circumstance – which was unknown to FIFA at the time of the Appealed Decision – must be taken into consideration for the assessment of the compensation. The relevant period for the calculation of the compensation is therefore from 23 July 2014 (*i.e.* the date of the breach of the Sports Agreement) until 1st June 2015 (*i.e.* the date of the Player's return to Safa). This period of time corresponds to season 2014/2015.

Furthermore, the Panel observes that, towards the end of August 2014, Nafit Mesan made an offer to Safa consisting in the loan of the Player to Nafit Mesan for the 2014/2015 season. The offer stipulated that Nafit Mesan was ready to pay an amount of USD 125,000 as a compensation for the services of the Player. The Panel considers that such amount is particularly relevant to assess the Player's market value at the relevant period of time.

Having said that, the Panel believes it is adequate to also take into consideration the fact that Safa has saved the player's remuneration during the 2014/2015 season, *i.e.* USD 22,000. Therefore, the amount of USD 22,000 must be deducted from the Player's market value at the relevant period of time (*i.e.* 125,000). This would result in an amount of USD 103,000.

In light of the foregoing, the Panel finds that the amount of USD 103,000 represents the actual damage incurred by Safa as a result of the termination by the Player of the Sports Agreement without just cause. Said amount takes into account the Player's market value, the savings made by Safa, the fact that the Player breached the Sports Agreement in the protected period and the fact that the Player returned to Safa on 1st June 2015. This conclusion takes also into account the specificity of sport, which is in itself not an additional head of damage, but a factor to take into account in the evaluation of the other elements.

Decision

The appeal filed by Hamzeh Salameh and Nafit Mesan FC on 17 December 2016 against the Decision of the FIFA Dispute Resolution Chamber rendered on 17 June 2016 is partially upheld.

The principal amount relating to the compensation for breach of contract is fixed at USD 103,000.

All other points of the Decision of the FIFA Dispute Resolution Chamber rendered on 17 June 2016 are confirmed.