



Tribunal Arbitral du Sport
Court of Arbitration for Sport
Tribunal Arbitral del Deporte

CAS 2020/A/6713 Nilmar Honorato da Silva v. Fédération Internationale de Football Association (FIFA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Prof. Luigi **Fumagalli**, Professor and Attorney-at-law, Milan, Italy
Arbitrators: Mr Efraim **Barak**, Attorney-at-law, Tel Aviv, Israel
Mr Andreu **Camps**, Attorney-at-law, Madrid, Spain
Clerk: Ms Stéphanie **De Dycker**, CAS Clerk, Lausanne, Switzerland

in the arbitration between

Nilmar Honorato da Silva, São Paulo, Brazil

Represented by Mr Breno Costa Ramos Tannuri, Attorney-at-law with Tannuri Riebiro Abogados, São Paulo, Brazil

- Appellant -

and

Fédération Internationale de Football Association, Zurich, Switzerland

Represented by Mr Emilio García Silvero and Mr Miguel Liétard, FIFA Litigation Department, Zurich, Switzerland

- Respondent -

I. PARTIES

1. Mr Nilmar Honorato da Silva is a Brazilian professional football (the “Appellant” or the “Player”).
2. The *Fédération Internationale de Football Association* (the “Respondent” or “FIFA”) is the governing body of football worldwide. FIFA is an association under the Swiss Civil Code with its headquarters in Zurich, Switzerland.
3. The Player and FIFA are jointly referred to as the “Parties”.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties’ submissions and allegations. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. The Proceedings before the FIFA Dispute Resolution Chamber and the Court of Arbitration for Sport

5. On 26 May 2016, the FIFA Dispute Resolution Chamber (the “DRC”) decided (the “DRC Decision”) to reject the claim filed by the Player regarding an employment-related dispute against El Jaish FC (“El Jaish”), a club then affiliated to the Qatar Football Association (“QFA”), a national football federation affiliated to FIFA.
6. On 8 June 2016, the findings of the DRC Decision were notified to the parties.
7. On 20 September 2016, further to the Player’s request, the DRC communicated the grounds of the DRC Decision.
8. On 11 October 2016, the Player lodged an appeal before the Court of Arbitration for Sport (the “CAS”) against the DRC Decision.
9. On 23 August 2017, CAS resolved to partially uphold the appeal filed by the Player against the DRC Decision (the “2017 CAS Award”). In particular, the DRC Decision was set aside and El Jaish was ordered:

“[...] to pay to Mr Nilmar Honorato da Silva an amount of EUR 100,000 (one hundred thousand Euro) net as outstanding bonus plus interest at 5% (five per cent) per annum from 26 April 2014 until the date of payment.

[...] to pay to Mr Nilmar Honorato da Silva an amount of EUR 300,000 (three hundred thousand Euro) net as compensation for breach of contract plus interest at 5% (five per cent) per annum from 29 July 2014 until the date of payment.
[...]”

B. The Proceedings before FIFA Disciplinary Committee

10. On 14 February, 8 March and 29 May 2019, the Player contacted the FIFA Players' Status Department submitting that El Jaish and Lekhwiya SC ("Lekhwiya") had merged into a new club, Al Duhail SC ("Al Duhail"), and requesting the opening of disciplinary proceedings against the latter for failing to comply with the 2017 CAS Award.
11. On 29 May 2019, the FIFA Players' Status Committee referred the case to the FIFA Disciplinary Committee ("FIFA DC") for consideration and formal decision.
12. On 10 July 2019, the Secretariat of the FIFA DC opened disciplinary proceedings against Al Duhail and invited it to provide its position within the prescribed time limit.
13. On 16 July 2019, FIFA provided Al Duhail, upon its request the full file of the case.
14. On 22 July 2019, Al Duhail submitted its observations, denying to be the legal successor of El Jaish and requesting that all charges against it be dismissed.
15. On 15 August 2019, the FIFA DC issued the following decision (the "Appealed Decision"):

"[...] The member of the FIFA Disciplinary Committee considered that the club Al Duhail SC is not liable for the debts incurred by the club El Jaish FC.

[...] All charges against the club Al Duhail SC are dismissed.

"[...] The disciplinary proceedings initiated against the club Al Duhail SC are hereby declared closed."

16. On 23 December 2019, the grounds of the Appealed Decision were notified to the Parties. The pertinent grounds of the Appealed Decision are as follows:

"[...] Foremost, the member of the Committee acknowledges that the club Al Duhail SC challenges the competence of the Disciplinary Committee to decide as to whether said club can be considered the successor of El Jaish FC, and hence, the member of the Committee will now analyse as to whether she is competent to do such assessment.

[...] [S]ince the Qatar Football Association has confirmed that the Original Debtor, El Jaish FC, is no longer affiliated to the QFA, the latter has lost its indirect membership to FIFA and therefore, the Disciplinary Committee can no longer impose sanctions against the club El Jaish FC nor intervene in cases in which it may have been involved.

[...] Notwithstanding the above, the member of the Committee notes that the Creditor had requested the enforcement of the CAS award against the club Al Duhail SC which, in its view, is considered to be the successor and/or the same entity as the disaffiliated club El Jaish FC.

[...] [T]he member of the Committee considers that, in line with the jurisprudence of the Court of Arbitration for Sport, she is not prevented from reviewing and/or making a legal assessment and deciding if the New Club, Al- Duhail SC, is the same as – and/or the successor of – the Original Debtor, El Jaish FC, especially

considering that the former is still duly affiliated to the Qatar Football Association, and as such, under the jurisdiction of the Committee.

[...] *As such, the member of the Committee deems that she is competent to assess the present matter and therefore to pass a formal decision of a substantive nature on the Creditor's request concerning the liability of the New Club, Al Duhail SC, towards the debts of the original Debtor in the frame of art. 64 of the FDC.*
[...]

[...] *Once having assessed the issue of competence, the member of the Committee moves on to analyse whether the new Club, Al Duhail SC, has a legal connection with the Original Debtor, El Jaish FC, and therefore, can be held liable for the debts of the latter.*

[...] *[T]he member of the Committee notes from the statement provided by the QFA in relation to any potential connexion between the club Al Duhail and the club El Jaish FC, and according to which:*

- i. the alleged association between El Jaish FC and Al Duhail SC was never materialized, and any media report to the contrary must be wrong.*
- ii. no official document had been provided to prove any kind of legal connection between the two clubs and should have been the case, the potential association between clubs would have been conducted in accordance with Qatari Law.*
- iii. as per the association understanding, "Duhail FC is NOT the legal successor of El Jaish FC and [the association has] not been provided with any official and/or legal document which would suggest otherwise".*

[...] *Al Duhail SC provided two correspondences from the Ministry of Commerce and Industry of Qatar. The first one confirmed that the commercial registry created on 30 May 2010 on the name of Lekhwiya SC was amended to Al Duhail SC, without amending the owners or adding new partners, while the second one informed that the commercial registry of El Jaish FC had been struck off. [...]*

[...] *In this respect the member of the Committee, after examining the facts and evidence brought to the proceedings, has noted that:*

- i. Al Duhail SC is the legal successor of Lekhwiya SC.*
- ii. El Jaish FC is no longer registered to the Qatar Football Association and its commercial registry was removed from the Ministry of Commerce and Industry of Qatar.*
- iii. From the documentary evidence provided in the proceedings, there is no legal document that certifies or demonstrates, with the minimum standard of proof that the situation requires, the link between the clubs Al Duhail SC and El Jaish FC.*

[...] *All the above-mentioned considerations have led the member of the Committee to conclude that, the facts themselves claimed by the Creditor, are not sufficient to confirm the connection between the club Al Duhail SC and the club El Jaish FC.*

[...] *As such, on the basis of the information and the documentary evidence at her disposal, the member of the Committee is of the opinion that said documents*

have no legal force, and hence, the evidence provided by the Creditor does not comply with the standard of proof required in the present matter.

[...] As a consequence, and since the burden of proof falls on the Creditor, the member of the Committee is comfortable to conclude that the Creditor failed to demonstrate the alleged merge between the club Al Duhail SC and the club El Jaish FC.

[...] After having established the above, the member of the Committee moves on to analyse whether the New Club, Al Duhail SC, has a sporting connection with the Original Debtor, El Jaish FC, and therefore, can be held liable for the debts of the latter.

[...] [T]he member of the Committee recalls that and in line with the jurisprudence of CAS and art. 15 par. 4 of the 2019 FDC the identity of a club is constituted by elements such as its name, colours, logo, fans, history, players, stadium, etc., regardless of the legal entity operating it. As a result, based on the specificities and particularities of the case, and after taking into due consideration all the evidence produced and all arguments made, the member of the Committee has no other alternative but to concludes that the club Al Duhail SC is not to be understood as the sporting successor of the club El Jaish FC, and therefore, the club Al Duhail SC cannot be held liable for the debts incurred by the club El Jaish FC, in casu, those related to the CAS award passed on 23 August 2017.

[...] Consequently, the member of the Committee resolves that the disciplinary proceedings opened against Al Duhail SC shall be closed.[...]"

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 13 January 2020, in accordance with Article R47 of the Code of Sports-related Arbitration, edition in force since 1 January 2019 (the “CAS Code”), the Appellant filed a Statement of Appeal with the CAS against FIFA to challenge the Appealed Decision. In his Statement of Appeal, the Appellant requested that the present matter be submitted to a sole arbitrator and suggested the appointment of Mr Efraim Barak, Attorney-at-law in Tel Aviv, Israel, as sole arbitrator.
18. On 27 January 2020, FIFA informed the CAS Court Office that it agreed to submit the present matter to a sole arbitrator nominated by the President of the CAS Appeals Division as long as the arbitrator was selected from the football list.
19. On 27 January 2020, the Appellant informed the CAS Court Office that, “*taking into account the circumstances of the present matter and due to the complexity of the legal issues arising from the present matter, [he] is of the opinion that the present matter should be submitted to a Panel composed of three arbitrators*” and that “*in any event, the Appellant indicates Mr Efraim Barak, who is from the football list to be member of the Panel.*”
20. On 28 January 2020, the CAS Court Office took note of the Appellant’s reconsideration of his position on the number of arbitrators to be appointed in the present case and therefore invited FIFA to nominate an arbitrator.

21. On 7 February 2020, FIFA appointed Mr Andreu Camps i Povill, Attorney-at-law, Alpicat, Spain, as arbitrator in the present proceedings.
22. On 9 March 2020, the Appellant, within the extended time limit granted by the Deputy President of the Appeals Arbitration Division, filed the Appeal Brief, pursuant to Article R51 of the Code. Such Appeal Brief contained *inter alia* a request for the production of documents by FIFA.
23. On 23 March 2020, the CAS Court Office informed the Parties that the Panel appointed to decide the present dispute was constituted as follows:

President: Prof. Luigi Fumagalli, Professor and Attorney-at-law, Milan, Italy
Arbitrators: Mr Efraim Barak, Attorney-at-law, Tel Aviv, Israel
Mr Andreu Camps, Attorney-at-law, Alpicat, Spain.

Furthermore, the Parties were advised that Ms Stéphanie De Dycker, in-house Clerk with CAS, would assist the Panel as Clerk in this matter.
24. On 2 June 2020, FIFA, within an extended time limit, filed its Answer, pursuant to Article R55 of the Code.
25. On 17 June 2020, the Panel, after having consulted the Parties, decided to hold a hearing in the present matter and consulted the Parties on possible hearing dates. In the same letter, the Panel also invited the Appellant to confirm whether he maintained his request for production of documents, as set out in the Appeal Brief, in light of FIFA's Answer and the exhibits to such Answer.
26. On 24 June 2020, the Appellant confirmed that it no longer maintained his evidentiary request in light of FIFA's Answer. Also, on the same day, both Parties confirmed their availability on the proposed hearing date.
27. On 27 July 2020, the CAS Court Office issued on behalf of the President of the Panel an order of procedure (the "Order of Procedure") confirming *inter alia* the CAS jurisdiction and the hearing date, and requested the Parties to return a signed copy of it, which the Parties did on 30 July 2020.
28. On 22 September 2020, the CAS Court Office informed the Parties that the hearing in the present matter would be held by videoconference.
29. On 28 September 2020, the CAS Court Office confirmed to the Parties that the hearing in the present matter would take place on 23 October 2020 via videoconference. The CAS Court Office also invited the Parties to communicate their list of hearing attendees including contact details, which the Parties did on 1 and 5 October 2020.
30. On 23 October 2020, a hearing was held via videoconference. The members of the Panel, Mr Antonio de Quesada, Counsel and Head of Arbitration at the CAS, and Ms Stéphanie De Dycker, Clerk to the CAS, as well as the following persons attended the hearing:

For the Appellant: Mr Breno Costa Ramos Tannuri, Mr André Ribeiro, Mr Somaiah M.J., and Mr Vitor Restivo Neves, Legal counsel

For the Respondent: Mr Miguel Liétard Fernandez-Palacios, Director of Litigation, and Mr Alexander Jacobs, Senior Legal counsel

31. At the hearing, the Parties were given a full opportunity to present their case, submit their arguments and submissions, and answer the questions from the Panel.
32. At the end of the hearing, the Parties confirmed that they were satisfied with the hearing and that their right to be heard was provided and fully respected.

IV. THE PARTIES' SUBMISSIONS

33. The following summary of the Parties' positions and submissions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Appellant

34. In its Appeal Brief, the Appellant requested the Panel to decide as follows:

“Procedurally [...]

On the merits:

SECOND - To dismiss in full the Appealed Decision;

THIRD — To confirm that A1 Duhail is found guilty of failing to comply in full with the CAS Award and as such shall immediately pay the following amounts to the Appellant:

- (...) EUR 100,000 (one hundred thousand Euro) net as outstanding bonus plus interest at 5% (five per cent) per annum from 26 April 2014 until the date of payment.
- (...) EUR 300,000 (three hundred thousand Euro) net as compensation for breach of contract plus interest at 5% (five per cent) per annum from 29 July 2014 until the date of payment.
- The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne as follows: (...) 2/5 by El Jaish FC and (...)

FOURTH — FIFA shall communicate A1 Duhail that it has 30 days as from the receipt of the present award, A1 Duhail shall pay a fine amounting CHF 30,000 (thirty thousand Swiss Francs);

FIFTH — FIFA shall communicate A1 Duhail that it has a final deadline of 30 days as from receipt of this award to settle the aforementioned debts with the Appellant;

SIXTH — FIFA shall communicate A1 Duhail that whether it fails to pay the Appellant,

as well as forward proof of such payment to the FIFA Disciplinary Committee, a ban from registering new players, either nationally or internationally, will be immediately imposed. The implementation of such transfer ban shall occur automatically by QFA and/or FIFA, without a further formal decision having to be taken nor any order to be issued by CAS, FIFA Disciplinary Committee or its secretariat. The transfer ban shall cover all men eleven-a-side team of Al Duhail for its first team and youth categories. Al Duhail shall be able to register new players, either nationally or internationally, only upon the payment to the Appellant of the total outstanding amount referred in the sub-item THIRD above;

SEVENTH — FIFA shall communicate its affiliated-member QFA about the terms and conditions of the present award, as well as assure its implementation. If, by any chance, QFA does not comply with the contents of the present award, FIFA shall decide on appropriate sanctions on its affiliated-member;

EIGHTH — FIFA shall communicate Al Duhail that it shall notify the secretariat to the FIFA Disciplinary Committee, as well as QFA of every payment made, as well as to provide the relevant proof of payment(s); and

NINTH — The Appellant shall notify the secretariat to the FIFA Disciplinary Committee, as well as QFA of every payment receive.

Alternatively and only whether the above is rejected:

TENTH — To set aside in full the Appealed Decision; and

ELEVENTH - To revert the case back to the attention of the FIFA Disciplinary Committee, confirms that Al Duhail is the successor of El Jaish and as such re-open disciplinary proceedings against the former for consideration and imposition of the applicable sanctions (cf. Art. 15 of the FIFA Disciplinary code).

At any rate:

FOURTH — To order FIFA to pay all arbitration costs and be ordered to reimburse the Appellant the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS (if any); AND

FIFTH — To order FIFA to pay to the Appellant any contribution towards the legal and other costs incurred and regarding the ongoing proceedings in the amount of CHF 20,000 (twenty thousand Swiss Francs).”

35. The Appellant’s submissions in support of such requests may be summarized as follows:

- The Appealed Decision lacks motivation and therefore violates fundamental legal principles. In particular, the FIFA DC disregarded the evidence provided by the Appellant and overestimated the evidence adduced by Al Duhail and the QFA; in doing so, it did not explain the definition of “official” versus “unofficial” documents, nor did it appropriately weigh the applicable criteria for the assessment of a sporting succession *in casu*. In addition, the FIFA DC refused to provide access to the file to the Appellant.
- Contrary to what was found in the Appealed Decision, the Appellant validly discharged his burden of proving that Al Duhail is liable for the financial obligations of El Jaish arising from the 2017 CAS Award, since it demonstrated

that:

- ✓ Al Duhail is the legal successor of El Jaish and as such is liable for any obligation of El Jaish. Several public statements confirm the merger of El Jaish and Al Duhail (formerly known as Lekhwiya), which include in particular: (i) a statement issued by the Ministry of Culture and Sports of Qatar dated 9 April 2017, (ii) a statement issued by Qatar Stars League on 10 April 2017 and (iii) statements by the QFA in its official website on 11 and 12 April 2017; furthermore, the merger between El Jaish and former Lekhwiya was recorded (iv) in the Qatari Official Journal on 9 April 2017, which was also confirmed in (v) a public statement by Al Duhail on its official website. All of these documents were issued publicly through official channels of the Qatari government as well as referenced sports associations and thereby qualify as “official”.
- ✓ Al Duhail is also the sporting successor of El Jaish and therefore is liable for the financial obligations of El Jaish resulting from the 2017 CAS Award. The list of criteria contained in Article 15 para 4 of the FIFA Disciplinary Code is only indicative and several elements confirming the sporting succession between El Jaish and Al Duhail – in particular the use of the same stadium, the same management team and the same players – were ignored in the Appealed Decision.

B. The Respondent

36. The Respondent requested the Panel to decide as follows:

- “(a) *Confirm that the Appellant lacks the required standing to appeal and therefore to reject the appeal on this basis;*
Alternatively to point (a);
- (b) *Reject the Appellant’s appeal in its entirety;*
- (c) *Confirm the decision rendered by the FIFA Disciplinary Committee on 15 August 2019;*
In any case;
- (d) *To order the Appellant to bear all costs incurred with the present procedure and to order the Appellant to make a contribution to FIFA’s legal costs.”*

37. The Respondent’s submissions in support of such requests may be summarized as follows:

- The Appellant lacks standing to appeal since he was not a party to the proceedings before the FIFA DC and does not have a direct and legal interest worthy of protection; the Appellant’s only interest – *i.e.*, the actual receipt of the monies resulting from the 2017 CAS Award – is not at stake in the scope of the disciplinary proceedings and can therefore only be qualified at most as indirect.
- For the sake of completeness, FIFA submits that the Appealed Decision does not lack any motivation, but rather the Appellant failed to discharge his burden of

proving to the comfortable satisfaction of the FIFA DC that Al Duhail is the legal or sporting successor of El Jaish. Moreover, under Swiss law and Swiss arbitration law, the deciding body – *i.e.* FIFA DC – is free in its evaluation of the evidence.

- The FIFA DC refused to provide the Appellant with access to the file of the proceedings before the FIFA DC because the Appellant was not a party to such proceedings. In any event, the Appellant’s procedural arguments on the alleged violation of fundamental principles would in any event be cured by the *de novo* proceedings at CAS.
- In order to come to its finding, the FIFA DC relied on: (i) letters from QFA dated 28 September 2017 as well as 29 April 2019, confirming that there is no sporting succession between El Jaish and Al Duhail; (ii) a letter from the Qatari Ministry of Culture and Sports dated 18 July 2019 that there was no merger between Al Jaish and Lekhwiya but that Al Jaish was deleted and Lekhwiya changed its denomination to Al Duhail; (iii) two separate letters from the Qatari Ministry of Commerce and Industry dated 14 May 2019, confirming that Al Jaish was struck off the commercial registry and that Lekhwiya had amended its denomination to Al Duhail.
- The statement by the Qatari Ministry of Culture and Sports and the Qatari Official Gazette adduced by the Appellant constitute novel elements of evidence in the disciplinary proceedings. The letter from the Qatari Ministry of Culture and Sports dated 9 April 2017 is not translated by an official translator, contains no header or any other official element that enables to cross check the source; there is no date on it either; in addition, content of this letter as well as of the other statements issued around the same date express a mere intention, which was subject to the completion of several steps. The Appellant’s exhibit containing the abstracts of the Qatari Official Gazette is an unclear assemblage of documents which was not translated by an official translator and which contains some inconsistencies; in addition, said document merely expresses an intention to merge, not the actual merger. Finally, the media release dated 16 July 2017 is not consistent with the turn of events described by the Appellant.
- As to the elements adduced by the Appellant in order to substantiate the sporting succession between El Jaish and Al Duhail, FIFA notes that the majority of the players left El Jaish for other clubs, that the stadium was previously used by Lekhwiya and that the QFA consistently held that there is no legal or sporting succession between El Jaish and Al Duhail.

V. JURISDICTION OF THE CAS

38. The question of whether the CAS has jurisdiction to hear the present dispute must be assessed on the basis of the *lex arbitri*. As Switzerland is the seat of the arbitration and not all Parties are domiciled in Switzerland, the provisions of the Swiss Private International Law Act (“PILA”) apply, pursuant to its Article 176.1. In accordance with Article 186 of PILA, the CAS has the power to decide upon its own jurisdiction (“*Kompetenz-Kompetenz*”).

39. Article R47 of the CAS Code provides as follows:

“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.[...]”

40. Article 58 (1) of the FIFA Statutes provides that:

“[a]ppeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question.”

41. The Panel notes that the Appealed Decision represents a final decision taken by FIFA in the meaning of Article 58 (1) of the FIFA Statutes, and that therefore the CAS holds jurisdiction to decide on the present appeal. In addition, the jurisdiction of the CAS to hear the appeal filed by the Appellant against the Appealed Decision is confirmed by the signature of the Order of Procedure.

42. Based on the above considerations, the Panel finds that it has jurisdiction to decide on the present appeal.

VI. ADMISSIBILITY

43. Article R49 of the CAS 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties.”

44. The Panel notes that the statement of appeal was filed on 13 January 2020, *i.e.* within the time limit as provided under Article R49 of the CAS Code and Article 58 of the FIFA Statutes. The Panel also notes that the other requirements provided under Article R48 of the CAS Code are fulfilled. As a result, the present appeal is admissible.

VII. APPLICABLE LAW

45. Pursuant to Article R58 of the CAS Code:

“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.”

46. Pursuant to Article 57 (2) of the FIFA Statutes:

“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.”

47. To decide on the present matter, the Panel shall therefore apply primarily the FIFA Statutes and other FIFA rules and regulations, and, on a subsidiarily basis, Swiss Law.

VIII. MERITS

A. Preliminary observations

48. The object of this arbitration is the Appealed Decision, issued by the Respondent (the FIFA DC), which found that Al Duhail committed no disciplinary infringement under the FIFA rules by not making a payment originally due to the Appellant by another club (El Jaish). The FIFA DC in fact held that “*Al Duhail SC is not liable for the debts incurred by the club El Jaish FC*”, as it could not be considered its successor. The Appellant challenges the conclusion reached by the FIFA DC and requests this Panel to find that (i) Al Duhail was indeed a successor to El Jaish, (ii) it failed to satisfy the payment obligation due to the Appellant, and therefore (iii) FIFA should sanction it for the disciplinary infringement committed.
49. The appeal filed by the Appellant raises a number of complex issues, some of them having a preliminary nature. In fact, the Appellant was not a party to the proceedings before the FIFA DC, which, even though based on the Appellant’s complaint, were brought against Al Duhail and regarded the commission of a disciplinary infringement by that club. On the other hand, the current CAS arbitration has been started by the Appellant only against FIFA, which rendered the Appealed Decision, and does not involve Al Duhail, *i.e.* the club whose disciplinary responsibility was the object of the Appealed Decision.
50. Such issues, therefore, require this Panel to conduct a careful analysis of the Appellant’s power to challenge the Appealed Decision and to obtain the relief it seeks in this arbitration. Indeed, a first question arises as to the standing of the Appellant to bring an appeal against the Appealed Decision, and therefore as to whether there is any right for which the Appellant is entitled to seek protection in the arbitration. In addition, should the existence of any such right be found, the second question to arise would be whether, and in which limits, such protection should be granted in light of the absence of Al Duhail.
51. As a result of the foregoing, the first question to be examined is whether the Appellant has standing to challenge the Appealed Decision.

B. Standing to appeal of the Appellant

a.) Position of the Parties

52. The Respondent contends that the Appellant lacks standing to appeal since he was not a party to the proceedings before the FIFA DC, and does not have a direct and legal interest worthy of protection: the Appellant's only interest is the actual receipt of the monies resulting from the CAS Award, which is not at stake in the scope of the disciplinary proceedings.
53. The Appellant submits that it has standing to appeal in the current proceedings. In his capacity as creditor, the Appellant is affected by the Appealed Decision. Indeed, in the Appealed Decision, the FIFA DC did not limit its analysis to the issue of whether or not sporting sanctions should be imposed upon the debtor, but rather delved into the issue of whether or not Al Duhail is the legal and/or sporting successor of El Jaish. As a creditor, the Appellant clearly holds an interest in the result of this investigation. The Appellant has a right to initiate the disciplinary proceedings and, as such, has a right to have his case duly investigated by the FIFA DC. In addition, the FIFA DC assessed the evidence adduced by the Appellant in its request to initiate disciplinary proceedings against Al Duhail; however, if the Appellant lacks standing to appeal it cannot make submissions and adduce evidence contrary to these documents in appeal, which is not acceptable. FIFA has a duty to investigate the situation properly and, as a creditor, the Appellant has at least an interest in having the FIFA DC undergo such a thorough examination of the situation.

b.) Position of the Panel

54. The Panel notes that according to settled CAS jurisprudence a party has standing to appeal if it can show sufficient legal interest in the matter being appealed (CAS 2008/A/1674; see also CAS 2014/A/3744 & 3766, para. 175). In this respect the appealing party must show that it is aggrieved by the appealed decision, *i.e.* that it has something at stake (CAS 2009/A/1880-1881, at para. 29).
55. The issue of standing to appeal however shows specific features when it is raised in the framework of an appeal against a disciplinary decision rendered on the basis of Article 64 of the FIFA Disciplinary Code.
56. According to Article 64 of the FIFA Disciplinary Code, “[a]nyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision) ...” may be sanctioned with a monetary fine and subsequently with additional sanctions until it complies with its monetary obligation vis-à-vis the creditor. The judgment creditor merely has to submit an appropriate request to the FIFA Disciplinary Committee and apply for enforcement of the decision.
57. There is abundant CAS case law on the fact that – in principle – disciplinary matters only concern and involve the disciplinary authority and the addressee of the disciplinary measure and that competitors or third parties are not affected in their legal rights by

disciplinary measures that are not directed at them. For instance, in CAS 2014/A/3707, the panel stated as follows:

“No rule of law, either in the FIFA Regulations or elsewhere, is allowing the club victim of the breach of contract to request that a sanction be pronounced. Indeed, the system of sanctions lays down rules that apply to the FIFA, on the one side, and to the player or to the club that hired the player, on the other side. A third party like the club victim of the breach of contract has no legally protected interest in this matter and has therefore no standing to require that a sanction be imposed upon the player and/or the club that hired the player.”

58. Similarly, CAS panels (CAS 2012/A/2981 para. 48, see also : CAS 2006/A/1206, 2007/A/1329&1330, CAS 2007/A/1367, CAS 2008/A/1620) have consistently confirmed that:

“the proceedings before the DC ... intended to protect primarily an essential interest of FIFA, i.e. the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of the DC Decision, and of the appeal brought in these proceedings against it, regards only the existence of a disciplinary infringement by ... and the power of FIFA to sanction it”.

59. Despite the above, CAS panels have in the past also recognized that the fine imposed on the judgment debtor serves as an incentive to make the corresponding payments to the judgment creditor. The panel in CAS in CAS 2012/A/2817 explained that the

“imposition of disciplinary measures ... [serves] to “compel” the debtor to comply. Indeed, the Federal Tribunal, in its decision of 5 January 2007 [4P.240/2006, at consid. 4.2], acknowledged that the imposition of a sanction has the purpose to secure the observance of the rules of the association, deterring an associate from breaching them, and therefore constitutes an element of pressure on the associate to comply with its financial obligation towards the other affiliates (in the similar way, see the decision of the Federal Tribunal of 27 March 2012, 4A_558/2011): such effect, however, does not put the power of the association to sanction in conflict with the State monopoly on enforcement procedures, provided that sufficient grounds are offered by the rules of the association for the exercise of that power (and provided that the sanction imposed does not severely infringe the personality right of a player: decision of 27 March 2012).”(CAS 2012/A/2817, para. 104).

60. Evidence of the above, i.e. that Article 64 FIFA Disciplinary Code also serves the interests of the judgment creditor, is that the disciplinary proceedings are only initiated upon request of the judgment creditor and not by FIFA *sua sponte*.

61. Similarly, CAS panels have recognized the creditor’s right to institute meaningful disciplinary proceedings against the debtor:

“Whether in the case at stake the Appellant can request CAS to order the FIFA DC to institute or impose sanctions against the judgment debtor appears – at first glance – to be questionable for Article 64 of the FIFA Disciplinary Code primarily provides for a disciplinary measure. However, normally one member of the FIFA family does not have

a claim against FIFA to have a sanction imposed on a fellow member (CAS 2012/A/3047, para. 51). In the case of Article 64 of the FIFA Disciplinary Code the prevailing opinion appears to grant the creditor a right to ‘assistance with enforcement’, i.e. a right to institute disciplinary proceedings against the judgment debtor. This follows (directly) from a number of CAS awards, which deal with decisions by FIFA, in which enforcement proceedings were instituted belated or not at all and which were appealed by the creditor to the CAS. In all these cases the CAS accepted the creditor’s standing to sue (cff. CAS 2011/A/2343, para. 8; CAS 2012/A/2750, para. 34; CAS 2012/A/2817, para. 47). The Panel follows this jurisprudence. Even though disciplinary in nature (see below) the enforcement procedure according to Article 64 of the FIFA Disciplinary Code is a (natural) continuation of the procedure before the FIFA DRC. Thus, the right of access to justice does not only cover a party’s right to bring a case for the determination of the parties’ rights and obligation before the FIFA DRC, but also before the competent organs of enforcement of FIFA. In conclusion, the Panel holds that the creditor, in principle, has a right to request FIFA to initiate enforcement proceedings against the judgment debtor.” (CAS 2015/A/4162, para. 74)

62. The Panel agrees with the view expressed by the CAS panel in CAS 2015/A/4162. Any judgment creditor has a right to request the initiation of meaningful disciplinary proceedings against his debtor. In the Panel’s view, in case such disciplinary proceedings are not initiated or are initiated belatedly or are not otherwise meaningful, the interests of the judgment creditor are clearly aggrieved. This is all the more evident when in the framework of the disciplinary proceedings, the FIFA DC analyses and takes a decision on an issue that is essentially not disciplinary in nature, such as the issue of legal or sporting succession of a judgment debtor.
63. The Panel finds that the situation in the present case is not different. In the present matter, the FIFA DC did not merely consider whether or not sporting sanctions shall be imposed on the initial debtor, but rather took a decision on an issue that is not disciplinary in nature, *i.e.* whether Al Duhail is the legal or sporting successor of the debtor, Al Jaish. The Appellant, as judgment creditor, had the right to request the initiation of meaningful disciplinary proceedings against his debtor including the alleged successor of the debtor, and finds itself in a situation where it is aggrieved by the Appealed Decision which denied the point.
64. In light of the foregoing, the Appellant has a standing to bring an appeal in the present proceedings to enforce its right to request the initiation of meaningful disciplinary proceedings and this includes also the right to challenge in essence the finding of the FIFA DC that Al Duhail is not the legal or sporting successor of the debtor, Al Jaish.

C. The absence of Al Duhail as respondent

65. The core of the dispute concerns the existence of a sporting or legal succession of Al Duhail to El Jaish, and therefore whether Al Duhail was liable for the obligations of El Jaish towards the Appellant. Only in the event such succession is established, could a legal responsibility be found that might entail a disciplinary violation.
66. In its prayers for relief, the Appellant requests the Panel to order several measures. Some

of those measures are directly sought against Al Duhail. This is the case with respect to the prayers for relief entitled “*THIRD*” up to “*NINTH*” in the Appellant’s Appeal Brief. Indeed, in these submissions, the Appellant requests the Panel to decide (i) that “*Al Duhail is found guilty of failing to comply in full with the [2017] CAS Award*”, (ii) that therefore it is ordered to make the payments due under such 2017 CAS Award, and (iii) that FIFA shall take the appropriate steps to follow up on any payment received.

67. The Appellant also made specific requests, which – although not expressly and directly sought against Al Duhail – directly affect the latter in its legal position and interests. This is the case with respect to the prayers for relief entitled “*SECOND*” as well as “*TENTH*” and “*ELEVENTH*”. Indeed, in such prayers for relief, the Appellant requests that the Appealed Decision be set aside and that the case be referred back to the FIFA DC for imposition of disciplinary sanctions against Al Duhail as the successor of El Jaish. If the Panel were to uphold these prayers for relief, it appears clearly that Al Duhail would lose the benefit of the legal certainty on the fact that it is *not* liable for the debts of El Jaish as it is *not* the successor of the latter, which corresponds to the main conclusion that was drawn by the FIFA DC in the Appealed Decision.
68. In light of the above, the Panel concludes that all of the prayers for relief submitted to it by the Appellant are either sought directly against Al Duhail or directly affect Al Duhail in its legal interests. As a result, in the view of the majority of the Panel, Al Duhail should have been brought as necessary respondent in the present proceedings. The Appellant, however, did not call Al Duhail as a respondent in this arbitration. By failing to do so, the Appellant deprived Al Duhail of its right to be heard, namely its right to state its defence, adduce evidence and make submissions in a matter that undoubtedly affects the latter’s legal interests. As a result, in the absence of Al Duhail in the present proceedings, the Panel finds by majority that it has no power to grant any of the prayers for relief sought by the Appellant and that the appeal must be dismissed.

IX. COSTS

69. The Panel observes that Article R64 of the CAS Code provides the following:

“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. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs.”

70. Article R64.5 of the 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 and without any specific request from the parties, 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.”*
71. Having considered the outcome of the arbitration, in particular the fact that the appeal is dismissed, the Panel determines that the costs of the arbitration, as notified by the CAS Court Office, shall be borne by the Appellant.
72. Furthermore, pursuant to Article R64.5 of the CAS Code, and in consideration of the outcome of the proceedings as well as the financial resources of the Parties and the absence of external representation for FIFA, the Panel rules that no contribution shall be awarded for legal costs and other expenses incurred in connection with these proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 13 January 2020 by Nilmar Honorato da Silva against FIFA with respect to the Decision taken by the Disciplinary Committee of FIFA on 15 August 2020 is dismissed.
2. The decision by the Disciplinary Committee of FIFA dated 15 August 2020 is confirmed.
3. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne entirely by Nilmar Honorato da Silva.
4. Each party shall bear its own costs and other expenses incurred in connection with these proceedings.
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 26 May 2021

THE COURT OF ARBITRATION FOR SPORT

Luigi Fumagalli
President of the Panel

Efraim Barak
Arbitrator

Adreu Camps
Arbitrator

Stéphanie De Dycker
Clerk