



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0369/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Mohamed Esseghir

- Claimant -

represented by Mr. Kevin T. Beck, attorney at law,
Law Office of Kevin T. Beck, 259 Fourth Ave. North,
St. Petersburg, FL 33701, U.S.A.

vs.

El Geziera Basketball Club
15 Saray St., Al Gezia, AL Zamalek, 11211 Cairo, Egypt

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Mohamed Esseghir is a professional basketball player (hereinafter referred to as “the Player” or “the Claimant”).

1.2 The Respondent

2. El Geziera Basketball Club (hereinafter referred to as “the Club” or “the Respondent”) is a professional basketball club in Egypt.

2. The Arbitrator

3. On 5 March 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 30 September 2012, the Club and the Player entered into a guaranteed contract for the 2012/2013 season (the “Agreement”), whereby the latter would receive a total salary of USD 64,000 to be paid in monthly installments as follows: USD 4,000 after passing a medical examination upon arrival in Egypt; USD 4,000 on 5 November 2012; USD 8,000 on 5 December 2012; USD 8,000 on 5 January 2013; USD 8,000 on 5 February 2013; USD 8,000 on 5 March 2013; USD 8,000 on 5 April 2013; USD 8,000

on 5 May 2013; USD 8,000 on 5 June 2013.

5. The Player contends the following events occurred after his signature of the Agreement:

- On 8 October 2012, he landed in Cairo and passed the physical examination the same day.
- He then played two exhibition games and three regular season games, the last one on 10 November 2012.
- On 11 November, his agent sent him a text message stating: *“I received call from the coach and team manager and they decided to release you now with no more money and they said you got your salary for the month you stay in Egypt and I tried to push them to pay you at least more 2 months but they said no more money they will try to change your ticket to leave soon so we will go to FIBA to take your money and my money cause they don’t pay me nothing also do prepare your self to leave and I will start to contact with FIBA don’t go to practice anymore will call you afternoon ...”* As evidence of the message, he has produced a screen shot of the foregoing text, to which he replied: *“What? Seriously?”*
- He immediately called the Club’s head coach, who confirmed the Club was releasing him.
- That day, the driver who usually picked him daily to take him to the Club never arrived.
- Thereafter, he received no written confirmation of the release.
- He therefore decided to return to practice but on 15 November when he

attempted to join practice, he was denied access.

- The same day he received a phone call from the Club's manager indicating that he would be given a release in exchange for giving up his remaining salary (US 56,000). He refused.
- At the end of the same day, he called the FIBA offices¹ in Cairo to explain the situation and to request a meeting.
- On Friday, 16 November, he had a meeting at FIBA's offices where he was advised by the FIBA representative to try to go back to practice and take a lawyer with him to witness any difficulties that might arise.
- It was not easy to find a lawyer over the weekend. On Saturday 17 November, he attempted to go to the game but was denied access. He took a video recording of the event during which the head coach told him the Club had no money to pay him.
- On 18 November, he managed to hire a lawyer.
- On Monday, 19 November the Player and his lawyer headed together for the practice session but it had been cancelled. The same day, he sent an email to FIBA repeating in substance his concern that the Club had in effect terminated his contract and was not letting him practice or play but was refusing to provide him with a release unless he signed a declaration stipulating he was waiving any right to a salary. In this letter, he solicited advice from FIBA on how to proceed.

¹ Given that FIBA itself has no offices in Egypt, the Arbitrator understands this to refer to the FIBA Africa offices in Cairo, Egypt.

- On 20 November, he and the lawyer again headed for a practice session but were denied access; the head coach repeated that the reason was the Club had no money. In that relation, the lawyer who accompanied him, Mr. Mahmoud Moustafa Mahmoud Bakir, has declared in writing on 21 November 2012 “To Whom it May Concern”: *“I, Mahmoud Moustafa Mahmoud Bakir registered with the Egyptian Bar Association ... personally witnessed Mr. Mohammed Esseghir’s attempt to attend basketball practice with El Gezira Basketball team. He was refused admittance to practice in my presence and following this refusal, I asked the team coach who refused Mr. Mohamed Esseghir’s admittance for the reason of such refusal and was told that the El Gezira Club (owner of El Gezira Basketball team) did not have the funds to continue the contract with Mr. Mohamed Esseghir”.*
- On 21 November, he met again in Cairo with representatives of FIBA, in the presence of the President of the Algerian basketball federation, to explain what had happened and to show them the video and the declaration.
- This led to a settlement meeting being proposed by the Club’s President, but it only took place on 24 November, meaning that the Player had to change his plane ticket in order to prolong his stay in Cairo.
- When he met with the Club’s President and explained the situation, he was only offered an amount of USD 5,000, which he turned down with the result that the Club refused to provide him with a written release.
- On 25 November 2012, he sent another email to FIBA explaining that the Club was still refusing to pay him or provide him with a release and asking what he should do before leaving Egypt in order to obtain a release and not lose the possibility of playing for another Club if the opportunity arose.

- On 27 November 2012, deeming the Club had breached its contractual obligations, he left Egypt to return to the United States, his country of residence and of citizenship.
- *“He did not seek employment with another club because he was still under contract and had not been released. Furthermore, efforts to communicate with El Gezeira BC are today and have historically been difficult, hence [his] efforts to work through FIBA.”*

6. Despite being duly notified by the BAT of these proceedings and having been given the opportunity to reply and having been sent copies of all of the procedural instructions/orders as well as of the Player’s submissions, the Club did not participate in the proceedings and has not contested the Player’s above allegations or challenged the evidence relied on by the latter.

3.2 The Proceedings before the BAT

7. On 11 January 2013, the Player filed a Request for Arbitration in accordance with the BAT Rules and on 25 January 2013, paid EUR 2,000 as the non-reimbursable handling fee.

8. On 5 March 2013, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the Advance on Costs to be paid by the Parties as follows:

<i>“Claimant (Mr. Mohamed Esseghir)</i>	<i>EUR 4,000</i>
<i>Respondent (El Geziera BC)</i>	<i>EUR 4,000”</i>

9. In the foregoing letter, the BAT also underlined that: *“The Answer shall be filed by the **Respondent in accordance with Art. 11.2 of the BAT Rules** by no later than **Friday, 29 March 2013**”* and reminded the parties that “[...] according to Art. 14.2 of the BAT

Rules the Arbitrator may proceed with the Arbitration even if the Respondent fails to submit an Answer or to submit his Answer in accordance with Art. 11.2 of the BAT Rules”.

10. On 23 April 2013, the Claimant paid his Advance on Costs in an amount of EUR 4,000.
11. The Respondent failed to pay its portion of the Advance on Costs and to submit an Answer within the fixed deadlines or to communicate with the BAT in any manner in that connection.
12. By procedural order of 30 April 2013, the Respondent was again requested to pay its share of the Advance on Costs, within a new deadline of 15 May 2013. At the same time, the procedural order stipulated that the Respondent is “... *granted a final opportunity to file an Answer to the Request for Arbitration by no later than **Wednesday, 22 May 2013**. The Respondent is hereby given notice of the fact that, in accordance with Article 14.2 of the BAT Rules, if the Respondent fails to submit an Answer the Arbitrator may nevertheless proceed with the arbitration and deliver an award*”.
13. Despite the foregoing reminder, the Club neither paid its share of the Advance on Costs nor submitted an Answer.
14. Consequently, by procedural order of 27 May 2013, the BAT informed the Parties that in accordance with the Article 9.3 of the BAT Rules - stipulating that: “*If a party fails to pay its share, the other party may substitute for it*” - for the matter to proceed, the Claimant must substitute for the Respondent.
15. On 5 June 2013, the Claimant paid the balance of the Advance on Costs.
16. By procedural order of 11 June 2013, the Claimant was invited to indicate whether after leaving Egypt in November 2013, he had played professionally for any other Club and

thereby earned a salary during the remaining part of the 2012/2013 season.

17. On 15 June 2013, the Claimant submitted in substance that he had not played professional basketball or earned a salary during the remaining part of the 2012/2013 season after leaving Egypt, and that, although he had reached out to FIBA regarding the problem, he had not been released by the Club and therefore believed he was contractually prohibited from playing for any other entity.
18. By procedural order of 20 June 2013, the Claimant was invited to indicate on what date he had enquired with FIBA about whether the Club had formally released him and to indicate whether he had made any attempts to seek employment by another Club during the 2012/2013 season after leaving Egypt.
19. On 23 of June and 1 July 2013, the Claimant replied by submitting copies of two emails he sent to FIBA on 19 and 25 November 2012 before leaving Egypt, wherein he had informed FIBA about the Club's refusal to release him and enquired about how to address the problem.
20. By procedural order of 1 July 2013, the Claimant was informed that he had not entirely answered the questions contained in the procedural order of 20 June 2013 and was invited to complete his response with more detail.
21. On 10 July 2013, the Claimant replied by repeating in substance that he had made contact with FIBA by email before leaving Egypt about how to handle the absence of release from the Club and that he remained with the belief that he was still under contract and could not therefore seek employment with another club, in addition to the fact that communication with the Club had been and remained difficult.
22. By procedural order of 11 July 2013, the Claimant was requested to indicate what he did to obtain a release beyond the first contacts with FIBA (before leaving Egypt).
23. The Claimant did not answer the foregoing procedural order within the fixed deadline of

15 July 2013.

24. On 23 July 2013, the proceedings were closed and the parties invited to file their statements of costs.
25. On 26 July 2013, the Claimant requested to be allowed to submit further evidence in relation to his attempts to find alternative employment during the 2012/13 season.
26. On 29 July 2013, the Claimant filed his statement of costs. The Respondent did not submit any such statement.
27. By procedural order of 2 August 2013, the Respondent was given the opportunity to file comments on the Claimants' statement of costs but did not do so. In the same procedural order, the Arbitrator informed the Claimant that he *"had several opportunities to submit evidence relating to alleged attempts to seek a new club but failed to do so within the fixed deadlines and after such failure the proceedings were closed and the final award has already been drafted. Furthermore, the questions put to the Claimant previously in relation to any attempts he made to seek a new club were clear and the Claimant responded that: «He did not seek employment with another club because he was still under contract and had not been released.» Finally, there are no new circumstances or facts evoked which justify that the proceedings should be re-opened in order to admit the new evidence. For the above reasons, the Arbitrator has decided not to re-open the proceedings or admit the new documents."*

4. The Positions of the Parties

4.1 The Claimant's Position

28. The Player submits the following in substance:
 - He turned down various other opportunities to be able to sign the Agreement with the Club.

- During his time with the Club, he performed all his duties under the Agreement, whereas the Club breached its duties by, in effect, unilaterally terminating the Agreement without cause and without paying him the remaining USD 56,000 of salary guaranteed to him under the terms of the Agreement.
- Furthermore, the Club refused to provide him with a written release unless he waived his right to the guaranteed salary, which he legitimately refused to do.
- Consequently, for legal and equitable reasons, the Club owes him the foregoing principal amount, plus interest from the date of its breach of contract.
- He sought advice from FIBA before leaving Egypt in November 2012 regarding what to do about the absence of release from the Club, and remained in the belief that he was not entitled to sign with a new club due to still being under contract and therefore did not seek a new club during the remainder of the 2012/2013 season.

29. In his Request for Arbitration dated 11 January 2013, the Claimant requested the following relief:

"2. Request for Relief

The Claimant is entitled to the remaining unpaid salary, interest, costs of the arbitration, legal fees and expenses. There remains a balance of \$56,000.00 in unpaid compensation and accrued interest from the date the Respondent breached the contract. The respondent (sic) also requests that the costs of the arbitration be reimbursed and that attorney's fees be assessed against the Respondent."

4.2 Respondent's Position

30. As previously stated, despite several invitations to do so, the Club has not made any submissions in these proceedings.

5. The Jurisdiction of the BAT

31. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction ex officio, on the basis of the record as it stands².
32. Pursuant to Article 2.1 of the BAT Rules, “[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland”. Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).
33. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
34. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.³
35. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Article 14 of the Agreement, which reads as follows:

“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitively in accordance with the FAT Arbitration Rules.

The arbitrator shall decide the dispute ex aequo et bono.

Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded.”

36. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA. Also, in accordance with Article 18.2 of the BAT

² ATF 120 II 155, 162.

³ Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

Rules “Any reference to BAT’s former name ‘FIBA Arbitral Tribunal (FAT)’ shall be understood as referring to the BAT”.

37. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).
38. Although the copy of the Agreement adduced by the Player contains numbering which is partly incorrect (articles 9, 11 and 12 are missing) and article 14 of the Agreement is in different font (or at least different font size) from the rest of the Agreement, there is no evidence that the document in question was falsified in any manner, and the Club’s counsel has declared that articles 11 and 12 were deleted during the negotiations and more generally that “*The player contract I attached to the request is a true copy of the player contract Mr. Esseghir executed and relied upon*”. If the foregoing statement were untrue, it would have been easy for the Club to submit proof that the Agreement was actually different in content. However, despite having had ample opportunity to bring any such proof during these proceedings, the Club has not attempted to do so and has not contested in any manner the genuineness or validity of the Agreement filed by the Player.
39. For the above reasons, the Arbitrator finds he has jurisdiction to adjudicate the Player’s claims against the Club.

6. Discussion

6.1 Applicable Law – ex aequo et bono

40. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties

may authorize the Arbitrators to decide “en équité” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.

41. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

“Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.”

42. Article 14 of the Agreement includes a sentence providing that if and when any dispute is submitted to the BAT: *“The arbitrator shall decide the dispute ex aequo et bono”.*

43. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Player against the Club in this arbitration in front of the BAT.

44. The concept of “équité” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage⁴ (Concordat)⁵, under which Swiss courts have held that arbitration “en équité” is fundamentally different from arbitration “en droit”:

“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”⁶

45. This is confirmed by Article 15.1 of the BAT Rules in fine, according to which the Arbitrator applies *“general considerations of justice and fairness without reference to any particular national or international law”.*

⁴ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

⁵ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁶ JdT 1981 III, p. 93 (free translation).

46. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

47. Despite having ample opportunity to make submissions, the Respondent did not contest the Player's allegations as to the facts of his claim, nor did it challenge the evidence adduced in that connection.

48. Furthermore, on their face, the content of the Agreement, the content of the screenshots of the text messages exchanged between the Player and his agent on 11-12 November 2012, as well as the written declaration of 21 November 2012 by the Player's Egyptian lawyer, all confirm the reality of the Claimant's allegations as to the facts. There is no indication or evidence on record that would lead the Arbitrator to conclude that the Player is being untruthful in any manner.

49. For the above reasons, the Arbitrator finds that the Player has established the existence of a contractual debt of the Club towards him of USD 56,000, corresponding to the outstanding salary payments due to him by the Club under the terms of his fully guaranteed Agreement.

50. The principle of the debt and of the Club's liability having been established, the questions which remain are whether (i) the Player had the duty to mitigate, if so, (ii) whether he made any efforts to do so and (iii) if he made no effort, what are the consequences.

51. In keeping with BAT jurisprudence, the Arbitrator finds that the Player had a duty to mitigate damages, particularly since he left Egypt to return home early in the 2012/2013 season (at the end of November 2012), when there was still plenty of time to seek a new contract.

52. In fairness, a player that has the possibility of seeking a new club cannot just sit back and rely on the right to be paid a guaranteed salary by his/her previous club for the

remainder of a season if the latter has *de facto* terminated the contract and is refusing to maintain the player on its team.

53. Based on the evidence adduced and bearing in mind that the Player has the burden of proving the efforts he made and the steps he undertook to obtain a release and to find a new club, the Arbitrator considers that the efforts the Player made to cope with the situation when the Club refused to provide him with a written release are insufficient.
54. He did enquire twice with FIBA in November 2012 shortly before leaving Egypt about how to address the problem, but he did so in relatively general terms and without making a formal request for FIBA to intervene in obtaining a release.
55. Moreover, the Player did not file any evidence of having ever enquired again with FIBA after returning home at the end of November 2012 and he does not contend having made any effort to seek another club.
56. In that connection, the Arbitrator finds that the Player's allegation that he thought he remained bound by his prior contract for the rest of the season is not defensible in fairness, since - as a professional player with an agent - he could and should have known that if the Club itself refused to keep him on its team and considered the Agreement to be terminated and he deemed the Club's unilateral termination to be unjustified, a procedure was available to seek a release via FIBA.
57. In addition, he had plenty of time both to apply for a release and to look for a new club within the season.
58. For the above reasons, the Arbitrator finds that the Player did not meet his duty to mitigate damages.
59. The question remains by how much his compensation should be reduced as a result.
60. In that relation, the Arbitrator finds that given the salary he was earning with the Club, his profile as a player and the time he had at hand to cope with the situation, he most

probably could have obtained his release and found a new Club with a similar salary within a couple of months of reaching home at the end of November 2012, i.e. for about half the season underway at least.

61. Consequently, the Arbitrator finds it fair that in the circumstances his outstanding salary guaranteed under the Agreement be reduced *ex aequo et bono* by 50% for not meeting his duty to mitigate the damage, meaning that the principle amount he will be awarded is USD 28,000 (50% of USD 56,000).
62. Finally, although the Agreement does not expressly regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time.
63. Therefore, the Arbitrator finds it appropriate to award interest at a rate of 5% per annum, in line with BAT jurisprudence.
64. In the circumstances of this case, the Arbitrator finds it fair that the interest run on the amount of USD 28,000 from 25 of November 2012 onwards, when according to the evidence adduced the Club confirmed that it would not maintain the Player on its team or pay him his outstanding salaries.

7. Costs

65. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
66. On 19 September 2013 - considering that pursuant to Article 17.2 of the BAT Rules

“the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised - the BAT President determined the arbitration costs in the present matter to be EUR 8,000.00

67. Considering that the Claimant largely prevailed in his claim, it is fair that the fees and costs of the arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as make a contribution to those of the Claimant.
68. Given that the Claimant paid advances on costs of EUR 8,000 as well as a non-reimbursable handling fee of EUR 2,000 (which will be taken into account when determining the Claimant's legal fees and expenses), while the Club failed to pay any advance on costs, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:
 - (i) The Club shall pay EUR 8.000.00 to the Claimant, being the amount of costs advanced by him. .
 - (ii) The Club shall pay to the Claimant EUR 7,000 (2,000 for the non-reimbursable fee + 5,000 for legal fees) representing the amount of his legal fees and other expenses. The total amount awarded is not exceeding the maximum compensation stipulated in Article 17.4 of the BAT Rules for cases of this value.

8. AWARD

For the reasons set forth above, the Arbitrator decides as follows:

- 1. El Geziera Basketball Club shall pay Mr. Mohamed Esseghir USD 28,000 as damages, plus interest at 5% per annum on such amount from 25 November 2012 onwards.**
- 2. El Geziera Basketball Club shall pay Mr. Mohamed Esseghir an amount of EUR 8,000.00 as reimbursement for his arbitration costs.**
- 3. El Geziera Basketball Club shall pay Mr. Mohamed Esseghir an amount of EUR 7,000 as a contribution to his legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 24 September 2013.

Quentin Byrne-Sutton
(Arbitrator)