CAS 2019/A/6253 Wydad Athletic Club v. FIFA & Chisom Elvis Chikatara & El Gouna

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

Sole Arbitrator: Dr Jan Räker, Attorney-at-Law, Stuttgart, Germany (the "Arbitrator")

in the arbitration between

WYDAD ATHLETIC CLUB, Morocco

Represented by Nicolas Bône & Patricia Moyersoen, Attorneys-at-Law
Moyersoen Avocats, Paris, France

Appellant

and

Fédération Internationale de Football Association (FIFA), Switzerland

First Respondent

and

CHISOM ELVIS CHIKATARA, Nigeria

Represented by Johnny Precious Ogbah, Attorney-at-Law, Activity Chambers, Nottingham, United Kingdom

Second Respondent

and

El Gouna Football Club, Egypt

Represented by Dominic McGinn, Attorney-at-Law, Excello Law, Liverpool, United Kingdom

Third Respondent

* * * * *

I. PARTIES

1. Wydad Athletic Club ("the Appellant" or "Wydad") is a football club from Morocco, affiliated to the Royal Moroccan Football Federation which, in turn, is affiliated to the Fédération Internationale de Football Association ("the First Respondent "or "FIFA").

2. FIFA is the international governing body of football. It is an association under Articles 60 et seq. of the Swiss Civil Code, headquartered in Zürich, Switzerland.

3. Mr. Chisom Elvis Chikatara ("the Second Respondent" or "the Player" or "Chikatara") is a professional football player from Nigeria.

4. El Gouna Football Club ("the Third Respondent" or "El Gouna") is a football club from Egypt, affiliated to the Egyptian Football Federation which, in turn, is affiliated to FIFA. The Player played for El Gouna after the end of his relationship with Wydad.

5. The above parties are hereinafter also collectively referred to as "the Parties", the respondents collectively as "the Respondents".

II. INTRODUCTION

6. The Appellant challenges before the Court of Arbitration for Sport (the "CAS") a decision dated 7 March 2019 issued by FIFA's Dispute Resolution Chamber (the "DRC") which ruled, *inter alia*, that the Appellant had to pay an amount of USD 165,167 to its former player Chikatara as a result of a breach of a player contract between them (the "Appealed Decision") as well as a letter issued by FIFA on 2 April 2019, where FIFA considered that the grounds of the Appealed Decision would have been requested out of time and that it would thus not be in a position to provide them (the "Appealed Letter").

III. FACTUAL BACKGROUND

7. Below is a summary of the relevant facts and allegations based on the Parties' written submissions with regard to the scope of this award. Additional facts and allegations found in the Parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in its Award only to the submissions, pleadings and evidence he considers necessary to explain his reasoning.

8. Having agreed on a bifurcation of the proceedings, the Parties are divided at this stage

of the proceedings over two questions

- Whether the CAS has jurisdiction to decide the present appeal lodged by Wydad against the Player and FIFA (the "Appeal"), and if so,

- Whether the Appeal is admissible.

9. In light of the above, only the facts relevant to these questions will be briefly presented below.

10. On 7 March 2019, the FIFA DRC issued the Appealed Decision in the matters between the Player, as Claimant / Counter-Respondent, Wydad, as Respondent / Counter-Claimant and El Guna, as intervening party. This decision reads as follows:

"*1. The claim of* [Chikatara] *is partially accepted.*

2. [Wydad] *has to pay to* [Chikatara] ***within 30 days*** *as from the date of notification of this decision, outstanding remuneration in the amount of USD 44,000.*

3. [Wydad] *has to pay to* [Chikatara] ***within 30 days*** *as from the date of notification of this decision, compensation for breach of contract in the amount of USD 121,167.*

4. In the event that the aforementioned amounts are not paid by [Wydad] *within the stated time limit, interest at the rate of 5% p.a. will fall due as of the expiry date and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*

5. Any further claim lodged by [Chikatara] *is rejected.*

6. [Chikatara] *is directed to inform* [Wydad] *immediately and directly of the account number to which the remittances under points 2. and 3. are to be made and to notify the Dispute Resolution Chamber of every payment received.*

7. The counterclaim of [Wydad] *is rejected*".

11. The Appealed Decision was issued without reasons pursuant to Article 15 of the Rules Governing the Procedures of the Player's Status Committee and the Dispute Resolution Chamber (the "DRC Rules") and contained the following note:

"Note relating to the findings of the decision (art.15 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber):

A request for the grounds of the decision must be received, in writing, by the FIFA general secretariat within 10 days of receipt of notification of the findings of the decision. Failure to do so within the stated deadline will result in the decision becoming final and binding and the parties being deemed to have waived their rights to file an appeal."

12. The FIFA DRC sent the Appealed Decision on 13 March 2019 via e-mail to the parties involved in the proceedings before the FIFA DRC using, *inter alia*, one of the Appellant's e-mail address registered in FIFA's Transfer and Matching System (TMS), i.e. faty1999@gmail.com and to a further address for the Appellant registered in FIFA's files (wacsecfoot@gmail.com). The e-mail from FIFA DRC was an invitation to download the Appealed Decision via FIFA's e-filing system Cargo Link. The Appealed Decision was however not downloaded via the download links contained in the e-mails sent to the Appellant.

13. On 27 March 2019, the Player's legal counsel sent to Wydad an invoice for the amount awarded to the Player in the Appealed Decision, and attached a copy of the said decision.

14. On 28 March 2019, the Appellant sent to FIFA from its e-mail address wacsecfoot@gmail.com a letter stating that Wydad had not received the Appealed Decision and requesting FIFA to provide the grounds for the Appealed Decision.

15. On 2 April 2019, FIFA's Players' Status Department sent a letter to the Appellant ('the Appealed Letter') which read as follows:

"[...] we understand that you request the grounds of the decision reached by the Dispute Resolution Chamber on 7 March 2019 in the dispute between the above-captioned parties, the findings of which were directly communicated to Wydad Athletic Club on 13 March 2019, specifically to the email addresses, faty1999@gmail.com and wacsecfoot@gmail.com, as indicated by you within the proceedings as well as in your last correspondence (cf. document and transmission report enclosed).

In this regard, we kindly ask you to take due note that in accordance with art. 15 par. 1 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber as well as the note relating to the findings of the decision concerned, the motivated decision will be communicated to the parties, if a request for the grounds of the decision is received by the FIFA general secretariat in writing within ten days as from receipt of the findings of the decision. Failure to do so will result in the decision becoming final and binding and the parties being deemed to have waived their rights to file an appeal.

In view of the above, we would like to emphasize that the findings of the relevant

decision passed on 7 March 2019 have been duly notified to your club on 13 March 2019, yet the grounds of said decision have been requested on 28 March 2018 only, i.e. fifteen days after the notification of the findings of the decision.

As a result, and considering all of the above, particularly that the grounds of the decision have not been requested within the stipulated ten day time limit, we regret having to inform you that we are not in a position to provide you with the motivated decision."

16. By letter dated 3 April 2019, the Appellant informed FIFA that e-mail containing the Appealed Decision sent by FIFA on 13 March 2019 had been classified as "SPAM" by its e-mail service provider and that this e-mail had accordingly been moved to the spam folder on the respective account.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ("CAS")

17. On 3 April 2019, Wydad filed with the CAS a Statement of Appeal against "*the decision of the FIFA Dispute Resolution Chamber of 7 March and the FIFA Decision of 2 April 2019.*" FIFA and the Player were named as respondents.

18. On 25 April 2019, the CAS Court Office initiated the procedure *CAS 2019/A/6253 Wydad Athletic Club c. FIFA and Chisom Elvis Chikatara.*

19. On 26 April 2019, counsel for the Player requested that English be the language of the proceedings.

20. In a letter dated 28 April 2019, counsel for El Gouna announced that they are acting for the Third Respondent and stated that El Gouna "*must ... be part of this appeal process*". El Gouna also requested that English be the language of the proceedings.

21. By letter to the CAS dated 2 May 2019, FIFA claimed that the Appeal *"is manifestly inadmissible"* because the Appellant failed to timely request the grounds for the Appealed Decision and further that the CAS lacks jurisdiction because Wydad failed to exhaust the available remedies by not requesting the grounds for the Appealed Decision. FIFA thus requested the termination of the procedure. Alternatively and in case its first request would not be accepted, it also requested the bifurcation of the proceedings and further that the Appeal against the Appealed Letter be declared inadmissible because it does not constitute a "*decision*". FIFA also requested the use of the English language.

22. On 7 May 2019, CAS pointed out to El Gouna that they had not been named as respondent in the Appeal and that consequently El Gouna was currently not a party to

the proceedings but that its request for intervention was currently dealt with.

23. On 22 May 2019, the CAS Court Office informed the Parties that, in accordance with Articles R47, R49 and R52 of the Code of Sports- related Arbitration (the "CAS Code"), the President of the CAS Appeals Arbitration Division (the "Division President") had decided that it would be for the Panel, once constituted, to decide on the admissibility of the appeal.

24. On 24 May 2019, the Appellant requested that a Sole Arbitrator be appointed.

25. On 14 June 2019 and after consultation with the Respondents, CAS communicated the decision of the Division President that the case will be submitted to a sole arbitrator.

26. On 9 July 2019, the CAS Court Office took note of the Parties' agreement for a bifurcation of the present proceedings and informed the Parties that it would be for the Sole Arbitrator, once appointed to issue further procedural directions and to rule on El Gouna's request for intervention.

27. On the same day and after consultation with the Parties, the Division President had issued an Order on Language providing for the use of English as the language of the proceedings.

28. On 2 August 2019, CAS informed the parties that the Panel was constituted as follows: Dr Dirk-Reiner Martens, Attorney-at-law in Munich, Germany.

29. By letter of 13 August 2019 and in view of the Parties' agreement, the Sole Arbitrator issued procedural directions for the filing of the written submissions on the admissibility of the appeal and informed the Parties that, depending on the outcome of the award on admissibility, they would be invited to submit written submissions on the merits.

30. By letter dated 21 August 2019, the CAS Court Office informed the Parties, on behalf of the Sole Arbitrator, that, as agreed by the Parties, El Gouna was admitted as co-respondent in the present procedure.

31. On 4 September 2019 and within the extended time-limit, the Appellant submitted its appeal brief on the admissibility of the appeal.

32. On 27 September 2019, the Respondents submitted their answers on the admissibility of the appeal.

33. By letter of 2 October 2019, the CAS notified these answers. In view of the exception of lack of jurisdiction raised by the First Respondent and since the issues of jurisdiction

and admissibility had, if needed, to be addressed in the same award, the Sole Arbitrator further invited the Second and the Third Respondents to express their observations on CAS jurisdiction and informed the Parties that the Appellant would then be invited to submit a reply on jurisdiction and admissibility.

34. On 8 October 2019, the Second Respondent submitted his observations (dated 3 October 2019) on jurisdiction.

35. On 9 October 2019, the Third Respondent submitted its observations on jurisdiction.

36. On 21 October 2019, the Appellant submitted its reply on admissibility and jurisdiction. It further requested the Sole Arbitrator to exclude the Player's and El Gouna's submissions dated 3 and 9 October 2019 respectively as well as some of the exhibits to the response of FIFA from the CAS file, that were drafted in French and filed without English translation.

37. On 31 October 2019 and as agreed by the Parties, the CAS Court Office informed the Parties that the Sole Arbitrator deemed himself sufficiently well informed to decide on jurisdiction and admissibility without the need to hold a hearing.

38. On 19 November 2019, CAS informed the Parties with great sadness, that the Sole Arbitrator Dirk-Reiner Martens had passed away and that a new Sole Arbitrator shall be appointed in due course.

39. By letter dated 4 December 2019, CAS informed the Parties that Dr Jan Räker, Attorney-at-law in Stuttgart, Germany, had been appointed as the new Sole Arbitrator in this procedure.

40. On 14 February 2020, the Sole Arbitrator confirmed to the Parties that a preliminary (or final depending on the outcome) award on jurisdiction and admissibility shall be rendered in this matter. He further informed the Parties that, should he consider that the Appealed Letter is an appealable decision before CAS, he also intends to address the merits of the Appealed Letter, as far as they are relevant for the jurisdiction or the admissibility of the appeal against the Appealed Decision. The Parties were invited to submit any objection in this respect within five days and the Respondents to comment the Appellant's requests for exclusion of 21 October 2019. The Appellant was finally invited to indicate if he maintained such requests.

41. By communications of 17, 18 and 19 February 2020, respectively, the Appellant confirmed to maintain his requests made in his submission dated 21 October 2019, while all Respondents requested to reject such requests.

42. By letter dated 25 February 2020, CAS informed the Parties that the Sole Arbitrator had rejected the Appellant's requests dated 21 October 2019 essentially since: For the exhibits submitted in French without an English translation, the Sole Arbitrator considered that in view of Article R29(3) of the CAS Code and in the absence of any request or order for their translation, they should not be excluded from the CAS file. For the Player's and El Gouna's submissions dated 3 and 9 October 2019, the Sole Arbitrator considered that their filing was in compliance with the instructions given to the parties and does not contradict Articles R55 and R56 of CAS Code.

43. On 3 March 2020, the CAS Court Office informed the Parties that they all tacitly agreed with the way of proceeding as described in the CAS letter of 14 February 2020.

44. On 4 and 6 March 2020 and further to a request from the Appellant, the CAS provided the Parties with a copy of the unpublished award issued in the case *CAS 2018/A/5524* and, on behalf of the Sole Arbitrator, invited them to submit, their relating comments, if any.

45. The Second Respondent submitted its comments on 10 March 2020, while the other Parties submitted their comments on 19 March 2020.

V. THE PARTIES' POSITIONS

46. The Sole Arbitrator has carefully reviewed all of the Parties' submissions and will briefly summarise the same in this Section IV. To the extent relevant, they will be dealt with in more detail in the Section on the Sole Arbitrator's findings.

A. The Appellant's 4 September 2019's submission on admissibility

47. Anticipating a challenge of the admissibility of its Appeal the Appellant argues:

- That it did not receive the Appealed Decision (and thus the notice on the need to request the grounds within 10 days of receipt) because FIFA's 13 March 2019 e-mail arrived in its spam-box, and

- That it only became aware of the Appealed Decision on 27 March 2019 when the Player's counsel requested payment of the amount awarded to the Player attaching a copy of the Appealed Decision, and

- That it timely requested the grounds for the Appealed Decision on 28 March 2019, and

- That as a result of the Appealed Letter with the refusal to provide the grounds for the Appealed Decision, the Appellant had no choice but to file on 3 April 2019 an appeal to the CAS both against such refusal in the Appealed Letter and against the Appealed Decision as such.

48. With respect to its Appeal against the Appealed Letter the Appellant submits:

- That the Appealed Letter has all the necessary characteristics of a "*decision*" within the meaning of Article 58 of the FIFA Statutes and Article R47 of the CAS Code, and

- That consequently the Appeal filed through its 3 April 2019 letter is admissible.

49. The Appellant further alleges the "*lack of merits in refusing to communicate the grounds*" of the Appealed Decision and contends that:

- "*Knowledge of the decision... is the starting point for requesting the grounds*", and

- "*FIFA failed to ensure a reliable and secure notification system for such procedures,...*" and to ensure that "*an acknowledgement of receipt has arrived.*"

- One can conclude from several legal provisions and Swiss Federal Tribunals' judgements (such as 1B_222/2013 of 19 July 2013 or 8C_239/2018 of 12 February 2019), that "*the need to issue an acknowledgement of receipt in order to determine the time of compliance with a time limit therefore appears to be a principle commonly accepted in Swiss law and which should be taken into account in the absence of more precise provisions*";

- The CAS, in the award CAS 2014/A/3642, underlines that whilst the use of emails is not a problem per se, unless a "read receipt" is obtained, if the e-mail is met with silence, it leaves evidential difficulties in proving it was received and not automatically consigned to "spam", as the Club contended it was in this case (cf. §140);

- It follows from the SFT and CAS case law that "*it is for FIFA to demonstrate that the decision ha[d] been received by the WAC, based on the circumstances of the case and the addressee's statements within the time-limits of his good faith*";

- FIFA can "*not prove the reading of its e-mail by the WAC on 13 March 2019*" since "*on the contrary, the exhibit produced by FIFA shows that the WAC never*

downloaded the decision", while "*the WAC provides a report of the receipt of the decision by a bailiff in [its] SPAM box*";

- FIFA irrefutable presumption that the WAC had received the Appealed Decision "*violates the General Principles of Law, the case law of the CAS and the right of defence of the WAC*";

- "[U]*nless it could be presumed without proof that it was acting in bad faith, it obvious that the WAC had no interest in not requesting the grounds of the [Appealed Decision] insofar as this request allowed it to protect its interests*"

50. On a subsidiary basis, the Appellant further refers to the CAS awards CAS 2004/A/748, CAS 2005/A/899 and CAS 2008/A/1705, to consider that "*a decision without grounds of the FIFA Dispute Resolution Chamber is subject to appeal to the CAS if it meets the conditions laid down in Article 47 of the CAS Rules of Procedures*" and that these conditions are all respected here. The Appellant further refers to the case CAS 2008/A/1708 where "[t]*he Panel concluded that, in the event that a party does not wish to request the grounds of the decision, since CAS may hear any appeal de novo pursuant to Article R57 of its Code of Procedure, the grounds of the decision should not be considered a precondition for an appeal*". The Appellant is aware that some subsequent case-law "*made the request for communication of the grounds of the decision a mandatory precondition for any appeal*". It however considers that such case law is inapplicable here, since the Appellant was not able to request the grounds within the 10-day period established by Article 15 of the DRC Rules because of the lack of a valid notice. Under such circumstance ruling its appeal inadmissible would infringe the Appellant's right to due process as recognized by the CAS (CAS 2013/A/3155) and Article 6 of the European Convention on Human Right.

51. The Appellant submits the following requests for relief:

"Principally:

- *Declare admissible its appeal against FIFA's decision of April 2019 not to communicate the grounds for its decision;*

- *Command FIFA to communicate the grounds for the decision of 7 March 2019;*

- *Refer the case back to FIFA to reform its previous ruling by communication of the grounds;*

- *Impose jointly and severally on the Respondents the costs of the proceedings;*

- *The reimbursement of the expenses and procedure fees of the Appellant's lawyers jointly and severally by all the Respondents for a total amount of € 15,000.*

Subsidiary:

- *Declare admissible the appeal against FIFA's decision of 7 March 2019;*
- *Set a timetable to enable the WAC to reach a conclusion on the merits of the dispute;*
- *Impose jointly and severally on the Respondents the costs of the proceedings on the Respondents the costs of the proceedings; and*
- *The reimbursement of the expenses and procedure fees of the Appellant's lawyers jointly and severally by all the Respondents for a total amount of € 15,000."*

B. The Player's 25 September 2019 submission on admissibility

52. The Player puts into question the Appellant's contention that it did not receive the e-mail from FIFA of 13 March 2019 with the invitation to request the grounds for the Appealed Decision within ten days. According to the Player, the extensive and unobstructed e-mail exchange between the Parties, consistently using the e-mail addresses for Wydad on file at FIFAs' TMS system, demonstrates that the Appellant also received FIFA's 13 March 2019 e-mail. In any event, even if this e-mail did in fact end up in the Appellant's spam-box, it was negligent on its part to not regularly check the spam-box, particularly at a time when the Appellant knew that the Appealed Decision was imminent. The Player also rejects the Appellant's argument that FIFA needs to verify that e-mails have been read "*as this would lead to chaos because a party can receive an e-mail and be too busy to open it or too scared to open it knowing the outcome.*"

53. According to the Player, "*it is general and accepted practice that receipt of the e-mail by a party in their e-mail box is deemed sufficient and does not have to depend on any further action by the recipient to be deemed as duly notified.*" The Player further submits that in view of FIFA Procedural Rules and CAS case-law (CAS2015/A/3903, CAS 2011/A/2563), the Appealed Decision became final and binding 10-day after it had been sent.

54. The Player submits the following prayers for relief:

"*We hereby humbly urge this honourable court :*

1. *To reject the Appellant's request to set aside the decision hereby appealed against and hold that the DC Decision is final and binding: since its grounds were not requested to be submitted, the Appellant is deemed to have waived its right to file*

an appeal against the DC Decision.

2. *To confirm the decision hereby appealed against in its entirety.*

3. *To order the Appellant to bear all costs incurred with the present procedure and to cover all legal expenses of the 2nd Respondent related to the present procedure.*"

C. FIFA's 27 September 2019 submission on admissibility

55. FIFA submits that CAS lacks jurisdiction to decide on the Appeal because by not timely requesting the grounds for the Appealed Decision the Appellant failed to exhaust the legal remedies available to it.

56. As to the Appellant's appeal against the Appealed Letter, FIFA argues that this letter is not a "*decision*" within the meaning of Article 58 of the FIFA Statutes/ Article R47 CAS Code as it lacks the necessary form, content and "*animus decidendi*" and does not contain a ruling.

57. FIFA expresses surprise that out of a series of e-mails exchanged between the parties over the course of several months the 13 March 2013 e-mail with the Appealed Decision is supposed to have been the only one which allegedly arrived in the spam-boxes of the two e-mail addresses to and from which the previous messages were received and sent without a problem.

58. FIFA points out that Articles 9bis para. 1 and 19 para. 2 expressly provide for notification by e-mail and that the Appellant does not contest that the e-mail in question was received in its e-mail accounts, albeit allegedly in the spam-boxes. Thus, the e-mail entered the Appellant's sphere of control as a result of which the alleged failure to open it falls within the Appellant's responsibility, particularly since it had – in the words of the Swiss Federal Tribunal – and "*inquiry obligation*" ("Abfrage-Obliegenheit" in German) given the obvious likelihood that a DRC decision was forthcoming shortly.

59. Finally, FIFA emphasises that following the addition a few years ago of the words "*...and the parties being deemed to have waived their rights to file an appeal*" in Article 15 of the DRC Rules, it can no longer be put into question that an appeal against a DRC decision within the 21–day time limit pursuant to R49 CAS Code is inadmissible if the grounds for such decision have not been previously and timely requested.

60. FIFA requests CAS to issue a preliminary award and submits the followings prayers for relief:

(b) Declaring the lack of jurisdiction of CAS in the present case;

(c) Alternatively, declaring the present appeal inadmissible;

(d) In any event, ordering the Appellant to bear all costs incurred with the present procedure and to cover all the expenses of FIFA related to the present procedure.

D. The Player's 8 October 2019 submission on jurisdiction

61. The Player briefly supports FIFA's 27 September 2019 position that CAS lacks jurisdiction because by not timely requesting the grounds for the Appealed Decision Wydad failed to exhaust the legal remedies.

62. The Player does not submit any further prayers for relief.

E. The Third Respondent El Gouna's 27 September and 9 October 2019 submissions on jurisdiction/ admissibility

63. Quoting the full set of applicable regulations, El Gouna submits that the Appellant's request to be provided with the grounds for the Appealed Decision is clearly out of time and thus inadmissible.

64. Also, according to El Gouna, CAS lacks jurisdiction because by not requesting the grounds for the Appealed Decision Wydad failed to exhaust its legal remedies.

65. With respect to the appeal against the Appealed Letter, El Gouna states that this is not a "*decision*" within the meaning of the regulations because it lacks a "*ruling*" affecting Wydad's legal situation.

66. Finally, according to El Gouna "*there is a common sense obligation on a party to check spam*" and that there was "*in fact no adequate proof that the email first went to spam anyway*".

67. El Gouna submits the following prayers for relief:

"I. Declare that CAS does not have jurisdiction in relation to the Appealed Decision or the Second Appeal.

II. In the alternative to declare Wydad's appeal to be out of time.

III. Wydad shall bear all arbitration costs.

IV. Wydad shall be ordered to pay El Gouna a contribution towards the legal and other costs incurred by the latter in relation to these proceedings, in an amount to be determined at the discretion of the Panel."

F. The Appellant's 21 October 2019 and 19 March 2020 submission

68. In these further submissions the Appellant contends that it has no control over its computer system's qualification of an e-mail as spam and emphasises that, according to the CAS and SFT case-law, the burden of proof for proper notification lies with FIFA. On 19 March 2020, he further referred to the award issued in the case CAS 2017/A/5524 to sustain that a decision to refuse to communicate the ground of another decision is a decision and that the receipt of a FIFA decision shall be good and effective, since, in that case, further to an incomplete notification by fax, FIFA resent its decision by courier.

VI. APPEAL AGAINST THE APPEALED DECISION

A. Jurisdiction

69. Article R47 CAS Code reads as follows:

"Appeal

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body."

70. Article 58 para.1 of the FIFA Statutes, edition 2018 which was valid at the time the Appeal was filed, reads as follows:

"Appeals against final decisions passed by FIFA's legal 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."

1. Failure to exhaust legal remedies – Jurisdiction or admissibility?

71. FIFA challenges what it terms CAS' jurisdiction arguing that, contrary to Article R47 CAS Code and Article 58 FIFA Statues, the Appellant failed to exhaust the legal remedies available to it. The Sole Arbitrator notes that the Player raised the same jurisdictional argument and that in Wydad's view the Player's challenge is inadmissible for a violation of Article R56 CAS Code ("Appeal and answer complete"). The Sole Arbitrator refers here to his decision of 25 February 2020 and holds that in any event he would have had to deal with the matter of jurisdiction *ex officio* (Mavromati/Reeb, The Code of the CAS, R47, marg. no. 8; contra Rigozzi/Hasler in Arroyo (Ed.), Arbitration in Switzerland, Article R47 CAS Code, marg. no. 38) since the Respondents

have not yet proceeded on the merits of the case.

72. The Sole Arbitrator is aware of the existence of a debate as to whether the exhaustion of legal remedies is a question of jurisdiction or one of admissibility (likewise, Rigozzi/Hasler in Arroyo (Ed.), Arbitration in Switzerland, Article R47 CAS Code, marg. no. 37; contra Mavromati/Reeb, The Code of the CAS, R47, marg. no. 12 and 32). The Sole Arbitrator however holds that in this case it remains dispensable to deal with this issue if the Sole Arbitrator is of the view that a request for the grounds of a non-reasoned FIFA decision is not a "legal remedy" within the meaning of Article R47 CAS Code and Article 58 FIFA Statutes.

2. Exhaustion of legal remedies

73. The Sole Arbitrator therefore examines the nature of such request for a reasoned decision, in particular whether the possibility to request the grounds for a non-reasoned FIFA decision qualifies as a "*remedy*" under the applicable regulations. Oxford Learner's Dictionaries define "*remedy*" as "*a way of dealing with or improving an unpleasant or difficult situation*" or as "*...a way of solving or correcting a problem.*" There are other similar definitions (e.g. Lexico: "*...a means of counteracting or eliminating something undesirable*"; Merriam-Webster: "*...a means to enforce a right or to prevent or obtain redress for a wrong*") which are all uniform in their focus on the ability of a remedy to "change" or "amend" an unpleasant situation. It is the Sole Arbitrator's view that this is not the case here: a request for the grounds of a non-reasoned decision in the present circumstances does not in any way change or amend that decision, it simply provides the basis for the addressee of the decision to assess and determine whether the actual remedy, i.e. an appeal, should be filed.

74. This view was shared by the Panel in CAS 2008/A/1705, marg. no. 6: "*...the obligation to solicit the reasons of the decision cannot be qualified as an "internal remedy" within FIFA...*"

75. Accordingly, the Sole Arbitrator holds that the request to obtain a reasoned decision under Article 15 of the DRC Rules is not a legal remedy within the meaning of Article R47 CAS Code and Article 58 FIFA Statutes. The Sole Arbitrator further notes that other internal legal remedies prior to an appeal to CAS were not available to the Appellant.

76. The Sole Arbitrator therefore holds that CAS does have jurisdiction over the appeal against the Appealed Decision.

B. Admissibility

77. The Sole Arbitrator then turns to the issue whether the appeal against the Appealed Decision is admissible. Such admissibility is challenged for the alleged failure to timely request the grounds for the Appealed Decision.

78. Article 15 para. 1 DRC Rules reads as follows:

"The Players' Status Committee, the DRC, the single judge and the DRC judge may decide not to communicate the grounds of a decision and instead communicate only the findings of the decision. At the same time, the parties shall be informed that they have ten days from receipt of the findings of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision becoming final and binding and the parties being deemed to have waived their rights to file an appeal."

79. The Appellant argues that in the present case the 10-day time limit for requesting the grounds for the Appealed Decision did not start until 27 March 2019, i.e. the day when it received a copy of such decision from the Player's counsel in connection with the latter's demand for payment by Wydad of the amount awarded to the Player. As it requested the grounds for the Appealed Decision on the next day, i.e. on 28 March 2019, the request was timely so that the Appealed Decision did not become "*final and binding.*"

80. The Sole Arbitrator however notes that the Appellant does not deny that it received FIFA's email of 13 March 2019 with the invitation to download the (operative part of the) Appealed Decision in its computer system but argues that due to the fact that it allegedly arrived in the spam-boxes, it did not receive the notification within the meaning of Article 15 DRC Rules.

81. The crucial question thus is the interpretation of the term "*receipt*", in other words whether receipt in the Appellant's spam-boxes is tantamount to "*receipt*" within the meaning of the applicable regulations. In order to answer this question, the Sole Arbitrator agrees with the statements made in CAS 2006/A/1153 at para. 10:

"As a basic rule, a decision or other legally relevant statement is considered as being notified to the relevant person whenever that person has the opportunity to obtain knowledge of its content irrespective of whether that person has actually obtained knowledge. Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content (CAS 2004/A/574)."

Similarly, the Swiss Federal Tribunal decided in 4A_89/2011:

"Une déclaration de volonté émise sous forme de lettre parvient à son destinataire au moment où elle entre dans la sphère d'influence de celui-ci, d'une manière telle que l'on peut prévoir, selon les usages, qu'il en prendra connaissance. Un éventuel refus de

recevoir la lettre et d'en lire le contenu n'est pas opposable à l'auteur de cet écrit. »

Working translation by the Sole Arbitrator:

"A declaration of will in the form of a letter arrives at its addressee at the moment it enters into his sphere of influence, such that one can anticipate, according to usage, that he takes note of it. A possible refusal to receive the letter and to read its contents cannot be objected to the author of the document."

82. There are thus two requirements to be met in order for "*receipt*" to be fulfilled:

- The declaration must have entered the "*sphere of influence*" of the addressee, and
- One can expect under the circumstances that the addressee takes note of it.

83. The Sole Arbitrator holds that the first requirement does not present any problems in the circumstances of this case: the Appellant admits that the relevant e-mail arrived in its computer systems, albeit allegedly in its spam-boxes. It must therefore be held that the e-mail entered the sphere of influence of the Appellant who had full access to the contents of its spam-boxes.

84. The Sole Arbitrator further holds that in the present case, the second requirement is fulfilled as well.

85. According to Article 9bis DRC Rules, "*electronic notification by e-mail is considered a valid means of communication and will be deemed sufficient to establish time limits and their observance.*"

86. The Appellant was according to its own submissions "*aware [of the applicable FIFA regulations], particularly with regard to the procedure for communicating the grounds of a decision.*" The Appellant further knew that the DRC's decision was imminent. Accordingly, the Sole Arbitrator holds that in cases in which parties are aware of imminent communications and the applicability of regulations under which such communications are to arrive via e-mail to a specific e-mail account, not regularly checking their entire e-mail account, that is all folders in which incoming e-mail are received, including the spam-box, does constitute negligence on their part. The Sole Arbitrator takes note of the legal standpoint of Peter Gauch (Gauch et al., Schweizerisches Obligationenrecht, Allgemeiner Teil, 9e éd., vol. I, n. 199 et 200 p. 38) "*that* [a written declaration] *is received by the recipient as soon as it can be retrieved by him; a duty to so retrieve (emptying of the electronic Mailbox) exists at least if a person disclosed its e-mail address to a larger group of other persons.*" (working translation from German by the Sole Arbitrator). The Sole Arbitrator concurs with this view, especially when, as here, the recipient was aware of the existence of a procedure.

87. The Sole Arbitrator has further taken due note of the case-law mentioned by the Appellant. He however underlines that, here, the Appellant's spam-boxes were under its own control and that, contrary to the case CAS 2018/A/5524, FIFA was not aware of any not completed transmission. Indeed once an electronic communication has reached the recipient's sphere of control it is outside the sender's one, who cannot be held responsible anymore. When notification by e-mail is expressly provided for in the applicable rules and if the recipient is aware of such rules and either provided, in such awareness, the respective federation with his e-mail address or used such e-mail address within a procedure, it is for the recipient to adopt any appropriate measures (such as adding the sender to its White List of senders or to check its spam-boxes very regularly) and good faith cannot cure such failure. To find otherwise or to require an acknowledgement of receipt as suggested by the Appellant would make it all too easy for a recalcitrant recipient of an undesirable e-mail message to pretend not to have received it or to not have received it in the proper folder of its e-mail mailbox.

88. Further support for the Arbitrator's view can be found in para 3 of the same Article 9bis DRC Rules which reads as follows:

"Communications from FIFA shall be sent to the parties in the proceedings by using the e-mail address provided by the parties or as provided in the Transfer Matching System (TMS; cf. art. 4 par. 1 of Annexe 3 and art. 5 par. 2 of Annexe 3 of the Regulations on the Status and Transfer of Players). The e-mail address provided in TMS by associations and clubs is considered as a valid and binding means of communication."

89. Finally, Article 19 Paragraph 1 and 2 DRC Rules provide further support:

"1. Decisions shall be sent to the parties directly, with a copy also sent to the respective associations.

2. Notification is deemed to be complete at the moment the decision is delivered to the party, at least by e-mail."

90. The Sole Arbitrator also rejects the Appellants "*subsidiary*" argument that the 21-day time limit to appeal the Appealed Decision has been complied with as it has been (according to FIFA) notified on 13 March 2019 and was appealed on 3 April 2019, hence within the applicable time limit. As the Appellant failed to request the grounds for the Appealed Decision within the 10-day time limit under Article 15 DRC Rules, such decision has become "*final and binding and the parties* [are] *being deemed to have waived their rights to file an Appeal.*" The 21-day time limit according to Article 58 FIFA Statutes (and R59 CAS Code) thus no longer applies.

91. The Appeal against the Appealed Decision is therefore inadmissible due to the Appellant's failure to request the grounds for the Appealed Decision within the time

limit foreseen in Article 15 DRC Rules.

VII. APPEAL AGAINST THE APPEALED LETTER

A. Jurisdiction

92. The legal basis for an appeal against a FIFA decision, as required by Art. R47 CAS Code, is set out in Article 58 para.1 of the FIFA Statutes, edition 2018 which was valid at the time the Appeal was filed, according to which "*Appeals against final decisions passed by FIFA's legal 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.*"

93. In this case it was denied by the Respondents that the Appealed Letter contains a decision in the meaning of the above provisions.

94. The Appellant to the contrary argues that its appeal against the Appealed Letter is admissible because it qualifies as an appealable "*decision*" under Article R47 CAS Code. In the said letter, FIFA explained that as a result of the Appellant's failure to request the grounds for the Appealed Decision within the 10-day time limit under Article 15 DRC Rules such decision has become "*final and binding*" and that the Appellant is deemed to have waived its right to file an appeal.

95. The Sole Arbitrator initially notes that, in accordance with the above-mentioned provisions, CAS has the power to adjudicate appeals against a sport organisation provided notably that an actual decision has been issued, that it is final and that it is challenged in a timely manner.

96. Although the applicable regulations of FIFA do not provide any definition of the term *decision*, the possible characterisation of a letter as a decision was considered in several previous CAS cases (for instance CAS 2008/A/1633; CAS 2007/A/1251; CAS 2005/A/899).

97. The Arbitrator endorses the characteristic features of a decision stated in those CAS precedents, pursuant to which *"the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal."* (CAS 2008/A/1633)

98. Furthermore, *"In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties"* and *"an appealable decision*

of a sport association or federation is normally a communication of the association directed to a party and based on an animus decidendi, i.e. an intention of a body of the association to decide on a matter. [..] A simple information, which does not contain any ruling, cannot be considered a decision." (CAS 2008/A/1633).

99. It is up to the Sole Arbitrator to consider these general principles and apply them to the present case.

100. In doing so the Sole Arbitrator notes that the Appealed Letter contains FIFA's dismissive reaction to Wydad's request to be provided with the reasons of the Appealed Decision. The Sole Arbitrator further notes that the Appealed Letter is not formulated in a way which suggests that the authors of the letter did not consider themselves empowered with a discretionary power to either allow or reject Wydad's request. Instead, the letter contains an abstract mentioning of the applicable time limit, then notes the dates of the notification of the decision and the date of the request for a reasoned decision and then comes to the conclusion that the amount of days between the latter two events exceeds the time limit, counted from the decision's notification onwards. In essence thus, the Sole Arbitrator concludes that the Appealed Letter contains a legal analysis and the legal conclusion to it.

101. The Sole Arbitrator is well aware that the authors of the Appealed Letter may not have spent excessive time on such legal evaluation and that they may have considered the exceeding of the time limit as entirely apparent and straightforward and that, as a result of this, the authors may indeed not have been aware that they were taking a decision in rejecting the request. However, the Sole Arbitrator notes that such conscience is not a mandatory requirement for a letter to be a decision in the meaning of Article R47 CAS Code, as long as their letter was affecting the legal position of its addressee since it is in any event the material nature of a document that is relevant.

102. Whereas it may first look like the simple calculation of days passed since a certain event and the comparison of this amount with the amount of days allowed under a procedural time limit does not suffice to qualify as a decision, even more so as the legal consequence of such exceedance in accordance with the applicable legal provision applies automatically, the Sole Arbitrator notes that the rejection of Wydad's request did have an impact on its legal position, as it was deprived of the opportunity to legally assess a reasoned version of the Appealed Decision.

103. The Sole Arbitrator therefore notes that the legal position of the Appellant was indeed affected by the dismissal of its request within the Appealed Letter, which leads to the finding that such rejection shall be qualified as a decision. Then, if the legal situation of the requesting party is affected by a rejection of the request, such rejection does contain

a decision, irrespective of how straightforward the result of the underlying legal analysis is and irrespective of whether the creator of such decision had any discretion in his application of the law.

104. This finding is confirmed by the evaluation of the consequences in case of an illegal rejection of a request for a reasoned award. Would such request be rejected even though the applicable time limit had clearly not yet expired, such rejection should and would be litigable. Then, consistently, the issue whether such rejection was legal or illegal, even in cases in which the request was made well after the time limit expired, must accordingly be treated within the merits of an Appeal against such rejection.

105. Based on the foregoing, the Appealed Letter qualifies as a "*decision*" within the meaning of Article R47 CAS Code. Accordingly, CAS has jurisdiction to decide on the Appeal.

B. Admissibility

106. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against."

107. The Appealed Letter was sent to the Appellant on 2 April 2019. The statement of appeal was filed on 3 April 2019 and, thus, within the deadline of twenty-one days set in Article R49 of the Code.

C. Applicable Law

108. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

109. The matter at stake relates to an appeal against a FIFA decision and reference must hence be made to Article 57.2 of the FIFA Statutes which provides that:

"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."

110. The Appellant's request to FIFA for the provision of the grounds of the Appealed Decision was made under Article 15 paragraph 1 DRC Rules, which reads:

"The Players' Status Committee, the DRC, the single judge and the DRC judge may decide not to communicate the grounds of a decision and instead communicate only the findings of the decision. At the same time, the parties shall be informed that they have ten days from receipt of the findings of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision becoming final and binding and the parties being deemed to have waived their rights to file an appeal."

D. Merits of the Appeal

111. In order for the appeal against the Appealed Letter to be upheld, Wydad would have had to demonstrate that it requested the communication of the reasoned award within the applicable time limit stipulated in Article 15 DRC Rules.

112. However, as elaborated *supra* under marg. nrs. 77 to 91 the Appellant failed to request the reasons of the Appealed Decision on time. The Appealed decision was received by the Appellant by email, albeit allegedly in its spam folders, on 13 March 2019 and the grounds of the decision were requested on 28 March 2019, i.e. 15 days after the receipt of the relevant decision and accordingly outside the applicable time limit of 10 days.

113. The Appellant's request for the communication of the grounds was therefore filed late and no further claim exists to obtain the reasons to the Appealed Decision.

VIII. CONCLUSION

114. Based on the foregoing the Arbitrator reaches the following conclusions:

- The CAS has jurisdiction to decide both Appeals;
- The request to be provided with the grounds for a non-reasoned FIFA decision is not a "remedy" within the meaning of Articles R47 CAS Code and 58 FIFA Statutes;
- The Appealed Decision has become final and binding as a result of the Appellant's failure to timely request the grounds for the Appealed Decision;

- The Appellant's appeal against the Appealed Decision is therefore inadmissible and its appeal against the Appealed Letter is without merit for the same reasons.

IX. COSTS

115. Article R64.4 CAS Code provides as follows:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties."

116. Article R64.5 CAS Code provides as follows:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."

117. Having taken into account the outcome of the arbitration, in particular the fact that the Appellant's appeal is dismissed, the Sole Arbitrator finds that the costs of the arbitration shall be borne by the Appellant.

Furthermore, pursuant to Article R64.5 CAS Code, and in consideration of the outcome of the proceedings, the financial position of the parties and the fact that no hearing was held, the Sole Arbitrator rules that FIFA, who was not represented by an external counsel, shall bear its own costs incurred in connection with the present proceedings whereas Wydad shall contribute to the Player's and El Gouna's legal costs and expenses incurred in connection with these proceedings in an amount of CHF 3,000 each.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Wydad Athletic Club on 3 April 2019 against Chisom Elvis Chikitara and Fédération Internationale de Football Association and El Gouna Football Club is dismissed.

2. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne by Wydad Athletic Club.

3. Wydad Athletic Club is ordered to pay an amount of CHF 3,000 (three thousand Swiss Francs) each to Chisom Elvis Chikitara and to El Gouna Football Club as a contribution towards the costs, legal fees and other expenses the latter have sustained in connection with these arbitration proceedings.

4. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 30 November 2020

THE COURT OF ARBITRATION FOR SPORT

Dr Jan Räker
Sole Arbitrator