Arbitration CAS 2007/A/1429 Bayal Sall v. FIFA and IK Start & CAS 2007/A/1442 ASSE Loire v. FIFA and IK Start, award of 25 June 2008

Panel: Mr Hendrik Willem Kesler (the Netherlands), President; Mr Olivier Carrard (Switzerland); Mr Bård Racin Meltvedt (Norway)

Football
Unilateral termination of the employment contract during the protected period
Formal requirements for the validity of the contract
Validity of a contract in case of the existence of a previous one
Joint and several liability of the new club for the payment of the compensation for breach
Amount of compensation
Sporting sanctions

1. **The stating of a wrong date of birth does not make a contract invalid *per se*. Also, the absence of initials of the parties on every separate page of the contract does not lead to invalidity of the contract. Furthermore, although the absence of the name of the player's agent on a contract between a club and a player can in certain cases lead to sanctions, it does not lead to the invalidity of the contract itself.**

2. **Clubs and players are free – within the applicable regulations – to conclude contracts with each other on the basis of the so called contractual freedom. The mere fact that a player concludes a new contract with a club while already under a previous contract with another club does not make the new contract invalid or void, unless a reservation has been made in the new contract that it will only come into force subject to an agreement regarding a transfer compensation.**

3. **Article 17 para. 2 of the FIFA Regulations for the Status and Transfer of Players is mandatory. This means that the new club cannot be relieved from the obligation to pay the compensation for breach to the former club even though it can prove that it has not induced the breach of contract.**

4. **If, under the circumstances, the amount of compensation calculated by the DRC appears conform to Article 17 para. 1 of the FIFA Regulations as well as neither arbitrary nor excessive, there is no need for the CAS Panel to review the amount in question.**

5. **It follows from a literal interpretation of Article 17 para. 3 of the FIFA Regulations that it is a duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: "shall" is obviously different from "may". Consequently, if the intention of the FIFA Regulations was to give the competent body the power to impose a sporting sanction, it would have employed the word "may" and not "shall".**

Moustapha Bayal Sall ("the player" or "the first Appellant") is a football player from Senegal, at present living in Saint-Etienne, France.

La Societé ASSE Loire ("Saint-Etienne" or "the second Appellant") is a French football club with its headquarters in Saint-Etienne, France. Saint-Etienne is a member of the French Football Association, which, in turn, is affiliated to the Fédération Internationale de Football Association.

Fédération Internationale de Football Association (FIFA or "the first Respondent") is an association under Swiss law and has its headquarters in Zurich (Switzerland). FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials, players and players' agents worldwide.

IK Start ("IK Start" or "the second Respondent"), is a Norwegian football club with its headquarters in Kristiansand, Norway. IK Start is a member of the Norwegian Football Association, which, in turn, is affiliated to the FIFA.

On 30 March 2006, IK Start and the player signed an employment contract valid from 1 April 2006 to 30 November 2008.

According to the said employment contract, the player was entitled to a lump sum of USD 25,000, a gross monthly salary of NOK (Norwegian Kroner) 40,000, a bonus for each match played for IK Start and a bonus of NOK 10,000 for each official game played for the Senegal National A Team. Some secondary benefits were concluded as well.

On 26 August 2006, the player signed an employment contract with Saint-Etienne, valid until the end of the 2008/09 season. According to this contract, the player was entitled to a monthly salary as well as various bonuses based on matches played and results in accordance with the French Professional Football Charter.

The player denied having ever intended to sign an employment contract with IK Start and never considered himself under any obligation to IK Start.

In a letter dated 14 November 2006, IK Start lodged a complaint with FIFA against the player, for breach of contract due to his failure to take up his position as a player with IK Start. IK Start primarily sought execution of the employment contract by the player or, on a subsidiary basis, compensation of NOK 1,632,000 and the imposition of a sporting sanction against him. Besides, IK Start wanted Saint-Etienne found to be guilty of having induced the player to breach of contract and should therefore jointly be liable for the payment due to IK Start. IK Start also sought the imposition on Saint-Etienne of a ban on registering players for two registration periods.

IK Start lodged a claim with FIFA against the player for breach of contract and against AS Saint-Etienne for the inducement to breach an employment contract on 14 November 2006.

The claim was dealt with the Dispute Resolution Chamber (DRC) on 10 August 2007.

First of all, the DRC decided that it was competent to decide on the litigation involving a Norwegian club, on one hand, and a player from Senegal and a French club, on the other hand, regarding a dispute arisen in connection with the possible breach of an employment contract and the inducement to such breach of contract.

Furthermore, the DRC analyzed that the current FIFA Regulations for the Status and Transfer of Players (edition 2005, "the Regulations") were applicable to the case at hand, as to the substance.

The DRC then focused its consideration on the question whether an unjustified breach of the employment contract, signed by and between the player and IK Start occurred and, in the affirmative, which party would be responsible for such breach of contract, and whether inducement to breach of contract occurred as well, and finally to decide if sanctions for breach of contract and inducement to breach of contract should be applicable.

The DRC started then to conclude its considerations on the legal aspects by acknowledging that the player and IK Start signed on 30 March 2006 an employment contract, which was to be valid until 30 November 2008.

The DRC continued to consider that the arguments about the validity of the concluded contract as presented by the player and Saint-Etienne, could not be upheld as particularly described under the paras. 8, 9 and 10 of the foresaid Decision of the DRC.

The DRC continued to consider that it was an undisputed fact that, on 26 August 2006, the player and Saint-Etienne signed an employment contract valid until the end of the season 2008/09.

On this item, the DRC emphasized that, as a general rule, the signing of an employment contract by a player, with a new club, that starts to run before the employment contract between the player and his former club expired, or was prematurely terminated by mutual agreement, is to be considered as a breach of contract (para. 13 of the Decision).

The DRC concluded that the player evidently acted without the approval of IK Start, when signing a new employment contract with Saint-Etienne.

As a consequence of this, the DRC referred in particular to Article 18 para. 5 of the Regulations, according to which, in case a professional enters into more than one contract covering the same period, the same provisions concerning the consequences of terminating a contract without just cause apply.

The DRC held that such provisions fully apply to the case at stake, whereby the player concluded an employment contract with Saint-Etienne, while being under contract with IK Start.

The DRC therefore unanimously reached the conclusion that the player is liable to pay compensation for contractual breach and is to be sanctioned as if he had terminated the contract with IK Start without just cause.

Taking into consideration the requested compensation by IK Start to an amount of approx. USD 282,000 on the one hand, but also the behaviour of IK Start with regard to the obtaining of the ITC, on the other hand, the DRC considered that the facts of the case showed some mitigating circumstances with regard to the amount of compensation for breach of contract.

Finally, the DRC concluded that compensation amounting to USD 150,000 by the player to IK Start appears to be appropriate.

At the same time, the DRC held Saint-Etienne jointly and severally liable for the payment of the relevant compensation towards IK Start in the amount of USD 150,000.

Furthermore, the DRC concluded that the player breached the employment contract he had entered into with IK Start without just cause, during the protected period. As a consequence, sporting sanctions should be imposed on the player.

The DRC referred here to the content of Article 17 para. 3 of the Regulations stipulating that the sporting sanctions for breach of contract during the protected period as *"a restriction of four months on his [i.e. the player] eligibility to play in official matches. In the case of aggravating circumstances, the restriction shall last six months"* (para. 27 of the Decision).

As this is a minimal sanction and the relevant provision does not provide for a possibility to the deciding body to reduce this sanction under the fixed minimum duration in case of mitigation circumstances. On the other hand, the DRC could not find any aggravating circumstances, which would allow the conclusion to impose a restriction higher than four months of the player's illegibility to play in official matches.

Finally, the DRC concluded that Saint-Etienne acted in good faith when it signed the employment contract with the player in August 2006 and therefore concluded that no sporting sanctions should be imposed on Saint-Etienne.

The DRC decided therefore as follows:

> *"1. The claim of the Claimant, club IK Start, is partially accepted.*
>
> *2. The Respondent 1, player Bayal Sall, has to pay compensation in the amount of USD 150,000 to the Claimant, club IK Start, within 30 days of notification of the present decision.*

3. *If the aforementioned amount is not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of expiry of the fixed time limit and the present matter shall be submitted to the FIFA's Disciplinary Committee, so that the necessary disciplinary sanctions may be imposed.*

4. *The Respondent 2, club AS Saint-Etienne, is jointly and severally liable for the payment of the amount of compensation of USD 150,000 to the Claimant, club IK Start.*

5. *The Claimant, club IK Start, is directed to inform the Respondent 1, player Bayal Sall, and the Respondent 2, club AS Saint-Etienne, directly and immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*

6. *A restriction of four months on his eligibility to play in official matches is imposed on the Respondent 1, player Bayal Sall. This sanction shall take effect from the start of the first season of the Respondent 1's current club following the notification of the present decision.*

7. *Any further requests of the Claimant, club IK Start, are rejected.*

8. *According to art. 61 para. 1 of the FIFA Statutes this decision may be appealed before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS within 21 days of receiving notification of this decision and has to contain all elements in accordance with point 2 of the directives issued by the CAS, copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for the filing of the statement of appeal, the appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal (cf. point 4 of the directives)".*

The DRC Decision of 10 August 2007 was notified to the parties on 15 November 2007.

On 4 December 2007, the first and second Appellants filed their statement of appeal, together with 2 exhibits against the decision of the DRC of 10 August 2007.

On 13 December 2007, the Appellants submitted their appeal briefs, together with 19 exhibits.

The first Appellant, requested primarily to annul the Decision of the DRC of 10 August 2007 and subsidiarily to reduce the financial sanction delivered against him, and to reduce the sporting sanctions imposed on him by the DRC Decision.

The second Appellant asked for annulment of the financial sanction given by the DRC based on Article 17 para. 2 from the Regulations.

On 12 February 2008 the first Respondent submitted its response (in both cases), together with 5 exhibits. The first Respondent concluded:

> *"In light of the above considerations, we insist that the decision passed by the DRC in the matter at stake was fully justified. We therefore request that the present appeal be rejected and the decision taken by the DRC on 10 August 2007 be confirmed in its entirety.*
>
> *Furthermore, all costs related to the present procedure as well as the legal expenses of the first Respondent shall be borne by the Appellant".*

On 11 February 2008, the second Respondent submitted its answer together with 13 exhibits. IK Start requested:

> *"IK Start respectfully asks the Court of Arbitration for Sport to uphold the Decision of FIFA's Dispute Resolution Chamber in every respect, including the award for compensation against both the player Sall and ASSE Loire and the dismissal of ASSE Loire's allegations and claims of unlawful acts on the part of Start. IK Start has no comments to jurisdictional issues and accepts the jurisdiction of CAS".*

A hearing was held on 29 April 2008 in Lausanne.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS is based on Articles 60 ff of the FIFA Statutes and Article R47 of the Code of Sports-related Arbitration ("the Code"). It is also confirmed by the order of procedure, which was duly signed by all the parties.

2. The CAS therefore has jurisdiction to deal with this dispute.

3. Pursuant to Article R57 of the Code, the Panel has full power to review the facts and the law.

Applicable law

4. Article R58 of the Code stipulates the following:

   "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".

5. According to Article 60 para. 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".

6. In this case, the parties concluded a contract between themselves that refers to Norwegian law, but in their submissions the parties only referred to the applicable FIFA regulations, which they expressly confirmed at the hearing in front of the CAS Panel.

Admissibility

7. The decision of the DRC was notified to the parties on 15 November 2007. The appeals were lodged on 4 December 2007, within the deadline laid down in the FIFA Statutes and referred to in the decision itself. The statement of appeal and the appeal briefs subsequently submitted fulfil the requirements of the Code. The appeals therefore are admissible.

Admissibility of the exhibit N° 20

8. The Appellants requested, after the deadline as laid down in the Code, to produce a late exhibit (N° 20). The Respondents objected to this, but the Panel decided on the base of Article R44.3 of the Code to accept it, because it contributed to their opinion to a better understanding of the facts and their legal consequences.

Legal merits

9. The Panel will, with the answering of the question if there is a case of a valid contract between the first Appellant and the second Respondent, again review the arguments with a legal aspect as submitted by the parties.

10. Primarily the Panel notes that the first Appellant has not denied that the signature on the contract concerned is his. Also the declarations of the witnesses which have been given during the hearing make it clear that the player has signed the contract concerned.

11. *Ad* the first Appellant's argument: *"The contract is not valid because the correct date of birth of the Appellant is not stated and the contract is not initialled on all pages"*.

    The Panel can be brief about this. The stating of a wrong date of birth does not make a contract invalid per se. The contract's content is otherwise absolutely clear. IK Start – the Respondent – paid the Appellant for utilising his services as football player.

    The absence of initials of the parties on every separate page of the contract does also not lead to invalidity of the contract. In any case it is, according to the obligations for a contract such as this, to be valid not additionally required that the parties' initials must appear on every page. This requirement is not stated in the FIFA regulations, and also not in the provisions of the Football Association of Norway. Otherwise – setting this aside – the non-initial pages are

noticeable as standard provisions as indicated by the Respondent at the hearing. The Panel from its own knowledge, considers that more than one national football association handles such standard contracts and that specific, separate, provisions are included in appendices. The defence raised by the Appellant here, therefore, must be dismissed.

12. *Ad* the first Appellant's argument: *"The contract concerned is not provided with the signature of a player's agent"*.

The Panel can also be brief about this. The FIFA provisions indeed indicate that on a contract between Club and Player, the signature of the Player's Agent involved must appear (Article 18 para. 1 of the FIFA Regulations). Still its absence does not lead to the invalidity of the contract itself. The absence of the name of the agent can in certain cases lead to sanctions, but this is also then the only result of such absence. The Panel therefore also rejects this defence of the Appellant.

13. *Ad* the first Appellant's argument: *"The contract cannot be considered as a validly closed one because the first Appellant still had a valid professional contract with another club, that is to say US Gorée of Senegal"*.

The Panel concludes in first instance that the status of the player seems unclear. After all, at the hearing, the witness brought by the first Appellant declared that he – the first Appellant – was employed as a football player at US Gorée and that he received payment for his work activities as footballer there. The status of these payments is however unclear. From the exhibits it does not seem that the Player did receive payment prior to 1 April 2006, when he concluded his agreement with IK Start on 30 March 2006. Also the loan agreement submitted by the Appellants between US Gorée and another club for the season 2004/05 does not clarify this. It does seem that there is a case of loan agreement by US Gorée and another club from Senegal, but no payments to the first Appellant has been documented to result from this. The Panel however is of the opinion that for this situation, the provisions of FIFA should be applied, and namely Article 2 para. 2 of the Regulations for the Status and Transfer of Players, which clearly indicates that there is only a case of a professional player's contract if this is entered in writing. Such a written contract has not been provided by the first Appellant, accordingly the Panel must consider that he held an amateur status and that Article 18 para. 3 of the FIFA Regulations is therefore not applicable.

The Panel is however of the opinion that even having the status of a professional player this does not play a decisive role. Clubs and player are free – within the applicable regulations – to close contracts with each other, on basis of so called contractual freedom. The mere fact that the first Appellant has closed a contract with IK Start, while he is having a contract with another club, is complete at his own account and his own risk.

The fact of the existence of a previous contract does not make the second contract invalid or void. This situation would have been different if, in the second contract – otherwise common –, there would have been made a reservation that the contract only would come into

force if an agreement was to be reached, between the employer of the first Appellant and IK Start concerning a so-called transfer compensation. Now this restriction is entirely absent and therefore there is actually a case of a valid agreement between the first Appellant and IK Start and the defence raised by the Appellant cannot be effective.

14. *Ad* the first Appellant's argument: *"The first Appellant did not understand that he signed an employment contract with IK Start"*.

The first Appellant explains this further by indicating that he does not know the Norwegian and the English language and his French was of poor standard. He also stated, in this respect, that he thought that he signed a declaration, needed in order to get his passport back. He wanted to return to Senegal and therefore he needed to be in possession of his passport again. The first Appellant has further verbally explained his statement during the hearing but no further evidence for this case could be provided at use for the Panel at this submission. The witness, brought forward by the first Appellant, could of course not contribute to this evidence because he was not present in Norway at the time when the contract was signed.

Against this IK Start has produced two witnesses to be heard who offered a completely contradictory interpretation. The first witness, Mr Trond Arne Gjone, outlined that the most important provisions of the contract, namely the duration and salary were explicitly discussed in his presence with the player's companion, a person named Thorstensen, and that the player made it clearly known that he understood what had been made known to him. The second witness, Mr Jon Halvorsen also gave the same interpretation, indeed in another form, but he also declared that he clearly understood from the player that he knew what the most important parts of the contract were.

The Panel is still aware of the role of the so-called player's agent Thorstensen. The first witness has very explicitly declared that there was no contractual agreement between IK Start and the previously mentioned agent who anyway acted without FIFA licence. The Panel pieced together that Thorstensen emphatically tried to bring the player somewhere else in Europe, considering his attempts to close test trainings with clubs in Belgium, Spain and Norway. The Panel concludes from this that there certainly was a relation between the player and the previously mentioned "agent" named Thorstensen, which during the hearing is also admitted by the player. It is also this Thorstensen who discussed the content of the contract with the player, for which the second witness has been assisting as translator. The Panel can from the witness declarations, in combination with the behaviour of the player's agent Thorstensen, concerning the player, conclude nothing else than that the player must have known that he was signing a contract. The Panel then also rejects the player's defence that he did not know what he had signed because of his lack of knowledge of the English and/or Norwegian and/or French language.

15. *Ad* the first Appellant's argument: *"The player would have signed under pressure and it would have been specified to him that the documents he signed remained subject to the prior approval of US Gorée".*

The Panel refers to the abovementioned elements already stated under 14 concerning the signing of the contract. The first witness has explicitly and emphatically declared that these practices are not only not practiced in IK Start, but they are generally not present within the culture of the country.

Moreover, the player has not demonstrated that it is sufficiently plausible that the club treated him in this manner.

More concretely, the second witness has explicitly declared that after the player had returned to Senegal, he had further contact with him several times by telephone and understood that he was very satisfied with the contract which he had been signed, but that his family took a different position. Concerning this last communication of the witness the Panel observes that this interpretation is supported to a significant degree by the player's own declaration which indicates that immediately after his return to Senegal that consultation had taken place with this family on this matter. The Panel concludes that the objections of the player can also not be upheld here.

16. As none of the above-mentioned legal defences of the player are effective, the Panel concludes that there is a case of a valid player contract having been concluded between IK Start and the player. Other submissions of the first appellant had no legal impact and were therefore not necessary to take into consideration by the Panel.

The fact that the player has subsequently closed a contract with the French club Saint-Etienne, implies therefore that the existing contract with IK Start had been unilaterally broken, without a valid reason, during the protected period.

The player is therefore, in accordance with Article 17 para. 1 of the FIFA Regulations for the Status and Transfer of Players, liable to pay compensation to IK Start, the second Respondent.

17. According to Article 17 para. 2, Saint-Etienne is jointly and severally liable for the payment of this amount. This clause is evidently mandatory and the Panel therefore is not in a position to dismiss the second Appellant from this obligation although there was to the Panel's findings no inducement from the side of the second Appellant (cf. CAS 2006/A/1100; CAS 2006/A/1141; CAS 2007/A/1298, 1299 & 1300).

18. The Panel now has to consider whether the amount of compensation as decided by the DRC is reasonable and fair according to the conditions as lead down in Article 17 para. 1 of the FIFA Regulations.

19. The DRC took into account the remaining value of the contract concluded between the player and IK Start on the one hand and also reviewed the contract the player concluded with the second Appellant.

20. The DRC then took into consideration that the second Respondent (IK Start) could have taken steps towards FIFA in order to obtain the ITC by intervention of the Single Judge of the Player's Status Committee, which is, as the Panel can see it, a quite correct conclusion.

21. The DRC considered this as a reason for mitigation of the compensation which the Panel considers not as unreasonable.

22. The Panel notes that the level of compensation calculated by FIFA appears neither arbitrary nor excessive. There is therefore no need to review the amount of compensation fixed by the DRC, which appears appropriate under the circumstances and conform to Article 17 para. 1 of the FIFA Regulations (on this score to see CAS 2007/A/1358; CAS 2007/A/1359; CAS 2007/A/1298, 1299 & 1300).

23. This Panel is also called upon to decide on the first Appellant application that the imposed sporting sanctions on the player by the DRC should be reduced.

24. The basis for imposing sporting sanctions is laid down in Article 17 para. 3 of the FIFA Regulations. The said provision states that *"sporting sanctions shall also be imposed on any player found to be in breach of contract during the Protected Period"*.

25. It follows from a literal interpretation of the said provision that it is a duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: "shall" is obviously different from "may"; consequently, if the intention of the FIFA Regulations was to give the competent body the power to impose a sporting sanction, it would have employed the word "may" and not "shall". Accordingly, based on the wording of Article 17 para. 3 of the FIFA Regulations, a sporting sanction should be imposed.

26. Although the FIFA and CAS jurisprudence on this particular Article 17 para. 3 is not consistent and their decisions often are rendered on a case by case basis, the Panel in this case is of the opinion that there are no strong arguments brought forward by the first Appellant to deviate from the DRC Decision.

27. The Panel follows the DRC also in its well founded conclusion that the second Appellant acted in good faith and therefore no sporting sanctions should be imposed on it, on the basis of Article 17 para. 4 of the FIFA Regulations.

28. The Panel therefore decides to confirm the Decision of the DRC of FIFA of 10 August 2007 and to reject the appeals of both the Appellants.

The Court of Arbitration for Sport rules:

1. The appeals lodged by Moustapha Bayal Sall and ASSE Loire on 4 December 2007 against the decision of the FIFA Dispute Resolution Chamber of 10 August 2007 are dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 10 August 2007 in the dispute between Moustapha Bayal Sall and IK Start is confirmed.

3. Moustapha Bayal Sall is ordered to pay to IK Start the amount of USD 150,000 plus interest *ad* 5% as from 19 December 2007.

4. ASSE Loire is jointly and severally liable for the payment of the amount of compensation of USD 150,000 to the club IK Start plus interest *ad* 5% from 19 December 2007.

5. A restriction of four months on his eligibility to play in official matches is imposed on Moustapha Bayal Sall from the start of the first season of his current club following the notification of the FIFA decision.

(…)

9. All other claims are dismissed.