

COMPARISON / ANALYSIS

South Africa vs Senegal – 2017

South Africa vs Ghana - 2021

**Why South Africa's 2021
Appeal Will Not Succeed.**

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COMPARISON / ANALYSIS

SOUTH AFRICA v SENEGAL - 12 NOVEMBER 2017

v

SOUTH AFRICA v GHANA - 14 NOVEMBER 2021

2016 – Summary - South Africa v Senegal:

In 2017, SAFA's appeal would have succeeded if it went to CAS under Article 77(3) of the 2017 FIFA Disciplinary Code, using the *ubi lex voluit dixit, ubi noluit tacuit* (if the law means it, it says it) principle, but the Association decided not to pursue it because it did not want to be the recipient of a manipulated outcome. None of FIFA's rules catered for match manipulation prior to 2018.

2021 - Summary - South Africa v Ghana:

Unlike in 2017, when the FIFA World Cup Organizing Committee took the decision without the necessary explicit constitutional authority to order a replay, the 2022 rules have now been changed to include match manipulation and authority to adjudicate match manipulation matters was given to the FIFA Disciplinary Committee exclusively.

Overall Summary:

SAFA should not have made such a public spectacle of this challenge because the chances of success were remote from the very start. It seems to have misinterpreted FIFA's practice of dealing with match manipulation (FIFA's replay decision was linked directly to betting activity during that game as demonstrated by the 2016/17 case).

Even the revised regulations do not make provision for a match replay and, if the 2017 decision was applied, the legal principle of *ubi lex voluit dixit, ubi noluit tacuit* (if the law means it, it says it) would apply and pose another hurdle to the replay request.

Appealing the decision of the FIFA Disciplinary Committee would be fruitless at CAS level because CAS has repeatedly stated that it allows for a wide discretion for FIFA to take its decisions based on its own rules unless it has seriously violated a fundamental principle of law. This can only change if that discretion has been abused.

As FIFA is based in Switzerland, it is subject to Swiss law in the making of its regulations. *"In Swiss law, it is generally accepted that an association may impose disciplinary sanctions upon its members if they violate the rules and regulations of the association. The jurisdiction to impose such sanctions is based upon the freedom of associations to regulate their own affairs. The association is granted a wide discretion to determine the violations which are subject to sanctions, and to define the kind and the measure of the sanction. In a different context, this wide discretion is referred to as 'the margin of appreciation'."*¹

In my view, an appeal to CAS is unlikely to succeed as the decision of the FIFA DC falls within that margin of appreciation, unless there is a concerted effort to get CAS to redefine manipulation in the manner that Ace Ncobo's assessment has done.

¹ CAS 2005/C/976 & 986 Fédération Internationale de Football Association (FIFA) & World Antidoping Agency (WADA), 21 April 2006

SOUTH AFRICA v SENEGAL (12 November 2016)

On 6 September 2017, (SA v Senegal), the FIFA World Cup Organizing Committee invoked Article 3(3)(o) of the 2018 FIFA World Cup Regulations to order a replay of the match played on 12 November 2016. The Regulation states the following in respect of the jurisdiction of the FIFA World Cup Organizing Committee:

- o) dealing with any other aspect of the FIFA World Cup™ **that is not the responsibility of any other body** under the terms of these Regulations or the FIFA Statutes.

Article 76 of the 2017 edition of the FIFA Disciplinary Code states that:

76 General jurisdiction

The FIFA Disciplinary Committee is authorised to sanction any breach of FIFA regulations **which does not come under the jurisdiction of another body**.

Article 77 of the 2017 edition of the FIFA Disciplinary Code states that:

77 Specific jurisdiction

The Disciplinary Committee is responsible for:

- a) sanctioning serious infringements which have escaped the match officials' attention;
- b) rectifying obvious errors in the referee's disciplinary decisions;
- c) extending the duration of a match suspension incurred automatically by an expulsion (cf. art 18, par. 4);
- d) pronouncing additional sanctions, such as a fine.

Since Article 76 stipulates that the DC is responsible for sanctioning any breach of the regulations which does not come under the jurisdiction of another body, and Article 77(b) allows the DC to rectify the referee's obvious errors as it occurred in the SA v Senegal match, let us look at whether sanctioning match manipulation then resided with the FIFA World Cup Organizing Committee (FWCOC) in 2017.

Article 3 of the FWCOC's jurisdiction in the 2018 FIFA World Cup Regulations states the following:

3 Organising Committee for the FIFA World Cup™

1. The FIFA Organising Committee for the FIFA World Cup™, appointed by the FIFA Executive Committee, shall be responsible for organising the FIFA World Cup™ in accordance with the FIFA Statutes.
2. The FIFA Organising Committee may, if necessary, appoint a bureau and/or one or more sub-committee(s) to deal with emergencies. Any decision taken by the bureau or the sub-committee(s) shall come into effect immediately but shall be subject to confirmation by the plenary committee at its next meeting.
3. The responsibilities of the FIFA Organising Committee include but are not limited to:
 - a) supervising general preparations and deciding on the competition format, the draw and the formation of groups and sub-groups;
 - b) fixing the dates and venues of the matches in the final competition as well as in the preliminary competition whenever associations fail to agree;
 - c) determining the match schedule and kick-off times for the final competition;

- d) choosing the stadiums and training grounds for the final competition in accordance with the HA after consultation with the LOC;
- e) choosing the official football and stipulated technical material for the final competition;
- f) approving the choice of the WADA-accredited laboratory that will carry out the doping analyses as proposed by the FIFA Anti-Doping Unit;
- g) appointing FIFA Match Commissioners for the final competition of the FIFA World Cup™;
- h) reporting cases in relation to article 6 of these Regulations which fall under the jurisdiction of the FIFA Disciplinary Committee to the latter for its deliberation;
- i) replacing associations that have withdrawn from the FIFA World Cup™;
- j) judging protests and taking appropriate steps to verify their admissibility, with the exception of protests concerning the eligibility of players, which are dealt with by the FIFA Disciplinary Committee (cf. art. 8 par. 2 and 3 as well as art. 15 par. 3);
- k) deciding cases of participating member associations failing to adhere to the time limits and/or the formal requirements for submitting the necessary documents;
- l) dealing with cases of abandoned matches (cf. Law 7 of the Laws of the Game) in accordance with these Regulations;
- m) deciding on the rescheduling of matches due to extraordinary circumstances;
- n) settling cases of force majeure;
- o) dealing with any other aspect of the FIFA World Cup™ that is not the responsibility of any other body under the terms of these Regulations or the FIFA Statutes.

4. The decisions taken by the FIFA Organising Committee and/or its subcommittee(s) are final and binding and not subject to appeal.

It bears noting that the 2017 edition of the FIFA Disciplinary Code did not contain a reference to match manipulation and neither did the 2018 FIFA World Cup Regulations. So, the general provisions of Articles 76 and 77 of the FIFA Disciplinary Code should have been peremptory as the 2018 FIFA World Cup Organizing Committee had no explicit authority in the rules to sanction a breach of the 2018 FIFA World Cup Regulations. The legal principle of *ubi lex voluit dixit, ubi noluit tacuit* (if the law means it, it says it) should have applied.

Since the 2017 FIFA World Cup Regulations made no reference to match manipulation, it is clear that FIFA arbitrarily invoked Article 3(3)(o) to assume jurisdiction over that matter. My view is that the decision was disciplinary in nature because it had a material effect on the standing of South Africa in the FIFA World Cup preliminary stages. Such decisions fell within the scope of responsibility of the FIFA Disciplinary Committee in terms of Article 77(3) of the 2017 FIFA Disciplinary Code.

SUMMARY OF THE 2017 CASE:

In 2017, SAFA's appeal would have succeeded if it went to CAS under Article 77(3) of the 2017 FIFA Disciplinary Code, using the *ubi lex voluit dixit, ubi noluit tacuit* (if the law means it, it says it) principle, but the Association decided not to pursue it because it did not want to be the recipient of a manipulated outcome. None of FIFA's rules catered for match manipulation prior to 2018.

SOUTH AFRICA v GHANA (14 November 2021)

First, we must contend with Law 5 from the Laws of the Game. This is an immutable law that not even FIFA can change since IFAB is now an independent entity strictly in control of the Laws of the Game.

Here is an extract from Law 5:

2. Decisions of the referee

Decisions will be made to the best of the referee's ability according to the Laws of the Game and the 'spirit of the game' and will be based on the opinion of the referee, who has the discretion to take appropriate action within the framework of the Laws of the Game.

The decisions of the referee regarding facts connected with play, including whether or not a goal is scored and the result of the match, are final. The decisions of the referee, and all other match officials, must always be respected.

The referee may not change a restart decision on realising that it is incorrect or on the advice of another match official if play has restarted or the referee has signalled the end of the first or second half (including extra time) and left the field of play or abandoned the match. However, if at the end of the half, the referee leaves the field of play to go to the referee review area (RRA) or to instruct the players to return to the field of play, this does not prevent a decision being changed for an incident which occurred before the end of the half.

Except as outlined in Law 12.3 and the VAR protocol, a disciplinary sanction may only be issued after play has restarted if another match official had identified and attempted to communicate the offence to the referee before play restarted; the restart associated with the sanction does not apply.

If a referee is incapacitated, play may continue under the supervision of the other match officials until the ball is next out of play.

In 2019 FIFA added Article 18 (match manipulation) to its Disciplinary Code. This Article states:

18 Manipulation of football matches and competitions

1. Anyone who directly or indirectly, by an act or an omission, unlawfully influences or manipulates the course, result or any other aspect of a match and/or competition or conspires or attempts to do so by any means shall be sanctioned with a minimum five-year ban on taking part in any football-related activity as well as a fine of at least CHF 100,000. In serious cases, a longer ban period, including a potential lifetime ban on taking part in any football-related activity, shall be imposed.
2. If a player or official engages in behaviour described in paragraph 1, the club or association to which the player or official belongs may be sanctioned with the forfeiting of the match in question or may be declared ineligible to participate in a different competition, provided the integrity of the competition is protected. Additional disciplinary measures may be imposed.
3. Persons bound by this Code must cooperate fully with FIFA at all times in its efforts to combat such behaviour and shall therefore immediately and voluntarily report to the secretariat of the Disciplinary Committee any approach in connection with activities and/or information directly or indirectly related to the possible manipulation of a football match or competition as described above. Any breach of this provision shall be sanctioned with a ban of at least two years on taking part in any football related activity and a fine of at least CHF 15,000.

4. The Disciplinary Committee shall be competent to investigate and adjudicate all conduct on and off the field of play in connection with the manipulation of football matches and competitions.

After the conclusion of the SA v Ghana WCQ, SAFA filed a protest in terms of Article 14 of the 2022 FIFA World Cup Regulations and/or Article 46 of the 2019 FIFA Disciplinary Code. Article 14 states the following:

14 Protests

1. For the purpose of these Regulations, protests are objections of any kind related to events or matters that have a direct effect on matches organised in the preliminary competition of the FIFA World Cup 2022™, including but not limited to the state of and markings on the pitch, accessory match equipment, eligibility of players, stadium installations and footballs.
2. Unless otherwise stipulated in this article, protests shall be submitted in writing to the FIFA Match Commissioner within two hours of the match in question and followed up with a full written report, including a copy of the original protest, to be sent by email to the FIFA general secretariat within 24 hours of the end of the match, otherwise they shall be disregarded.
3. Protests regarding the eligibility of players selected for matches in the preliminary competition shall be submitted in writing to the FIFA Match Commissioner within two hours of the match in question and followed up with a full written report, including a copy of the original protest, to be sent by email to the FIFA general secretariat within 24 hours of the end of the match, otherwise they will be disregarded.
4. Protests regarding the state of the pitch, its surroundings, markings or accessory items (e.g. goals, flagposts or footballs) shall be made in writing to the referee before the start of the match by the head of delegation of the team lodging the protest. If the pitch's playing surface becomes unplayable during a match, the captain of the protesting team shall immediately lodge a protest with the referee in the presence of the captain of the opposing team. The protests shall be confirmed in writing to the FIFA Match Commissioner by the head of the team delegation no later than two hours after the match.
5. Protests against any incidents that occur during the course of a match shall be made to the referee by the team captain immediately after the disputed incident and before play has resumed, in the presence of the captain of the opposing team. The protest shall be confirmed in writing to the FIFA Match Commissioner by the head of the team delegation no later than two hours after the match.
6. **No protests may be made about the referee's decisions regarding facts connected with play.** Such decisions are final and not subject to appeal, unless otherwise stipulated in the FIFA Disciplinary Code. The same applies for any potential issue concerning the use of goal-line technology (GLT) and the video assistant referee (VAR) system.
7. If an unfounded or irresponsible protest is lodged, the FIFA Disciplinary Committee may impose a fine.
8. **If any of the formal conditions of a protest as set out in these Regulations are not met, such protest shall be disregarded by the competent body.** Notwithstanding the above, the FIFA Disciplinary Committee remains competent to prosecute any disciplinary infringement ex officio, as established in the FIFA Disciplinary Code.

9. FIFA shall pass decisions on any protests lodged, subject to the exceptions stipulated in these Regulations, the FIFA Statutes or any other FIFA regulations.

Article 46 of the 2019 FIFA Disciplinary Code also regulates *Protests* as follows:

46 Protests

1. Associations and their clubs are entitled to lodge protests. Protests must reach the Disciplinary Committee in writing, indicating the relevant grounds, within 24 hours of the end of the match in question.
2. The 24-hour time limit cannot be extended. For the sake of the smooth running of the competition, the corresponding competition regulations may shorten the protest deadline accordingly.
3. The protest fee is CHF 1,000. It must be paid when the protest is lodged and is reimbursed only if the protest is admitted in full.
4. A protest is admissible only if it is based on:
 - a) an ineligible player's participation in a match as a consequence of that player not fulfilling the conditions defined in the relevant FIFA regulations;
 - b) an unfit field of play, as long as the referee was informed as soon as the problem was reported or observed (whether in writing before the match, or orally by a team captain, in the presence of the captain of the opposing team, during the match);
 - c) an obvious error by the referee as defined in article 9 of this Code, in which case the protest may be directed only at the disciplinary consequences of the referee's obvious error.

Article 9 of the 2019 edition of the FIFA Disciplinary Code provides for the following:

9 Decisions of the referee

1. Decisions taken by the referee on the field of play are final and may not be reviewed by the FIFA judicial bodies.
2. In cases where a decision by the referee involves an obvious error (such as mistaking the identity of the person penalised), the FIFA judicial bodies may only review the disciplinary consequences of that decision. In cases of mistaken identity, disciplinary proceedings may, in accordance with this Code, be opened only against the person who was actually at fault.
3. A protest against a caution or a sending-off from the field of play after two cautions is admissible only if the referee's error was to mistake the identity of the player.
4. In cases of serious misconduct, disciplinary action may be taken even if the referee and his assistants did not see the event in question and were therefore unable to take any action.
5. The provisions of this Code relating to protests against match results affected by a referee's decision that was an obvious violation of a rule remain applicable.

Given the provisions of Article 9 of the 2019 edition of the FIFA Disciplinary Code, the likelihood of a replay was remote from the onset.

According to FIFA, SAFA did not meet the admissibility requirements as highlighted above in Article 14.2, Article 14.5 or Article 14.8 of the 2022 FIFA World Cup Regulations or Article 46 of the 2019 FIFA Disciplinary Code. Either the captain of Bafana Bafana should have lodged a protest during the match (Article 14.5) or SAFA should have used another rule to lodge its protest. But, it was clear that these provisions do not allow for an order to replay a match.

Given that FIFA “got away” with the replay decision in the 2017 SA v Senegal match, the rules appear to have been tightened and the principle that the referees decision is final has been reaffirmed. Even the 2020 version of the FIFA Code of Ethics reaffirms the approach that the FIFA Disciplinary Committee is solely responsible for sanctioning match manipulation.

Whilst it was possible under the 2018 edition of the FIFA Code of Ethics to lodge a protest with the FIFA Ethics Committee, this authority has now been fully transferred to the FIFA Disciplinary Committee to the exclusion of all other bodies.

Article 29 of the 2020 FIFA Code of Ethics states:

29 Manipulation of football matches or competitions

1. Persons bound by this Code are forbidden from being involved in the manipulation of football matches and competitions, and shall immediately report to the Ethics Committee any approach in connection with activities and/or information directly or indirectly related to the possible manipulation of a football match or competition.
2. The competence to adjudicate on all conduct related to the manipulation of football matches or competitions, both on and off the field of play, remains reserved for the FIFA Disciplinary Committee
3. The investigatory chamber shall transfer to the Disciplinary Committee any information obtained during its investigatory activity that might be related to conduct committed by any persons bound by this Code in violation of this article.

News reports indicate that SAFA may appeal to the Court of Arbitration for Sport (CAS) if no joy is forthcoming from FIFA. So, it is instructive to note CAS jurisprudence in this regard. In a ruling that serves as a precedent in CAS, it stated that *“the Panel declined to look at the video [of a referee making a mistake]; it seemed to the Panel that to do so would be to embark on a review of a purely technical “field of play” decision, which would be an illegitimate exercise, absent some evidence of bad faith in the making of the decision.”*²

In the same case, CAS also noted that *“The Panel should not be understood to be saying that video evidence should never be permitted. However, before such evidence is permitted, there must be some factual basis justifying its admission...”*

In the same ruling, CAS states:

“But there is a more fundamental reason for not permitting trial, by television or otherwise, of technical, judgmental decisions by referees. Every participant in a sport in which referees have to make decisions about events on the field of play must accept that the referee sees an incident from a particular position, and makes his decision on the basis of what he or she sees. Sometimes mistakes are made by referees, as they are by players. That is an inevitable fact of life and one that all participants in sporting events must accept. But not every mistake can be reviewed. It is for that reason that CAS jurisprudence makes it clear that it is not open to a player to complain about a “field of play” decision simply because he or she disagrees with that decision.”

² CAS ad hoc Division (O.G. Salt Lake City) 02/007, Korean Olympic Committee (KOC) / International Skating Union (ISU), award of 23 February 2002

SUMMARY OF THE 2021 CASE:

Unlike in 2017, when the FIFA World Cup Organizing Committee took the decision without the necessary explicit constitutional authority to order a replay, the rules have now been changed to include match manipulation and authority to adjudicate match manipulation matters was given to the FIFA Disciplinary Committee exclusively.

Appealing to CAS beyond the FIFA Appeal Committee is also not likely to be successful.

OVERALL SUMMARY:

SAFA should not have made such a public spectacle of this challenge because the chances of success were remote from the very start.