Arbitration CAS 2021/A/8008 Lukas Grozurek v. Pafos FC, award of 7 November 2022

Panel: Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

Football
Contractual disputes: validity of a contract
Existence of an employment contract
Res judicata
Principle of culpa in contrahendo

1. **Following article 1 para. 1 of the Swiss Code of Obligations, in order for a contract to be concluded, the mutual expression of intent by the parties is required. Such intent can be deduced from the wording of the document in question but this wording has to be put into context. In any case, in order for an employment contract to be concluded, the parties have to agree on the *essentialia negotii*. The *essentialia negotii* of an employment contract are the date, the parties' names, the subject of the contract, the duration of the relationship, the player's remuneration, both parties' signatures and the obligation of the parties to each other. If only secondary terms are still being negotiated between the parties a contract is deemed as having been concluded.**

2. **Only the operative part of a decision is vested with *res judicata* effect and not its reasoning.**

3. **Under Swiss law *culpa in contrahendo* means the negligent/intentional breach of pre-contractual duties. A finding of *culpa in contrahendo* requires the existence of contractual negotiations, trust that deserves protection, a breach of a duty, harm, a causal connection, and fault. At the contractual negotiation stage it includes – regardless of whether a contract is concluded later on – certain duties of care, consideration, good faith, and of providing information, including the duty to negotiate seriously and in a fair manner.**

I. PARTIES

1. Lukas Grozurek (the "Appellant" or the "Player"), is a football player of Austrian nationality.

2. Pafos FC (the "Respondent" or the "Club", together with the Appellant the "Parties") is a Cypriot football club, based in Paphos and affiliated to the Cyprus Football Association.

II. FACTUAL BACKGROUND

3. On 28 August 2020, Mr Shvets Mykyta Yuriyovich ("Mr Mykyta"), who acted on behalf of the Player, and Mr Pavel Gognidze, who was the Respondent's CEO (the "Respondent's CEO"), started discussions on a transfer of the Player to the Respondent.

4. At that time, the Player had a valid employment contract with Sportklub Sturm Graz ("SK Sturm Graz").

5. Mr Mykyta and the Respondent's CEO mainly communicated with each other via WhatsApp. On 29 August 2020, the Respondent's CEO sent an offer with the subject *"Proposal of contract to Mr. Grozurek"* (the "First Offer") to Mr Mykyta. Mr Mykyta informed the Respondent's CEO that the Player would not accept the First Offer and the negotiations continued.

6. During the negotiations Mr Mykyta voice messaged and wrote to the Respondent's CEO that a Turkish club was also interested in the Player. On 29 August 2020, Mr Mykyta sent to the Respondent's CEO a document named *"Proposal" between the Player, SK Sturm Graz and Tuzlaspor A.S. and Mustafa Eraydin"* (the "Turkish Offer").

7. On 30 August 2020, the Respondent's CEO sent a second (the "Second Offer") and a third offer (the "Third Offer") to Mr Mykyta. He asked him to check both options with the Player and his agents. Later that day, Mr Mykyta sent back the Third Offer to the Respondent's CEO which contained the Player's signature and the following hand note on the bottom:

   "I, Lukas Grozurek, confirm hereby that I am willing to accept the present proposal on the explicit condition that the contract will be fully to my satisfaction".

8. The Respondent's CEO then sent Mr Mykyta a draft of the employment contract. After Mr Mykyta asked for a signature bonus, the Respondent's CEO sent another draft of the employment contract including a sign-on fee (the "Draft Employment Contract").

9. Later that day, the Respondent's CEO sent to Mr Mykyta the Standard Employment Contract (the "CFA") and flight tickets for the Player and one of his agents to fly from Vienna to Paphos on 1 September 2020.

10. On 31 August 2020, the Player's agent consulted his sports lawyer on the Draft Employment Contract, as well as on the CFA and added comments and changes to both documents. Mr Mykyta then forwarded the comments that the Player's agent made to the Respondent's CEO.

11. On 1 September 2020 around midday, the Respondent's CEO sent back his comments on the amendments made by the Player's agent on the Draft Employment Contract and on the CFA to Mr Mykyta.

12. About one hour later, the Respondent's CEO informed Mr Mykyta, the Player and the Player's agent that the Club had decided not to proceed with the negotiations on a possible employment of the Player. At this moment, the Player and his agent were at the airport ready to board the plane to Paphos.

13. On 2 September 2020, the Player sent a notification to the Respondent stating that, with the Third Offer, the Parties entered into a binding contract. He requested to be compensated for breach of contract. The Respondent rejected the arguments of the Player.

III. PROCEEDINGS BEFORE THE FIFA DISPUTE RESOLUTION CHAMBER

14. On 30 October 2020, the Player lodged a claim (the "Claim") before the FIFA Dispute Resolution Chamber (the "FIFA DRC") against the Club, requesting EUR 114,000 plus 5% interest since 2 September 2020 and, alternatively, EUR 112,500, plus 5% interest since 2 September 2020. He further requested compensation and/or aggravated damages up to 6 months' salaries and the imposition of a transfer ban on the Club.

15. The Club requested the DRC to dismiss all allegations made by the Player and to dismiss the Claim in its entirety. Subsidiarily, it requested that the DRC reduced any amount of compensation. The Club requested that the administrative, procedural costs and expenses be imposed on the Player.

16. On 6 May 2021, the FIFA DRC issued the following decision (the "Appealed Decision"):

    1. The claim of the Claimant, Lukas Grozurek, is rejected.

17. The grounds of the Appealed Decision were communicated to the Parties on 7 May 2021.

18. In its decision, the FIFA DRC assessed whether the Parties were legally bound by an employment contract or not. To do so, it recalled that any party claiming a right on the basis of an alleged fact bears the burden of proof. It further stated that the evidence would be considered with free discretion (*cf.* art. 12 Rules Governing the Procedure of the Players' Status Committee and the Dispute Resolution Chamber). The FIFA DRC stated that, on 29 August 2020, the Respondent sent an offer to the Player which contained the *essentialia negotii*. The FIFA DRC further noted that the offer included a handwritten note. It considered the documents being ambiguous. In the opinion of the FIFA DRC, the handwritten note indicated that the Parties were still undergoing discussions about a possible new employment relationship. According to the FIFA DRC, a further indication of the ongoing discussions between the Parties was that, after 29 August 2020, the Respondent sent to the Player a draft of an employment contract in a *.docx* format with a higher salary than the salary in the First Offer and containing comments in the track changes function. The FIFA DRC concluded that the Player did not establish beyond reasonable doubt that the Parties agreed upon all necessary terms to conclude a valid and binding contract.

19. Referring to its jurisprudence on the burden of proof, the FIFA DRC recalled finally that it had to be *"very careful with accepting documents, other than the employment contract duly signed by the parties, as evidence for the conclusion of a contract"* (Appealed Decision, para. 14). Thus, the FIFA DRC rejected the Claim.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 28 May 2021, the Appellant filed its Statement of Appeal and requested the CAS to:

    1. *Uphold the present appeal and set aside the decision of the FIFA DRC.*

    2. *Decide that a duly binding contract had been reached between the Parties.*

    3. *Decide that the Respondent breached the contract.*

    4. *Award the Appellant EUR 114,000, plus 5% interest since 02/09/2020 as compensation for breach of contract by the Respondent.*

    5. *Alternatively to the request for relief in paragraph 4 above, award the Appellant EUR 112,500, plus 5% interest since 02/09/2020, as compensation equal to the damages and/or financial losses of the Claimant who, as a result of the Respondent's misrepresentations and/or bad faith and/or inducement, was led into rejecting a final and binding (in case he accepted it) offer from club Tuzlaspor AS.*

    6. *Order the Respondent to pay the procedural and all other costs arising out of the present proceedings and to reimburse the Appellant with the CAS Court Office Fee.*

21. On 3 June 2021, the CAS Court Office notified the appeal to the Respondent and invited it to comment on certain procedural issues such as the number of arbitrators and the language of the proceedings.

22. On 7 June 2021, the Respondent agreed with the appointment of a Sole Arbitrator and with English as the language of the proceedings.

23. On 28 June 2021, within the extended time limit, the Appellant filed his Appeal Brief requesting the CAS to:

    A. *Set aside the FIFA DRC decision.*

    B. *Accept that the Parties concluded a binding contract.*

    C. *Accept that the Respondent is liable for breach of the contract and order it to pay compensation equal to the value of the agreed contract mitigated by his new remuneration until 31/05/2021, i.e. a compensation of 149,000.03 or any other compensation CAS considers fair and just.*

    D. *Alternative to D* [sic] *above, order the Respondent to pay compensation equal to the value of the final and binding (in case he had accepted it) offer from club Tuzlaspor AS, mitigated by his new remuneration until 31/05/2021 or any other compensation CAS considers fair and just.*

    E. *In the alternative, to decide that the Parties concluded a pre-contract and the reason why they did not reach a final contract was due to the Respondent's breach of the principle of culpa in contrahendo. And for this reason order the Respondent to pay the compensation mentioned in C or D above, or any other compensation CAS considers fair and just.*

F. *All legal and procedural costs arising out of the present proceedings to be decided in his favour and against the Respondent and order the Respondent to pay a contribution to his legal fees.*

G. *Order the Respondent to reimburse the Court Office fee which the Appellant paid for the filing of the statement of appeal.*

24. On 23 August 2021, the Respondent submitted its Answer within the extended time limit requesting the CAS to:

a) *Dismiss all the allegations put forward by Mr. Lukas Grozurek;*

b) *Dismiss the present appeal and confirm the decision rendered by the FIFA Dispute Resolution Chamber on 6 May 2021 in totum;*

c) *Order Mr. Lukas Grozurek to bear any and all CAS administrative and procedural costs, which have already been incurred or may eventually be incurred in connection with this arbitration; and*

d) *Grant Pafos Football Club Ltd. a contribution towards its legal fees and other expenses incurred in connection with these proceedings, pursuant to Article R64.5 of the CAS Code, in an amount to be fixed by the Sole Arbitrator at its discretion but not lower than CHF 15,000.00 (fifteen thousand Swiss Francs).*

25. On 31 August 2021, the Respondent stated it did not consider it necessary to hold a hearing and reiterated its request for the production of evidence. On 1 September 2021, the Appellant stated that he preferred a hearing to be held.

26. On 6 September 2021, the Parties were informed that a hearing would be held by video-conference. With regard to the Respondent's request for document production in its Answer, the Sole Arbitrator ordered the Appellant to submit his employment contract with the SK Sturm Graz and the termination thereof. The other requests for document production by the Respondent were denied.

27. On 22 September 2021, the Appellant submitted within the extended deadline, the Player's employment contract with SK Sturm Graz and the termination thereof in German.

28. On 6 October 2021, referring to art. R29 CAS Code, the CAS Court Office consulted the Respondent whether it agreed with the submission of the documents in German. The Respondent asked for the Appellant to be ordered to present an English translation of its employment contract with SK Sturm Graz and the respective termination, at the Appellant's expenses.

29. On 14 October 2021, the Parties were informed of the Sole Arbitrator's decision that the Respondent should bear the burden of translating the documents and incur in the associated costs, should it wish to rely on its contents to support its argument. To avoid discussion of the translation's quality, the Respondent was ordered to submit a certified translation.

30. On 29 October 2021, within the extended deadline, the Respondent submitted the certified

translation of the relevant documents.

31. On 30 November 2021, the CAS Court Office sent the Order of Procedure to the Parties which was signed on the same day by the Appellant and on 7 December 2021 by the Respondent.

32. On 13 December 2021, a hearing was held by video-conference. At the outset of the hearing, all Parties confirmed that they did not have any objections as to the constitution and composition of the Arbitral Tribunal. In addition to the Sole Arbitrator and of Mrs Lia Yokomizo, CAS Counsel, the following persons attended the hearing:

For the Appellant:

- Mr Loizos Hadjidemetriou as Legal Counsel
- Mr Harmjan Schilperoort as Witness
- Mr Shvets Mykyta Yuriyovich as Witness

For the Respondent:

- Mr Victor Eleuterio as Legal Counsel
- Mr Victor Hugo Almeida as Legal Counsel

33. As a preliminary remark, the Appellant's legal counsel informed that the Player would not be attending the hearing.

34. At the hearing, the Parties were given a full opportunity to present their case, submit their arguments, and answer any of the questions from the Sole Arbitrator. At the end of the hearing the Parties stated that their procedural rights had been respected fully.

V. THE POSITION OF THE PARTIES

35. The following outline of the Parties' positions is of mere illustrative character and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator, has, nonetheless, carefully considered all the written and oral submissions made by the Parties, even if no specific reference to those submissions is made in the following summary.

a. The Position of the Appellant

36. The Appellant stated that the FIFA DRC falsely assumed that the Appellant accepted the First instead of the Third Offer. The FIFA DRC thus based its reasoning on a false assumption of the facts. The Appellant submitted that due to this misinterpretation, the FIFA DRC found that the Parties were still negotiating the Player's salary when, in reality, the agreed salary in the Third Offer corresponds to the agreed salary in the Draft Employment Contract.

37. The Appellant referred to the finding of the FIFA DRC according to which the offer included the *essentialia negotii*, which should be considered final, as this finding was not challenged by the Respondent. In any event, referring to case CAS 2019/A/6463 & 6464, the Appellant argued that the signature of the Parties was not a prerequisite for the *essentialia negotii* to be given. Thus, if all *essentialia negotii* were laid out and only certain secondary terms have not yet been agreed on, a valid and binding agreement can be reached. The Appellant concluded that the proposal submitted by the Respondent, namely the Third Offer, contained all *essentialia negotii*.

38. The Appellant argued that by signing and sending back the Third Offer, he accepted the Respondent's proposal. He argued that the handwritten note did neither affect his acceptance nor the validity of the Parties' agreement. He remarked that before making an agreement conditional, the agreement has to be accepted. Thus, only the binding nature of an agreement can be conditional, but not its acceptance. According to the Appellant, the handwritten note confirmed the Player's acceptance of the Respondent's proposal.

39. In a next step, the Appellant argued that his acceptance was unconditional. He referred to art. 2 para. 1 and art. 11 para. 1 of the Swiss Code of Obligations ("SCO") according to which a binding contract could not be made conditional on secondary terms or any administrative formalities. According to the Appellant, the handwritten note was, however, made due to administrative reasons. During the hearing, the Player's agent, Mr Harmjan Schilperoort, acting as a witness, stated that the note was included due to the Player's past bad experiences. In addition, the Player wrote it without consulting a lawyer and, thus, without legal advice.

40. In any event, should the Sole Arbitrator conclude that the acceptance of the binding nature was conditional, the Appellant submitted that it was conditional on the Player's satisfaction of the contract to be signed. This condition was satisfied as the Draft Employment Contract, in its form of 1 September 2020, was to the Appellant's satisfaction. The Appellant accepted the explanations given by the Respondent's CEO and therefore accepted the Draft Employment Contract.

41. In the event that the Sole Arbitrator would not consider the condition to be satisfied, the Appellant submitted that this was due to the Respondent's breach. The Club prevented the Player from signing the Draft Employment Contract by deciding not to employ him.

42. The Appellant further submitted that the Respondent's withdrawal from a binding agreement (*i.e.* the Third Offer) without a legitimate reason constituted a breach of contract.

43. Turning to the Draft Employment Contract, the Appellant argued that it constituted a new offer from the Respondent which contained all *essentialia negotii*. The Appellant argued that the *essentialia negotii* were accepted as can be noted from the tracked changes (duration of the employment, the Appellant's role, his remuneration, benefits and allowances). Thus, the Appellant waived his right to potentially refuse to sign an employment contract. The Appellant concluded that the Draft Employment Contract constituted a new, autonomous and unconditional agreement which included all of the *essentialia negotii*.

44. If the Sole Arbitrator were to find that no binding agreement had been concluded, the Appellant

submitted that the principle of *culpa in contrahendo* should apply. Referring to case CAS 2016/A/4489, the Appellant claimed that a pre-contract had been concluded between the Parties. However, the Respondent did not negotiate in good faith and abandoned the negotiations without a compelling reason. In the hearing, the Appellant's legal counsel referred to the Respondent's argumentation that it merely exercised its right not to contract. The Appellant's legal counsel stated that the Respondent's CEO did not mention this during the negotiations but, on the contrary, gave the impression that the Club wanted to contract the Player. In addition, the Appellant pointed out that when it had contacted the Respondent on 2 September 2020, the Respondent stated that no contract was concluded due to the Player's behaviour. Before the FIFA DRC, the Respondent allegedly changed its position and argumentation.

45. The Appellant submitted that he is entitled to compensation according to art. 17 FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") equal to the residual value of the contract with the Respondent for the season 2020-2021 (*i.e.* EUR 181,500) mitigated by the remuneration obtained by the Player until the end of May 2021 (*i.e.* EUR 32,492). The Appellant was employed by Sportklub Niederösterreich St. Pölten ("SKN St. Pölten") from September 2020 until 27 January 2021 and by FC Dinamo Batumi until 31 May 2021. The Appellant claimed for a compensation equal to EUR 149,000.03. Subsidiarily, the Appellant submitted to be entitled to a compensation equal to the value of the Turkish Offer minus the remuneration of its new clubs until the end of May 2020 [*sic.* 2021].

b. The Position of the Respondent

46. The Respondent argued that the Parties did not conclude a valid and binding employment agreement due to the following reasons. First, the Respondent stated that, with the Third Offer, the Parties did not intend to conclude an employment contract but only make a step in this regard. This mutual intention became evident from the wording of the Third Offer (*e.g. "offer"* and *"proposal"*). According to the Respondent, the handwritten note of the Player also indicated that the intent was not to conclude an employment contract, as the Third Offer was made conditional to a contract. In addition, the Respondent referred to the Parties' behaviour highlighting that after having accepted the Third Offer, Mr Mykyta forwarded a WhatsApp message to the Respondent's CEO in which either the Player or his agent stated that *"Everything clear with Sturm Graz. I have every necessary document, so we can sign all important documents <u>after we sign the Paphos contract</u>. So it will be a free transfer. But <u>the important thing is that everything is fine with the contract of Paphos</u>. <u>They have to change the things that Harmja sends to you</u>"* [emphasis added by the Respondent]. Finally, the Respondent submitted that the on-going negotiations on the Draft Employment Contract demonstrate the Parties' intention that, with the Third Offer, no employment agreement was concluded.

47. Secondly, referring to art. 151 SCO, the Respondent submitted that no valid and binding employment agreement was concluded as the precedent condition of the handwritten note (*i.e.* the contract being fully to the Player's satisfaction) was not implemented. The Respondent submitted that some of the most essential terms of the Draft Employment Contract and of the CFA were still being negotiated and thus, despite having accepted certain amendments, neither

of the documents was ready to be signed. The Respondent rebutted the Appellant's argument that he would have later accepted the terms of the Draft Employment Contract and the CAF by means of the letter dated 13 September 2020. The Respondent further argued that it withdrew from the negotiations before concluding an employment contract. Therefore, the Player could not retroactively construct a binding contract.

48. Thirdly, the Respondent argued that the Parties tacitly agreed on the condition of the Player's contract with SK Sturm Graz being terminated. The Player's contract with SK Sturm Graz was discussed at the very beginning of the negotiations and the Respondent's CEO raised the issue again on 31 August 2021, to which Mr Mykyta answered that everything would be agreed on and that the Player would be able to leave free of charge. Submitting this condition was not implemented, the Respondent argued that no valid and binding employment contract was concluded.

49. Subsidiarily, the Respondent argued that the Third Offer did not contain all *essentialia negotii* of an employment contract. Firstly, the Respondent rejected the Appellant's argument that the FIFA DRC's finding should be considered *res judicata*. Referring to SFT 4A_536/2018, dated 16 March 2020, the Respondent argued that only the operative part of the decision is vested with *res judicata* effect but not the reasoning. The Respondent stated that the section mentioned by the Appellant of the Appealed Decision is not reflected in the operative part. In accordance with the *de novo principle* in art. R57 CAS Code, the Respondent concluded that the Sole Arbitrator can freely analyse whether the *essentialia negotii* were present.

50. Secondly, the Respondent submitted that for an employment contract, the signatures of the player and the club constitute an *essentialia negotii*. The Respondent based its arguments on arts. 11 and 13 SCO in combination with art. 2 para. 2 FIFA RSTP and Nr. 1.1 of the FIFA Circular 1171, dated 24 November 2008, as well as case CAS 2015/A/3953 & 395 para. 1, case CAS 2017/A/5164 para. 4 and case CAS 2018/A/5628 para. 81. However, according to the Respondent, case CAS 2019/A/6463 & 6464, relied upon by the Appellant, cannot be applied as it relates to a transfer agreement. As none of the three offers was signed by the Respondent's CEO, the Respondent concluded that the Third Offer did not contain all *essentialia negotii*.

51. Thirdly, the Respondent argued that according to the FIFA Circular 1171, the listing of the club's obligation towards the player and vice versa is a minimum requirement for an employment contract. Referring to case CAS 2018/A/5682, the Respondent submitted that the importance of the FIFA Circular 1171 had been recognised by CAS. The Respondent argued that the Third Offer only contained the Respondent's financial obligations towards the Player, but no other obligations for either side. Thus, according to the Respondent, the Third Offer did not include all the *essentialia negotii* of an employment contract

52. Still subsidiarily, the Respondent argued that it did not act in contradiction of the principle *culpa in contrahendo*. It argued that it acted in good-faith, transparently and expeditiously by *e.g.* stating at the beginning of the negotiations with Mr Mykyta that the Club was simultaneously negotiating with another similar player. The Respondent further argued that the Appellant also held parallel negotiations, *e.g.* with a Turkish club. With regard to the Turkish Offer, the Respondent argued that the First Offer was rejected immediately by the Player and that the

Second and Third Offers were submitted to the Player after the Turkish Offer had already expired. The Respondent thus argued that the Appellant rejected the Turkish Offer at his own will and risk. With regard to the Appellant's contract with SK Sturm Graz, the Respondent sustained that it was terminated after the negotiations between the Parties. Therefore, the Respondent concluded that the withdrawal from its negotiations was the exercise of its freedom not to contract and the argument of *culpa in contrahendo* should be dismissed.

53. With regard to the compensation requested by the Appellant, the Respondent argued that any compensation, if found due, had to be mitigated by the highest salary negotiated by the Player with either SK Sturm Graz, SKN St. Pölten or SK Dinamo Batumi, for the period from 1 September 2020 until 30 June 2021. With regard to the financial loss allegedly suffered in connection with the Turkish Offer, the Respondent submitted that the Third Offer was only presented after the Turkish Offer had already expired. Moreover, the Respondent submitted that the Appellant did not meet the burden of proof to demonstrate that it rejected the Turkish Offer because of the negotiations with the Respondent. The Respondent further rejected the argument that a compensation was due based on liability arising out of *culpa in contrahendo*. It held that only the negative damage is to be compensated and in the case at hand, the Appellant did not have any losses or expenses, as he has never been unemployed and did not discharge the burden of proof with regard to the Turkish Offer. In the hearing, the Respondent further submitted that, in any event, any due compensation should be reduced to the amounts claimed by the Appellant before the FIFA DRC, which were lower than those requested by the Appellant before the CAS.

VI. JURISDICTION OF CAS

54. The question of whether CAS has jurisdiction to hear the present dispute must be assessed on the basis of the *lex arbitri*. Given that CAS has its seat in Switzerland and that when the present arbitration proceedings were initiated, the Appellant did not have its domicile in Switzerland, the provisions of chapter 12 of the Swiss Private International Law Act ("PILA") apply, pursuant to art. 176 para. 1 PILA. In accordance with art. 186 para. 1 PILA (reflected in art. R55 of the CAS Code), CAS has the power to decide upon its own jurisdiction. This general principle of Kompetenz-Kompetenz is a mandatory provision of the *lex arbitri* and has been recognized by CAS for a long time (see *e.g.* CAS 2004/A/748, para. 6).

55. Art. R47 para. 1 CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide (…) and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

56. Based on art. 22 lit. b in combination with art. 24 para. 1 RSTP, the DRC is competent to hear employment-related disputes between a club and a player of an international dimension. Art. 57 and 58 FIFA Statutes recognise CAS as an independent judicial authority to which appeals against final decisions passed by FIFA's legal bodies shall be lodged.

57. It is undisputed between the Parties that CAS has jurisdiction to adjudicate the matter at hand. In addition, the jurisdiction of CAS to hear the appeal filed by the Appellant against the Appealed Decision is confirmed by both Parties' signature of the Order of Procedure. The Sole Arbitrator is satisfied that, according to art. R47 CAS Code and art. 58 para. 1 FIFA Statutes, CAS has jurisdiction to hear this case and decide on the matter.

VII. ADMISSIBILITY

58. Art. R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. (…)".

59. According to art. 58 para. 1 FIFA Statutes, appeals *"(…) shall be lodged with CAS within 21 days of receipt of the decision in question".*

60. The Sole Arbitrator notes that the Statement of Appeal was filed on 28 May 2021, within the 21-day time limit after the notification of the grounds of the Appealed Decision to the Parties and contained the requirements set by art. R48 CAS Code. In addition, no questions regarding the admissibility of the Appeal have been raised by either Party.

61. It follows that the Appeal is admissible.

VIII. APPLICABLE LAW

62. Art. R58 of the CAS Code reads as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

63. According to art. 57 para. 2 of the FIFA Statutes (June 2019 edition), the provisions of the CAS Code shall apply to the proceedings. In addition, the CAS shall primarily apply the various regulations of FIFA and additionally, Swiss law.

64. The Sole Arbitrator therefore rules that the present dispute is to be solved according to the corresponding FIFA regulations, in particular FIFA RSTP (June 2019 edition), and that Swiss law shall apply subsidiarily.

IX. MERITS

a. Issues of the Dispute

65. The main issue in dispute is whether the Parties entered into a valid and binding employment contract. In that regard, both Parties focus on whether an employment contract was concluded with the Third Offer. The Sole Arbitrator will first examine whether an employment relationship was established with the Third Offer (*cf.* points *b* and *c* below). If this is not the case, the Sole Arbitrator will examine whether the Parties did so with the Draft Employment Contract (*cf.* points *d* and *e* below). If an employment relationship between the Parties is denied, the Sole Arbitrator will then examine whether the Respondent breached its obligation arising from the negotiations between the Parties, namely the Appellant's argument concerning the principle of *culpa in contrahendo (cf.* point *f* below*).*

b. Intent of the Parties regarding the Third Offer

66. In order for a contract to be concluded, the mutual expression of intent by the parties is required (*cf.* art. 1 para. 1 SCO). Thus, the Sole Arbitrator will examine which was the expressed intent of the Parties and whether their intents corresponded with regards to the *essentialia negotii*. The Respondent submitted that, with the Third Offer, the Parties intended to make a step towards an employment contract, but that, by accepting the Third Offer, the Parties did not intend to automatically enter into said employment contract, nor to bind themselves in an employment relationship. The Appellant submitted that, with the Third Offer, the Parties intended to automatically enter into an employment contract.

67. To determine the Respondent's expressed intent, the Sole Arbitrator first refers to the wording of the Third Offer sent by the Respondent. In the document's headline it is written *"Offer"* and its subject is *"Proposal of contract to Mr. Grozurek"*. It is further written that the Respondent would hereby *"(…) like to propose a permanent transfer with the following conditions (…)"*. The wording indicates that the Respondent was interested in a transfer of the Player. However, to evaluate whether it was the Respondent's intent to conclude a contract directly or to make a first step in that direction, the wording has to be put into context. The Sole Arbitrator turns his attention to the WhatsApp conversation between Mr. Mykyta and the Respondent's CEO, where before having sent the Third Offer, the Respondent's CEO writes *"I am just write [siq.] that we are interested*"., *"Maybe instead of Kuzi [another player] we'll take him [the Player]"* (WhatsApp Conversation, hereinafter the "WhatsApp Conversation"). Thereby, the Respondent's CEO indicated an interest in general negotiations on a possible transfer of the Player. After the Player returned the signed Third Offer, the Respondent's CEO sent the Draft Employment Contract to the Appellant and negotiations on its terms began (*e.g.* WhatsApp Conversation: *"I will read and answer the contract tonight")*. During these negotiations the Respondent's CEO wrote the following messages to Mr Mykyta: *"And signing on Wednesday (…)"* (WhatsApp Conversation) and *"Hands ["Hands" being a verbalisation of a hand-emoji] haven't reached yet"* (WhatsApp Conversation). Through the Draft Employment Contract and the exchanged messages, the Respondent expressed that in addition to the Third Offer, an employment contract had to be signed for an employment relationship to be established. Considering the above, the Sole Arbitrator finds that the Respondent could not be found to have intended to automatically enter

into an employment contract solely by sending the Third Offer.

68. The Sole Arbitrator now turns his attention to the Player's expressed intent. In the handwritten note on the Third Offer, the Player wrote that he is *"(…) willing to accept the present proposal on the explicit condition that the contract will be fully to my satisfaction"*. The wording of the handwritten note indicates that the Player was of the opinion that a further contract would be concluded. Accordingly, after having sent back the Third Offer, Mr Mykyta forwarded to the Player and his agent the Draft Employment Contract to which they made amendments. The Appellant's opinion that a further contract would be needed can also be seen from the following message that Mr Mykyta forwarded to the Respondent's CEO: *"They [the Respondent] have to change the things Harmjan sends to you [amendments to the Draft Employment Contract]. So everything could finished [siq.] fast there (…)"* (WhatsApp Conversation). Thereby, the Player also expressed his understanding that, for an employment relationship to be established, a contract had to be concluded as the Third Offer would not be sufficient to do so.

69. Turning to the WhatsApp messages sent by Mr Mykyta, the Sole Arbitrator notes that after the Respondent's CEO sent the Third Offer, Mr Mykyta wrote that he was waiting for the signed offer by the Player *"to show that he was informed and agrees with the terms"* (WhatsApp Conversation). However, after having sent back the Third Offer, Mr Mykyta asked the Respondent's CEO to prepare the agency agreement *"(…) in case of birth of contract (…)"* (WhatsApp Conversation). Furthermore, once the Respondent informed Mr Mykyta that they would not continue with the negotiations regarding the Player, Mr Mykyta wrote to the Respondent's CEO *"(…) allegedly looking at him there on the night <u>before</u> departure to <u>sign the contract</u> (…)"* (emphasis added by the Sole Arbitrator, WhatsApp Conversation). Lastly, Mr Mykyta did not object to the Respondent's CEO's messages indicating that *"hands haven't reached yet"*. Therefore, also through the WhatsApp messages sent by Mr Mykyta, the intent was expressed that the Third Offer was not sufficient to establish an employment relationship and that the signing of a contract was required to that effect.

70. The Sole Arbitrator notes that the Player's contractual situation with SK Sturm Graz also needs to be taken into consideration. The Player terminated the contract with SK Sturm Graz on 16 September 2020 with immediate effect, thus more than two weeks after signing the Third Offer. In the hearing, Mr Schilperoort stated that the Player and himself wanted to terminate the Player's employment contract with SK Sturm Graz as soon as the Player had signed a new employment contract. The fact that the Player did not terminate the employment contract with SK Sturm Graz when signing the Third Offer indicates, that the Player was aware that he had not entered into an employment agreement yet, by signing the Third Offer. It was also communicated to the Respondent that the Player still had a contractual relationship with SK Sturm Graz after signing the Third Offer through a forwarded WhatsApp message in which the Player's agent wrote *"Everything clear with Sturm Graz. I have every necessary document with me, so we can sign all important documents <u>after</u> we signed the Paphos contract* (…) (emphasis added by the Sole Arbitrator, WhatsApp Conversation).

71. Based on the above, the Sole Arbitrator concludes that the expressed mutual intent of the Parties with the Third Offer was not to automatically enter into an employment relationship, but rather to enter into one in the future, subject to the signing of a proper employment

contract, based on the terms of the Third Offer. Thus, the Third Offer does not constitute a valid and binding employment contract.

c. *Essentialia Negotii* of the Third Offer

72. In any case, the Sole Arbitrator wishes to emphasise *obiter dictum*, that in order for an employment contract to be concluded, the parties have to agree on the *essentialia negotii*. In the case at hand, the Sole Arbitrator has the competence to decide on the *essentialia negotii* as only the operative part of a decision is vested with *res judicata* effects but not its reasoning (*cf.* SFT 4A_536/2018, dated 16 March 2020).

73. According to CAS jurisprudence (CAS 2015/A/3953 & 3954, preamble, para. 4; CAS 2018/A/5628, para. 81) and taking into consideration the FIFA Circular 1171, the *essentialia negotii* of an employment contract are the date, the parties' names, the subject of the contract, the duration of the relationship, the player's remuneration, both parties' signatures and the obligation of the parties to each other. If only secondary terms are still being negotiated between the Parties a contract is deemed as having been concluded.

74. As a preliminary remark, the Sole Arbitrator states that the contract in question is an employment contract. Thus, the *essentialia negotii* of a transfer agreement are not of relevance in the present case. By determining whether the Third Offer included all *essentialia negotii,* the Sole Arbitrator notes that the duration of the relationship, namely the conditions for the automatic extension of the employment relationship continued to be the subject of negotiation in the Draft Employment Contract. With regard to the salary, the Sole Arbitrator notes that apart from the salary for the season 2020/2021, the Third Offer did not specify whether the mentioned sums were net or gross sums. In the hearing, Mr Schilperoort confirmed that, in the Third Offer, it was not stipulated whether the bonuses were gross or net. With regard to the sums to be paid, the Sole Arbitrator further notes that the Parties continued to negotiate the form of payment for the Player's salary for the 2020/2021 and 2021/2022 season and the conditions for the payment of bonuses to the Player. Furthermore, the Third Offer only contained the Respondent's financial obligations towards the Player, but no other obligations for either side. Thus, it did not include a provision containing the mutual obligations of each Party, which constitutes part of the *essentialia negotii* of a contract. Lastly, the Respondent did not sign the Third Offer. Therefore, the Sole Arbitrator concludes that the Third Offer did not include all *essentialia negotii* of an employment contract.

75. To conclude, the Sole Arbitrator finds that it was not the Parties' expressed intent to enter into an employment contract with the Third Offer. In addition, *obiter dictum*, the Third Offer did not include all *essentialia negotii* of an employment contract.

d. Intent of the Parties regarding the Draft Employment Contract

76. As no employment relationship was established between the Parties with the Third Offer, the Sole Arbitrator will evaluate whether the Parties did so with the Draft Employment Contract.

77. To determine the Parties' intent regarding the Draft Employment Contract, the Sole Arbitrator refers to its wording. Its headline is *"Employment Contract"* followed by the subtitles *"Appointment and Duration"* and *"Terms and Employment"*. At the bottom there is a space reserved for the Parties' signatures as well as for the signature of two witnesses. Thus, the wording of the Draft Employment Contract indicates that the Parties intended to enter into an employment relationship with the Draft Employment Contract.

This conclusion is supported by the WhatsApp Conversation between the Respondent's CEO and Mr Mykyta, *e.g.* by the message of the Respondent's CEO: *"And signing on Wednesday and the first workout in the evening on Wednesday (…)"* which indicates that as soon as the Draft Employment Contract was signed, the Player would start training with the team.

78. Thus, the Sole Arbitrator concludes that, with the Draft Employment Contract, the Parties did intend to enter into an employment relationship.

e. *Essentialia Negotii* of the Draft Employment Contract

79. In a next step, the Sole Arbitrator will evaluate whether the Draft Employment Contract contained all the *essentialia negotii* of an employment contract.

80. As laid out above according to CAS jurisprudence (CAS 2015/A/3953 & 3954, preamble, para. 4; CAS 2018/A/5628, para. 81) and taking into consideration the FIFA Circular 1171, the *essentialia negotii* of an employment contract are the date, the parties' names, the subject of the contract, the duration of the relationship, the player's remuneration, both parties' signatures and the obligation of the parties to each other.

81. On 30 August 2020, the Respondent's CEO sent to Mr Mykyta the Draft Employment Contract by WhatsApp. During the hearing, Mr Schilperoort explained that he included the comments of his sports law lawyer in the Draft Employment Contract and sent the document back to the Respondent. The comments were on whether the agreed salary sums were net or gross, the number of instalments for the payments to be made regarding the seasons 2021/2021 and 2021/2022, the automatic extension of the employment contract, the period of payment (due dates of the instalments), as well as a question on the bonuses. In addition, the Appellant's agent added comments to the CFA on the consequences in case of payment default by the Club, the jurisdiction clause and the applicable law. These amendments were important for the Appellant, as becomes evident from the WhatsApp message Mr Mykyta forwarded to the Respondent's CEO, in which the Players agent wrote that *"(…) They have to change the things that Harmjan [Mr Schilperoort] sends to you.(…)"* (WhatsApp Conversation). Thus, when the Appellant sent his comments back to the Respondent, no consent had been reached yet. This is in line with the Respondent's CEO's WhatsApp message *"Hands haven't reached yet"* (WhatsApp Conversation) sent shortly afterwards.

82. Even though it remained unclear what the Respondent's CEO meant by this particular message, it becomes clear that the Respondent's CEO agreed on certain but not all of the amendments made by the Player, *e.g.* he did not agree with the proposed instalments for the payment regarding seasons 2020/2021 and 2021/2022, with the bonuses, and also added a general

question on art. 1.4.1 of the Draft Employment Contract. In addition, the Respondent rejected all amendments the Appellant had made to the CFA.

83. Subsequently, the Respondent's CEO informed the Appellant that the Respondent was no longer interested in further negotiations for a possible transfer of the Player. Considering the above, the Sole Arbitrator concludes that the Parties never reached an agreement on relevant points of the employment contract. In addition, the Sole Arbitrator wishes to emphasise that the signature of the Parties and the contract date were missing as well. Thus, the *essentialia negotii* were not present.

84. The Appellant submitted that with his letter dated 13 September 2020, he had accepted the last amendments made by the Respondent to the Draft Employment Contract. The Sole Arbitrator finds that this argumentation does not stand as the Respondent terminated the negotiations beforehand. In any event, the contract date and both parties' signatures were still missing.

85. Thus, at the moment the Respondent withdrew from the negotiations, neither the Parties' mutual expression of intent regarding the *essentialia negotii* of an employment contract, were present.

86. This leads to the conclusion that no employment relationship was established between the Parties.

f. Breach of the Principle *Culpa in Contrahendo*

87. The Appellant submitted that due to the negotiations with the Respondent, he rejected the Turkish Offer. He further sustains that the Respondent abandoned the negotiations without a compelling reason, thereby breaching the principle *culpa in contrahendo*.

88. Under Swiss Law *culpa in contrahendo* means the negligent/intentional breach of pre-contractual duties. A finding of *culpa in contrahendo* requires the existence of contractual negotiations, trust that deserves protection, a breach of a duty, harm, a causal connection, and fault. The breach of a duty in particular derives from the principle of good faith. At the contractual negotiation stage it includes – regardless of whether a contract is concluded later on – certain duties of care, consideration, good faith, and of providing information, including the duty to negotiate seriously and in a fair manner (CAS 2016/A/4489).

89. The Sole Arbitrator notes that, with regard to the Turkish Offer, the Appellant did not prove that his rejection of said offer was due to the Respondent's behavior. In any event, the Sole Arbitrator emphasizes that the Turkish Offer was valid until the date of 29 August 2021. The Respondent's CEO sent the Second and Third Offer on 30 August 2021, thus after the Turkish Offer had already expired.

90. In addition, the Sole Arbitrator recalls that for a compensation to be awarded based on the principle *culpa in contrahendo*, a damage/harm is required. In the case at hand however, the Appellant was not unemployed due to the interruption of the negotiations. He terminated his contract with SK Sturm Graz on 16 September 2020 and entered into an employment contract

with SKN St. Pölten from 17 September 2020 on, followed by an employment with FC Dinamo Batumi. Thus, the Appellant's argumentation in that regard does not stand.

91. The Sole Arbitrator therefore concludes that the requirements for a breach of the principle *culpa in contrahendo* are not present.

g. Conclusion

92. In light of the foregoing, the Sole Arbitrator holds that the Appeal filed by the Appellant against the Respondent with regard to the Appealed Decision is rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Lukas Grozurek on 28 May 2021 against Pafos FC concerning the Decision of the FIFA DRC of 6 May 2021 is rejected.

2. (…).

3. (…).

4. All other or further requests or motions for relief are dismissed