

Media & Entertainment - Switzerland

Landmark *Matuzalem* ruling has major consequences for FIFA regulations

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Introduction

For the first time in more than 20 years, the Supreme Court has annulled an international arbitral award for breach of substantive public policy. In a landmark ruling the Supreme Court overruled a Court of Arbitration for Sport award in which a decision of the International Federation of Association Football (FIFA) Disciplinary Committee was confirmed. The decision had found Brazilian football player Francelino da Silva Matuzalem and Spanish football club Real Saragossa guilty of breaching their obligations towards Ukrainian football club Shakhtar Donetsk. Among other consequences, Matuzalem would have automatically been banned from any activity in connection with football pursuant to the applicable FIFA regulations. The Supreme Court considered such a worldwide ban to be a breach of public policy, and particularly an excessive commitment in the sense of Article 27(2) of the Civil Code.

First Federal Supreme Court decision

In 2004 Matuzalem entered into a five-year employment contract with Shakhtar Donetsk. After three years, Matuzalem terminated his contract and signed a contract with Real Saragossa, which undertook to protect him from any claims arising from the termination of the contract without just cause. Based on Article 17 of the Regulations on the Status and Transfer of Players, FIFA ordered Matuzalem and Real Saragossa to pay compensation to Shakhtar Donetsk in the amount of €6.8 million, plus interest at 5% from July 2007. Both parties appealed the FIFA decision. Thereafter, the Court of Arbitration for Sport increased the compensation to be paid to Shakhtar Donetsk to €11.86 million, plus interest at 5% from July 2007.

Matuzalem and Real Saragossa filed an appeal against this decision with the Supreme Court. The court rejected the appeal on June 2 2010 (Case 4A_320/2009), thus substantially strengthening the position of football clubs in the world of football. The court considered the extremely punitive calculation of the compensation as "compensation for damages" only. However, the Court of Arbitration for Sport had in fact decided that the football player had to pay compensation comprising:

- a possible future salary (minus the salary that Matuzalem would have earned with Shakhtar Donetsk);
- a possible future transfer sum defined in the contract but never paid; and
- a sport-specific penalty of six months' salary.

FIFA Disciplinary Committee decision

Matuzalem was unable to pay such compensation. Until Summer 2009, when his contract with Shakhtar Donetsk would have ended, his salary was no more than €1 million a year. In addition, at the monetary peak of his career in the 2009/10 season, when he transferred to Lazio Roma at the age of 31, he earned only €3.22 million. Therefore, until the end of his career Matuzalem would not earn the amount that he was ordered to pay Shakhtar Donetsk for terminating his employment contract two years early.

Unfortunately, due to financial difficulties, Real Saragossa was also unable to pay Shakhtar Donetsk the compensation, and therefore could not keep its agreement with Matuzalem. For this reason, Shakhtar Donetsk initiated disciplinary proceedings

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against Matuzalem and Real Saragossa with FIFA. Based on Article 64 of the FIFA Disciplinary Code, the FIFA Disciplinary Committee found Matuzalem and Real Saragossa guilty and condemned both to pay a fine of Sfr30,000. The committee held that if such payment was not made within 90 days, Shakhtar Donetsk could demand in writing from FIFA that Matuzalem be banned from taking part in any football-related activity, and/or that six points be deducted from Real Saragossa in the domestic league championship. These measures would be imposed, without further formal decision of the FIFA Disciplinary Committee, until the total outstanding amount was fully paid.

The appeal filed by Matuzalem and Real Saragossa against the committee's decision was turned down by the Court of Arbitration for Sport on June 29 2011. Matuzalem appealed to the Supreme Court.

Second Federal Supreme Court decision

In a decision of March 27 2012 (Case 4A_558/2011), the Supreme Court first reaffirmed that the free development of an individual must be respected not only by the state, but also by monopolistic private individuals, such as sports federations. The court held that any decision of such a sports federation must be consistent with fundamental Swiss values. Although these fundamental values of public policy are not exhaustively defined in Swiss jurisprudence, one such value is the 'excessive commitment' set out in Article 27(2) of the Civil Code, which is considered by the Supreme Court as a substantial part of any moral and legal system. Thus, the violation of this principle leads to a violation of substantive public policy if personality rights are clearly and seriously violated.

Taking into consideration Article 27(2), the court found that the worldwide ban of a professional football player for an unlimited time because of his incapacity to pay a certain amount of money to his former club was a breach of substantive public policy. Instead of promoting compliance with the decision, the punishment renders payment completely impossible because the player would never be able to earn enough to pay the fine. Furthermore, such a punishment was considered unnecessary as, under the New York Convention, it would be quite easy to enforce the decision. Therefore, the Federal Supreme Court annulled the Court of Arbitration for Sport award.

Consequences for FIFA

As the Court of Arbitration for Sport decision has been set aside, that court is now in a position to render a new decision without applying Article 64(4) of the FIFA Disciplinary Code. The worldwide ban on a football player is against public policy. Whether the fine of Sfr30,000 is also against public policy, or whether it is at least contrary to mandatory Swiss law, has yet to be decided. Based on the Supreme Court's decision, there are serious reasons why such regulations are, if not contrary to public policy, at least illegal, as they are not really suitable to enforce a fine of several million euros.

As Real Saragossa did not appeal the decision to deduct points in the national championship, the court did not consider whether Article 64 of the FIFA Disciplinary Code was generally contrary to public policy. It could also have been argued that the deduction of points would not be necessary to enforce the FIFA and Court of Arbitration for Sport decisions in the football world. Therefore, the penalties imposed on the football club could also be considered to be excessive under Article 27(2) of the Civil Code. Such considerations could particularly be applied to the FC Sion case. FC Sion was punished by the FIFA Disciplinary Committee for letting six (unregistered) football players play in the Europa League and the Swiss Football League based on a decision of a lower court, which was later lifted by an upper court.

In any case, based on the Supreme Court's decision, FIFA's entire sanctioning system needs to be reviewed to determine whether it is suitable to achieve the association's goals, or whether the personality rights of the persons involved prevail. With its decision, the Supreme Court has shown that it will not always give more weight to the interests of sports federations than to those of the athletes.

Matuzalem's salary and his inability to pay the compensation clearly showed that the compensation as calculated by the Court of Arbitration for Sport, which the Federal Supreme Court considered in its first decision to be "compensation for damages only", in fact had nothing to do with the value of the player and the damage suffered by Shakhtar Donetsk.

In light of the second decision of the Supreme Court (and the fact that the court consequently discussed only damages in that decision), it may be that in future, the Supreme Court will take a closer look at the compensation to be paid in case of early termination of an employment contract pursuant to the FIFA Regulations on the Status and Transfer of Players. Even though the principle of *pacta sunt servanda* ("agreements must be kept") applies, there is no (sporting) reason why a football player should become a slave to his former football club for the rest of his life if he decides to terminate his contract early. No prevailing interest of the football world justifies such a lifelong limitation of personal and economic freedom.

Against this background, the compensation payments set out in Article 17 of the FIFA

Regulations on the Status and Transfer of Players will need to be reviewed again in light of the excessive commitment detailed in Article 27(2) of the Civil Code.

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