



Arbitration CAS 2011/A/2654 Namibia Football Association v. Confédération Africaine de Football (CAF), award of 1 March 2012 (operative part of 10 January 2012)

Panel: Mr Mark Hovell (United Kingdom), President; Mr Goetz Eilers (Germany); Mr Raymond Hack (South Africa)

Football

Nationality of a player

Scope of review of the CAS

Burden of proof

- 1. If the essence of a dispute is between two national federations, where one (being the Appellant with the CAS) believes the other has fielded an ineligible player in the qualifying matches for a final competition and has sought by protest from its Confederation to have the matches scores reversed and to replace the other federation in the final competition, but that the Confederation has deemed the protest to be inadmissible for lack of compliance with its regulations, then the Appellant has to bring the other national federation into the proceedings with the CAS if it wants that the entirety of its prayers for relief be reviewed by the CAS. If the Appellant does not include the other national federation as a party but only directs its appeal at the Confederation, the scope of review of the CAS is then limited to a review of the decision of the Confederation, as by going further and issuing an award that would tackle the question of reversing the matches scores and replacing the other national federation in the final competition, the CAS would infringe upon the rights of a third party that is not involved in the proceedings.**
- 2. If the Appellant wants to discharge its burden of proof, it has to produce evidence to support its allegations. It is not enough to attempt to reverse the burden of proof and allege that the other party has not provided sufficient evidence on its side.**

The Namibia Football Association (NFA; the “Appellant”) is the national football association of Namibia, with headquarters in Windhoek, Namibia, and is a member of CAF (as hereinafter defined) and of the Fédération Internationale de Football Association (FIFA).

The Confédération Africaine de Football (CAF; the “Respondent”) is the confederation recognised by FIFA with headquarters in Egypt, which promotes football in Africa.

On 22 January 1984 the footballer Herve Zengue (“the Player”) was born in Yaounde, Cameroon. The Player took up residency in Burkina Faso in 1994 and married his wife, a Burkina Faso national,

on 22 June 2006. The Player was issued with a Burkinabe Nationality Certificate on 14 September 2006.

On 25 March 2011, the Player received a 5 year passport from the African Nation of Burkina Faso.

The national teams of Namibia (“Namibia”) and of Burkina Faso (“Burkina Faso”) first played each other on 26 March 2011 in the 2012 Africa Cup of Nations (“AFCON 2012”) qualification stages, in Ouagadougou, Burkina Faso. Burkina Faso won 4-1 and the Player participated in that match.

On 4 June 2011, Namibia and Burkina Faso played their second qualification match of AFCON 2012, in Windhoek, Namibia. The match was played under protest, as the Appellant had prepared a letter of complaint (“the Protest Letter”) alleging that the Player was ineligible to participate in that match. Burkina Faso again won the match, 1-4.

On 6 June 2011, the Appellant wrote to the Respondent and forwarded a further copy of the Protest Letter and paying the relevant appeal fee.

On 17 June 2011, the Player received a second 5 year passport from Burkina Faso.

On 28 October 2011, the Bureau of the African Cup of Nations Committee (“the Bureau”) rejected the protest of the Appellant regarding the ineligibility of the Player on the grounds that the Protest Letter failed to comply with Article 37.1 of the Regulations of the Orange Africa Cup of Nations 2012 (“the AFCON 2012 Regulations”).

On 31 October 2011, the Appellant appealed to the CAF Appeal Board against the decision of the Bureau submitting that the original Protest Letter had been signed by the captains of both Namibia and Burkina Faso before the 2nd qualification match was played and directed the CAF Appeal Board to Article 36.12 of the AFCON 2012 Regulations.

On 15 November 2011, CAF’s Appeal Board heard the Appellant’s appeal against the Bureau’s decision, with the Appellant and the Fédération Burkinabé de Football (“the Burkina Faso FF”) present.

On 24 November 2011, CAF’s Appeal Board rendered its decision (“the Appealed Decision”), which concluded:

“To declare the appeal lodged by the Namibia Football Association to be regular as to form.

To declare invalid the protest submitted by the Namibia Football Association concerning the non-respect of the requirements stipulated by Article 37 of the 2012 CAN Regulations”.

On 8 December 2011, the Appellant filed its Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport (CAS). The Appellant requested the matter be dealt with on an expedited basis. The Appeal contained the following prayers for relief:

“...to set aside the Decision of the CAF Appeal Board of November 24, 2011 and accepting the protest submitted by the Namibia Football Association before the kick-off of the match of June 4, 2011 between

Burkina Faso and Namibia because of the non-eligibility of the Player Herve Zengue for the team of Burkina Faso having the result that Burkina Faso should lose the two matches by penalty (3-0). This again would have the consequence that the team of the Namibian Football Association would take part in the final round of the Africa Cup of Nations instead the team of Burkina Faso”.

On 14 December 2011, the Appellant confirmed its Statement of Appeal was to serve as its Appeal Brief too and requested a hearing in this matter.

On 19 December 2011, the Respondent agreed that the matter could be dealt with on an expedited basis.

On 24 December 2011, the Respondent requested that the language of the matter be changed to French. After due consideration of the request, in light of the fact that the Appeal was made in English and on an expedited basis, the President of the Panel refused this request, which was confirmed to the parties on 27 December 2011, by the CAS Court Office.

On 2 January 2012, the Respondent filed its Answer, which contained the following prayers for relief:

“...the Confederation of African Football respectfully requests that this Court grant its motion and dismiss Appellant’s appeal in its entirety.

The entire costs of the proceedings shall be paid in full by Appellant and a procedural indemnity of 30.000 Swiss Francs shall be granted by the same to the CAF for irrecoverable costs incurred”.

The Respondent agreed to a hearing and despite the Respondent disputing the admissibility of the Appellant’s appeal, all duly signed the Order of Procedure beforehand.

On 4 January 2012, the Appellant sought to file additional submissions in the form of an answer to the Respondent’s submissions. The additional submissions were accepted by the Respondent at the hearing of the matter.

A hearing was held on 6 January 2012 at the CAS premises in Lausanne, Switzerland. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel.

There were no witnesses or experts providing evidence or opinions at the hearing, but the representatives of the NFA and CAF both spoke and were examined by the Panel and the other parties. The parties were given the opportunity to present their cases, submit their arguments and to answer any questions posed by the Panel. After the parties’ final, closing submissions, the hearing was closed and the Panel reserved its detailed decision to its written award, but confirmed the operative part of the decision would be rendered in line with the expedited procedure. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their right to be heard and to have been treated equally in these arbitration proceedings. The Panel heard carefully and took into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties both in their written submissions and at the hearing, even if they have not been summarised in the present award.

LAW

Jurisdiction of the CAS

1. Article R47 of the Code provides as follows:

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

2. The Appellant submits that the Appealed Decision was made by the Appeal Board of the CAF and is appealable to the CAS pursuant to Article 8 of the CAF Disciplinary Code, which stipulates:

“Decisions taken by the Appeal Board shall be final and binding on all the parties concerned. This provision is subject to appeals lodged with the Court of Arbitration for Sport (CAS) (art. 45 para. 4 of the Statutes)”.

3. The jurisdiction of the CAS was confirmed within the Appealed Decision, which stated:

“This decision is subject to appeal in the Court of Arbitration of sports [sic] (CAS), the appeal should be lodged in a delay of 21 days starting from the date of notification of the decision above. This appeal should be submitted in conformity with the rules of the Court of Arbitration of Sports”.

4. The Respondent referred to Article 51 of the CAF Statutes as the basis for the arbitration, which states:

“CAF shall allow appeals to the Court of Arbitration for Sport, an independent arbitration tribunal based in Lausanne (Switzerland), to resolve any disputes between CAF, national associations (...)”.

5. The parties therefore agree that the CAS has jurisdiction to hear the matter at hand and the order of procedure duly signed by the parties is additional confirmation.

6. Under Art. R57 of the Code of Sports-related Arbitration (“the Code”), the Panel has the full power to review the facts and the law and may issue a *de novo* decision superseding, entirely or partially, the appealed one.

Applicable Law

7. Article R58 of the Code provides as follows:

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

8. At the hearing, the parties agreed that the applicable law should be the AFCON 2012 Regulations, read in conjunction with the CAF Statutes and the CAF Disciplinary Code, with the FIFA Statutes where applicable and finally, with Swiss Law applying subsidiarily. The Panel agreed with this position.

Admissibility

9. The Respondent disputed the admissibility of the Appeal on a number of grounds.
10. Firstly, it submitted that the Appeal was not made in a timely manner, as the Appeal had to be lodged with the CAS Court Office within 10 days of the Appellant being notified of the Appealed Decision, in accordance with Article 51.3 of the CAF Statutes:
“Only CAS is empowered to deal with appeals against decisions or disciplinary sanctions taken in the last instance by any legal body of CAF (...) any appeal must be filed within 10 days of the decision being communicated”.
11. The Respondent notified the Appealed Decision to the Appellant on 24 November 2011, the 10 days began on 25 November 2011 and the 10 days therefore expired at midnight on 4 December 2011. The Appeal was received by the CAS Court Office on 8 December 2011 and as such the Respondent argued it is inadmissible.
12. The Appellant referred to the final paragraph of the Appealed Decision as set out in para. 3 above. This referred to a 21 day time limit within which to file the Statement of Appeal. The Respondent acknowledged that this was a “mistake”, but the Appellant argued that it was an acknowledgement of the 21 day time limit within Article R49 of the Code. The Respondent argued that Article R49 of the Code only applies *“in the absence of a time limit set in the statutes or regulations of the federation (...) concerned”* and there was a time limit set in Article 51.3 of the CAF Statutes, which is 10 days.
13. The Panel noted that the CAF Secretary General, Mr El Amrani, had signed the Appealed Decision and stated that it was not a reference to Article R49 of the Code, so determined to disregard the Appellant’s submission on that point, which seemed self defeating. The Panel therefore had to decide if this was an indulgence by the Respondent to extend the deadline or a mistake. Even if it was the latter, the Panel determined that it would not be right to hold the Respondent’s mistake against the Appellant. The Panel noted the CAS jurisprudence in CAS 2008/A/1708 and CAS 2009/A/2439 in which the parties faced a similar conflict between two apparently conflicting time limits set by FIFA. As such, the Panel determined to confirm the Appeal had been made in time, the 21 days expressly granted by the Respondent in the Appealed Decision.
14. Secondly, the Respondent challenged the extent of the Appellant’s prayers for relief in the absence of Burkina Faso as a respondent to these proceedings, claiming the CAF lacked the

standing to be sued and that the relief ultimately sought affected the rights of that third party, which was not present to defend itself.

15. The Panel noted the Respondent's agreement to be a respondent in this matter, confirmed by its participation in this arbitration, the signing of the order of procedure and its clarification given at the hearing that it wished to respond to allegations made against it, but the Panel also noted the Respondent's position that the Burkina Faso FF should have been the "principle" respondent in this matter.
16. The Respondent directed the Panel to Article R48 of the Code. The Appellant did not bring the Burkina Faso FF into these proceedings and the scope of the Panel's review is limited to those prayers that the Respondent is the subject of. The Appellant's prayers for relief included the request that the Panel determine that "(...) *Burkina Faso should lose the two matches by penalty (3-0). This again would have the consequence that the team of the Namibian Football Association would take part in the final round of the Africa Cup of Nations instead the team of Burkina Faso*".
17. The Panel noted that it was ultimately the choice of the Appellant against whom it appealed, but by not including the Burkina Faso FF as a party, the Panel has determined that its scope of review is limited to a review of the Appealed Decision alone. In the event that, on the merits, it is determined to overturn the Appealed Decision, then this Panel would be unable to go further and issue an award that would have the effect of replacing Burkina Faso with Namibia at AFCON 2012.
18. The essence of the dispute is between two national federations, where one believes the other has fielded an ineligible player. It has sought a decision to that effect from its Confederation and for the Confederation to then penalize that other national federation firstly by reversing the match scores and then to recalculate the qualification points replacing one national federation with the other in AFCON 2012. The Panel does not consider the CAF as the "passive subject" of the claim brought before CAS by way of the appeal against CAF's decision, as CAF's rights are not relevant to the relief sought by the Appellant. The Panel are satisfied that the CAF does not have the standing to be sued in relation to the entirety of the Appellant's prayers for relief, but it has participated in these proceedings willingly and is therefore accepting that its Appealed Decision be reviewed, but not that the relief after that sought by the Appellant be entertained.
19. Having established the admissibility of the Appeal and the scope of its review, the Panel now considers the merits.

Merits of the Appeal

20. The Panel had to determine the following:
 - A. Did the Bureau have jurisdiction to deal with the Appellant's protest?
 - B. If so, did it and the CAF Appeal Board follow the CAF Disciplinary Code and provide a fair hearing? If not, what affect does that have?
 - C. Was the CAF Appeal Board correct in dismissing the protest for a breach of Article 37.1 of the AFCON 2012 Regulations?
 - D. If not, should the CAF Appeal Board have sanctioned the Burkina Faso FF under either Articles 36 or 39 of the AFCON 2012 Regulations instead?

A. Jurisdiction of the Bureau

21. The Panel noted the confusion, caused by the Bureau, in its decision of 28 October 2011, by referring to itself as "the Bureau of the African Cup of Nations Committee CAN 2012" and then by the CAF Appeal Board referring to it as "the Bureau of the Organizing Committee of CAN 2012". At the hearing the Respondent confirmed that there is one Organizing Committee, established pursuant to Article 30 of the CAF Statutes for AFCON 2012 and that the two references were to the same body.
22. The Appellant questioned whether the Organizing Committee had the ability to establish a bureau or subcommittee, as Article 28.2 of the CAF Statutes refers to the Executive Committee of the CAF having the ability to establish a bureau and then only when urgency required it. At the hearing the representative of the Respondent stated that all Standing Committees are established by the Executive Committee and are able to establish bureaus or subcommittees in accordance with Article 28.2 of the CAF Statutes.
23. Article 4.3.2 of the AFCON 2012 Regulations gave the Organizing Committee the ability to take decisions regarding complaints or protests, which it commenced pursuant to the Appellant's Protest Letter. The Respondent confirmed that when the draw was approaching for the second phase of AFCON 2012, even though the investigations of the Organizing Committee had not been completed, a bureau was established by it to render a decision.
24. The Panel is satisfied that the Bureau was established with the necessary powers to deal with the Appellant's Protest Letter.

B. Fair hearing?

25. The Panel noted the complaints made by the Appellant with regard to the access to the CAF file before the Appeal Board hearing; its inability to be present at the session of the hearing when the CAF Appeal Board examined the Burkina Faso FF representative; and the perceive unfairness of not being able to be fully heard. Equally, the Panel noted all the representations

on these points by the Respondent and the references to the CAF Statutes and the CAF Disciplinary Code.

26. The parties are aware of the Panel's ability to hear the Appeal of the Appellant *de novo*, in accordance with Article R57 of the Code. The Panel has reviewed the facts and law in this matter and heard from the representatives of the parties. The parties both confirmed at the hearing that their respective rights to be heard and to be treated equally in these proceedings had been respected and as such, any shortcomings that there may have been in the appeals beforehand have been corrected.

C. *Article 37.1 of the AFCON 2012 Regulations*

27. The Protest Letter was presented to the CAF Commissioner on 4 June 2011. It was acknowledged at the hearing that it was a requirement of Article 37.1 of the AFCON 2012 Regulations that any protest had to be made to the CAF before the match commenced and then confirmed (pursuant to Article 37.2) to the CAF within 48 hours. The Protest Letter, whilst mentioning the fact that the Player had also played in the first qualifying match between Namibia and Burkina Faso on 26 March 2011, was protesting about the Player about to take the field of play on 4 June 2011. The allegation of ineligibility for the March match was raised after that first match and as such was treated by the Respondent as a notice of a potential fraud, which resulted in an enquiry in accordance with Article 39 of the AFCON 2012 Regulations.
28. The Protest Letter, so far as Article 37.1 of the AFCON 2012 Regulations is concerned, was therefore directed at the ineligibility of the Player for the match of 4 June 2011 alone.
29. Both the Bureau and the CAF Appeal Board rejected the Protest Letter as a result of its form, as opposed to substance. The Regulation states that it must be countersigned by the captain of the opposing team from that making the protest. The Respondent also submitted that the "proper form" was box 10 on the CAF Commissioner's report.
30. The Panel noted that there was no separate form to be used and also noted that box 10 had very little space and determined that a letter annexed to and referred to in box 10 of the CAF Commissioner's report (as it was in this case) would fulfill the "proper form" requirements of Article 37.1.
31. The key issue was whether it had been signed by the Burkina Faso captain or not. At the hearing, the NFA Secretary General, Mr Rukoro, who produced the Protest Letter and handed it to the CAF Commissioner, stated that he was with the CAF Commissioner who then summonsed the match referee and informed him of the protest. Mr Rukoro confirmed that there was only a single copy of the letter and that it was signed by the referee and by both the captains in front of him. It was then retained by the fourth official whilst the match was being played. Mr Rukoro did not have the ability to make a copy to keep. He stated that the CAF Commissioner (and he argued it was the Commissioner's job to ensure the Regulations

were followed in regard to any protest) confirmed everything was in order. Mr Rukoro stated that later, before the CAF Appeal Board hearing, he spoke again with the captain of Namibia, who confirmed he had signed the Protest Letter, as had the captain of Burkina Faso. He found it “amazing” that the version of the Protest Letter on the CAF file only had the signature of the referee on it.

32. Mr El Amrani stated that he had spoken to the referee and to the CAF Commissioner and that they had both told him that neither of the captains signed the Protest Letter.
33. The Panel, when faced with conflicting accounts would normally have to determine which account it preferred. In this case, what has surprised the Panel is that neither party has, either at the CAF Appeal Board hearing or in these appeal proceedings sought to produce any witness evidence from the captains of the teams, the referee or the CAF Commissioner. The Panel notes that the burden of proof is upon the Appellant and if it believed the Protest Letter had been signed by both the captains, yet had its protest dismissed by the Bureau for lack of the signatures, why did it not produce evidence from at least the captain of its own national team to support its appeals to the CAF Appeal Board or to the CAS? The Appellant could see the version of the Protest Letter on the CAS file was one without the signatures of the captains, as such, the burden of proof is upon the Appellant to challenge the reliability of that version. The Panel has determined that the Appellant has failed to come up to the requisite standard of proof to enable it to rebut the fact that the version of the Protest Letter before it has not been signed by the captain of Burkina Faso, as required by Article 37.1 of the AFCON 2012 Regulations.
34. The Appellant argued, in the alternative, that even if the Protest Letter had not be signed, that was not a material defect and that the protest should stand. It also pointed out that if taken literally and the opposing captain refused to sign, then there could never be a valid protest. The Respondent countered by stating the rules are the rules and that it is not the role of the Panel to rewrite the rules by removing that requirement. Further, if the opposing captain refused to countersign, then that would be recorded by the referee and the CAF Commissioner in their reports.
35. On balance, the Panel agrees with the Respondent. The requirement of Article 37.1 is not confusing or unclear, nor is it difficult to satisfy. The Appellant had taken the trouble to prepare a letter of protest in advance of the match and to carry out extensive web-based research into the Player’s nationality – it could have and should have fully reviewed and complied with Article 37.1 and the Panel does not see any reason to overturn the decision of the CAF Appeal Board on this point.

D. Articles 36 or 39 of the AFCON 2012 Regulations

36. The Player had citizenship and had been included on the list of players for the AFCON 2012 tournament in accordance with Article 42 of the AFCON 2012 Regulations. The Respondent stated that Article 36 of the AFCON 2012 Regulations dealt with sanctions against players. It

was the first Article in the Chapter of the AFCON 2012 Regulations entitled “Sanctions of Players”. If an association fielded a player after he had been sanctioned for any offence and the penalty against that player was a suspension or if he had been found to be “non-qualified”, then the association would face losing that match 3-0. However, the sanction against the player was required before this sanction could be imposed against the association. In this case, there were no sanctions against the Player.

37. The Appellant argued that Article 36.12 of the AFCON 2012 Regulations applied as the sanction against the association, if it could be established at anytime and “*even without protest*” that a player was ineligible¹.
38. At the hearing, the parties provided their respective views on Articles 15 to 18 of the FIFA Statutes and the Respondent cited the case CAS 2010/A/2071. The Appellant argued that as the Respondent could not provide proof that the Player had lived continuously for 5 years in Burkina Faso after 2002, when he reached his 18th birthday, then he must fail to fulfill the criteria of Article 17 of the FIFA Statutes and is therefore ineligible, as under Article 32 of the AFCON 2012 Regulations, he must comply with these FIFA Statutes. If ineligible, then Article 36.12 applies.
39. Whilst the Respondent argues that as the case CAS 2010/A/2071 stipulates Article 18 of the FIFA Statutes is applicable. Pursuant to this it is irrelevant where the Player lived for that period.
40. The Panel again finds that the Appellant has not sufficiently discharged the burden of proof. The CAF Appeal Board could only reach a decision on the Player’s eligibility if it had stronger evidence from the Appellant as to where the Player lived at what stage, as opposed to submissions that he played for foreign clubs since 2004 and an attempted reversal of the burden of proof by the Appellant. It is not sufficient to say the CAF did not show the Player lived continuously in Burkina Faso for 5 years after he reached the age of 18. The Appellant needed to provide the evidence to demonstrate where the Player was living; to provide submissions on the application of Article 17 as against Article 18 of the FIFA Statutes; to produce submissions and evidence on what was meant be “*continuously living*” – is it actual residence or maintaining nationality – and to provide submissions to support Article 36.12 can be used in any event, or whether it only has application on an association after a player has been sanctioned.
41. Turning next to Article 39 of the AFCON 2012 Regulations, the Respondent confirmed at the hearing that it treated the Protest Letter as a notification of a possible fraud and commenced an enquiry pursuant to Article 39. It ultimately determined that the allegations were not proved. Again, from the evidence produced by the Appellant, the Panel agrees with the CAF Appeals Board. The Appellant has raised eligibility issues, but has not brought Burkina Faso into the proceedings, nor sought evidence from it regarding its Player, the granting of his Burkinabe nationality, no correspondence with FIFA regarding his nationality

¹ NdR: Article 36.12 states: “*A team which allows a non-qualified or a suspended player to take part in group matches shall lose the match by penalty (3 – 0), even in the absence of protests/reservations*”.

was put in the Appeal, no real enquiries regarding where the Player lived were made. On the other hand the CAF was presented with the Player's Burkina Faso passport, confirmation of his residency since 1994 in Burkina Faso, his marriage and nationality certificates, all of which it took at face value in determining there were insufficient grounds and evidence to conclude there was any type of fraud. The Respondent defined "fraud" from its own Regulations as "(...) *any deliberate intention of misleading or cheating by falsification of documents (...)*". There was no evidence of any deliberate intention to mislead or any allegation that the documents were forged. The Appellant did query why the Player had received a passport the day before the first match in March 2011 and then why he received another after the second match in June 2011. The Panel again notes the decision of the Appellant not to bring the Burkina Faso FF into these proceedings as a respondent. If it had, then perhaps that question could have been answered, but as regards the Respondent, the Panel agreed that there was insufficient proof to determine there was any type of fraud.

Conclusion

42. In summary, the Panel determines to confirm the Appealed Decision of the CAF Appeal Board and to dismiss the Appeal of the Appellant.

The Court of Arbitration for Sport rules:

1. The appeal filed by the Namibia Football Association on 8 December 2011 against the decision of the Appeal Board of the Confédération Africaine de Football dated 24 November 2011 is dismissed.
2. The decision of the Appeal Board of the Confédération Africaine de Football dated 24 November 2011 is confirmed.
- (...)
5. All other or further claims are dismissed.