4A_530/2011[1]

Judgment of October 3, 2011

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Kolly,
Federal Judge Kiss (Mrs),
Clerk of the Court: Carruzzo.

Appellant,

X._____,
Represented by Mr Pascal de Preux

v.

Respondent,
Z._____,
Represented by Mr Albert von Braun

Facts:

A.
A.a X._____ (hereafter: the Athlete) is a middle distance running athlete and holds a licence issued by the [name of country omitted] Athletics Federation.

On December 8, 2008, the Appeal Commission of Z._____, a public body specialized in combating doping confirmed a September 10, 2008 decision by which the Hearing Commission of Z._____ issued a two years ban against the Athlete as from November 16, 2007 for violating anti-doping rules.

Upon appeal by the Athlete the Court of Arbitration for Sport (CAS) found that the matter was not capable of appeal in an award of October 9, 2009.

A.b In the spring of 2010 the International Association of Athletics Federation (hereafter: IAAF, according to its English acronym) entrusted Z._____ with carrying out some anti-doping tests outside competition on a target group to which the Athlete belonged.

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[1] Translator's note: Quote as X._____ *v.* Z._____ 4A_530/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

After a first unsuccessful attempt, two agents of Z._____ went to a [name of country omitted] town on May 18, 2010, in a place where the Athlete was training, with a view to having her and another long distance runner submit to an unannounced test. According to the statement of one of them, which is disputed, the Athlete would have attempted to distort the test at the time a sample of urine was taken, then she would have precipitously left the bathroom and run away after throwing into the sink the cup she had started filling.

The Hearing Commission of Z._____ provisionally banned the Athlete in a decision of June 3, 2010. It heard her for the first time on the following day, then on June 11, 2010, when it also proceeded to hear witnesses and to confront the Athlete with the two agents who had carried out the May 18, 2010 test. In a decision nr 18 of July 8, 2010 the aforesaid Commission found that the provisions relating to the refusal to submit to an anti-doping test or to unjustified absence at such a test or to the counterfeiting or attempt at counterfeiting a sample were applicable. On that basis and in view of the previous disciplinary sanction given to the Athlete as well as the suspicious character of some samples taken from her during an off-competition test carried out by the IAAF on March 10, 2010, it banned the Athlete for life.

B.

B.a On August 4, 2010 the Athlete filed an appeal with the CAS. She sent her appeal brief on the 27th of the same month. Z._____ filed its answer on October 25, 2010.

In a fax of November 9, 2010 the Appellant applied for legal aid and agreed that the matter should be submitted to a sole arbitrator. For its part the Respondent asked for a three arbitrators Panel.

The International Council of Arbitration for Sport (ICAS) granted legal aid to the Appellant in a decision of January 11, 2011. On the same day the CAS Court Office informed the parties that the dispute would be decided by a sole arbitrator whose name it indicated. On February 15, 2011 it advised them that Mr Pascal de Preux had been appointed by the ICAS as court appointed counsel for the Appellant.

A hearing was held in Lausanne on April 14, 2011. During that hearing the Arbitrator interrogated several witnesses and experts as well as the parties before closing the case.

B.b In an award of July 26, 2011 the Arbitrator found that he had jurisdiction and rejected the Athlete's appeal and confirmed the decision under appeal.

In substance, the Arbitrator held that Z._____ had exclusive jurisdiction, to the exclusion of the Athlete's National Federation, to issue a decision as to anti-doping matters in [name of country omitted]. As to the Appellant's grievance that she had not been treated fairly in front of that body, he rejected it because the full power of review of the CAS both as to the facts and the law would in any event cure the possible procedural violations committed by Z._____. The Arbitrator then assessed the evidence in the record of the arbitration to determine if the Respondent, which had the burden of proof, had satisfactorily demonstrated pursuant to the *ad hoc* rules that the Athlete had eluded the taking of a urine sample. Reaching the conclusion that it was so, he then reviewed the sanction issued by Z._____. Whilst finding that a ban for life was rigorous as it meant the end of

the Athlete's career he found that he had to uphold it in view of the circumstances of the case and because in any event he was not seized of a submission that the sanction should be reduced. The Arbitrator added that it was also consistent with well-established case law of the CAS in this field; moreover it did not seek merely to punish of the Athlete but also to preserve her health.

C.
On September 6, 2011 the Athlete filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the July 26, 2011 award. The Appellant sought legal aid for the federal proceedings and the appointment of her counsel as court appointed counsel.

The Respondent and the CAS were not invited to file an answer.

Reasons:

1.
In the field of international arbitration a Civil law appeal is possible against the awards of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[2] (Art. 77 (1) LTF[3]). Whether as to the object of the appeal, of the standing to appeal, of the time limit to appeal or with regard to the Appellant's submissions, none of these requirements of admissibility raises any problem in this case. There is accordingly no reason not to address the appeal.

2.
The Appellant firstly argues that the CAS violated her right to be heard and the principle of equal treatment of the parties within the meaning of Art. 190 (2) (d) PILA in handling her request for legal aid.

2.1
The grounds in support of that argument are quite unclear and hardly make it possible to understand its scope. Moreover the request at issue was granted and the decision in this respect was issued by the ICAS.

2.2
The Appellant appears to argue in reality that the time between the filing of her request for legal aid and the appointment of her court appointed counsel – three months – was inadequate. According to her, that circumstance, in other words the absence of counsel during that time, would have deprived her from having her case adjudicated by three arbitrators as opposed to a sole arbitrator.

It is hard to see the nexus between such grievances and the argument involved. Above all, one does not see what would have prevented the Appellant, duly assisted by counsel at the hearing on April 14, 2011, to strongly oppose her case being entrusted to the sole arbitrator by repeating her

[2] Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

[3] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

arguments as to the duration of the legal aid proceedings and to demand that a three arbitrators Panel be appointed. Yet the award under appeal finds in the following terms that the Appellant did not follow that path (p. 11 nr 58):

"At the beginning of the hearing the Arbitrator recalled the elements on the record which had led to the composition of the Panel, limited to a sole arbitrator. He also recalled the observations made by the Parties in this respect. In answer to the Arbitrator's question as to the continuation and the holding of the hearings with a Panel consisting of a sole arbitrator, the Parties answered that they did not want to raise any objections as to the composition of the Panel and the conduct of the proceedings in front of the CAS in general and agreed that the case should go on." (Emphasis supplied by the Federal Tribunal).

The Appellant does indeed deny that she raised no objections during that hearing. Yet she does so on the basis of a truncated quote of the paragraph reproduced above, whilst stopping well short of quoting the words in bold type (see appeal brief, p. 4, § 2e), which deprives her argument of any credibility. Moreover she does not state which objections would have been made specifically in that occasion, merely referring the Federal Tribunal without any other precisions to the tape recording of the hearing on April 14, 2011, which is not admissible in view of the requirement for reasons in support of an appeal against an international arbitral award (see Art. 77 (3) LTF).

It must be recalled that a party considering to be the victim of a violation of its right to be heard or of any other procedural violation must raise it immediately in the arbitral proceedings under penalty of forfeiture. It is indeed contrary to good faith to invoke a procedural violation only in the framework of the appeal against the arbitral award when the violation could have been raised during the proceedings (judgment 4A_348/2009 of January 6, 2010 at 4).

According to these principles of case law the Appellant is no longer entitled to raise the alleged procedural violation which led to legal aid being granted or of the consequences it could have had on the composition of the Panel which issued the award under appeal, because she did not act timely.

Thus the first argument is groundless.

3.

3.1

Secondly the Appellant relies on Art. 190 (2) (e) PILA to argue that the award under appeal would be inconsistent with procedural public policy, of which the right to an impartial and independent tribunal, as guaranteed by Art. 30 (1) Cst.[4] would be an integral part.

After a theoretical explanation in which she recalls the contents of that constitutional guarantee, the Appellant seeks to demonstrate that Z._____, in view of its institutional connections with the state of [name omitted] and because of the way in which its Hearing Commission conducted the

[4] Translator's note: Cst. is the French abbreviation for the Swiss Federal Constitution.

disciplinary proceedings, would not meet the requirements that case law deducted from the aforesaid guarantee.

The Appellant finally points out that the full judicial review invoked by the Arbitrator on the basis of Art. R57 of the Code of Sport Arbitration (hereafter: the Code; award at 100 to 102), would apply only to the violation of the right to be heard and not to a procedural violation of such gravity as the lack of independence or impartiality of an arbitral tribunal.

3.2
The precedent on which the Appellant relies to tie the right to an independent an impartial tribunal to procedural public policy within the meaning of Art. 190 (2) (e) PILA is not pertinent. That judgment, issued on July 20, 2007 by the Federal Tribunal in case 4A_137/2007 dealt with the enforcement of a state judgment; it is in that context that the First Civil Law Court recalled at 6.1 that the requirement of independence and impartiality of a tribunal was one of the fundamental principles within the Swiss concept of Procedural law as contemplated at Art. 27 (2) (b) PILA.

In reality the Federal Tribunal stated a long time ago that the violation of the rule requiring an arbitral tribunal to present sufficient guarantees of independence and impartiality leads to an irregular composition within the meaning of Art. 190 (2) (a) PILA (ATF 118 II 359 at 3b). This Court confirmed its view in a recent decision (ATF 136 III 605 at 3.2.1 p. 608). As to procedural public policy within the meaning of Art. 190 (2) (e) PILA the Court sees in it only an alternative guarantee which can be invoked only if none of the grievances contained in Art. 190 (2) (a to d) PILA can be taken into account (judgment 4P.105/2006 of August 4, 2006 at 5.3 and references).

It must be found that the Appellant does not argue a violation of Art. 190 (2) (a) PILA in support of her second argument but only that of Art. 190 (2) (e) PILA. In other words she raises an alternative argument when she should have raised the principal argument that was available to her. It is therefore doubtful that the matter is capable of appeal from that point of view.

3.3
Be this as it may, the argument could only be rejected even if admissible.

3.3.1 The Appellant does not challenge the independence and the impartiality of the Arbitrator appointed by the CAS who decided her appeal with “full power to review the facts and the law” to adopt the wording of Art. R57 (1), first sentence, of the Code. Neither does she argue that it would have been impossible for her, for whatever reason, to submit to the Arbitrator some evidence substantiating her thesis or a legal argument which could support it. It is therefore clear that the Appellant was able to submit her case to an arbitral tribunal meeting the requirements of case law to be assimilated to a real Court, such tribunal exercising full judicial review both as to the facts and the law. In other words, a tribunal worthy of the name handled the case *de novo* to see if the facts held against the Appellant corresponded to reality or not. It then assessed the legal consequences of the breach of the anti-doping rules which resulted in its view from the facts it had found on the basis of the evidence presented. Finally it decided on the justification of the sanction imposed on the Athlete to punish the violation.

3.3.2 According to the Appellant the full judicial review of the CAS on the basis of the aforesaid provision of the Code would apply only to the violation of the right to be heard but under no circumstances to that of the guarantees of independence and impartiality of a tribunal. In her view, Z._____ would not offer such guarantees, whether as to its appointment process or its functioning. Thus finding that full judicial review on appeal suffices would effectively turn the CAS into a sole jurisdiction with unlimited power.

In the case of the professional cyclist A._____ the Federal Tribunal was seized of a similar argument as the Appellant claimed that the CAS wanted to exercise the powers of an investigating body, a disciplinary body and the appeal body in the same proceedings. The Court rejected the argument because it did not see why the CAS, on the basis of the broad powers it is given by Art. R57 (1) of the Code, could not investigate itself the case on which it has to issue a decision on appeal when the first instance authority refused to open disciplinary proceedings. The Court also pointed out that the requirement of having two bodies or a double degree of jurisdiction does not fall within procedural public policy within the meaning of Art. 190 (2) (e) PILA (judgment 4A_386/2010 of January 3, 2011 at 6.2[5] and the case quoted). The same remarks can be made *mutatis mutandis* in this case.

Therefore the argument based on a violation of Art. 190 (2) (e) PILA could only be rejected even if admissible.

4.
In view of the foregoing this appeal was doomed from the start. Hence the Appellant's request for legal aid can only be rejected pursuant to Art. 64 (1) LTF. Notwithstanding the foregoing, in view of the Appellant's precarious financial position as it appears from the documents filed, this Court will not charge costs for the federal proceedings (Art. 66 (1) LTF). There is no issue as to the costs of the other Party as the Respondent was not asked to file an answer to the appeal.

Therefore, the Federal Tribunal pronounces:

1.
The request for legal aid is rejected.

2.
The appeal is rejected to the extent that the matter is capable of appeal.

3.
No costs shall be charged.

4.
This judgement shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS)

[5] Translator's note: English translation available at www.praetor.ch

Lausanne October 3, 2011

In the name of the First Civil Law Court of the Swiss Federal Tribunal.

The Presiding Judge:	The Clerk:
KLETT (Mrs)	CARRUZZO