



Arbitration CAS 2021/A/8367 Club Africain v. Gilmerson dos Santos Mota, award of 10 October 2022

Panel: Mr Rui Botica Santos (Portugal), Sole Arbitrator

Football

Termination of the employment contract with just cause by the player

Interpretation of a contractual clause

Tacit agreement to FIFA's jurisdiction

Independent arbitration tribunal

Duty of the employer regarding bank details of the employee

Compensation payable to a player

Interpretatio contra stipulatorem

Interpretation of a rule

Principle of mitigation

1. The first element to be considered regarding the interpretation of a contractual clause is its wording, which shall be interpreted in accordance with the general principles governing the interpretation of expressions of will.
2. A party which did not raise any objection to the jurisdiction of FIFA while it could have done so in the course of the first instance procedure before FIFA, can no longer object to the jurisdiction of FIFA in a subsequent CAS procedure.
3. In application of article 22(b) of the FIFA Regulations on the Status and Transfer of Players (RSTP), an *“independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs”*. The burden of proof lies on the party alleging of the competence of said national arbitration tribunal.
4. The collection and preservation of the employees' bank details is part of the elementary duties of a responsible employer, especially since the bank details for the payment of the salaries of their employees is always a crucial information. It is therefore unconceivable to think that a club would be prevented from paying a player's salaries simply because said player would not have included his bank details in the formal notice.
5. In line with Articles 337b and 337c of the Swiss Code of Obligations (SCO), a player is entitled to the reparation of the damages suffered pursuant to the principle of the positive interest. Compensation for breach must be aimed at reinstating the injured party to the position it would have been, had the contract been fulfilled to its end. It shall be assessed in light of the guidelines of Article 17 RSTP and the special

circumstances of this case, taking into consideration (i) the remaining duration of the employment agreement; and (ii) the applicable mitigating factors, if any.

6. In application of the principle of *interpretatio contrat stipulatore*, the lack of clarity in the drafting of a contractual clause should not benefit the strong party to the contractual relationship, otherwise the respect for the general principle of contractual good faith would be at stake.
7. Following the Swiss Federal Tribunal jurisprudence, there is no reason to depart from the plain text of a provision under review, unless there are objective reasons to think that it does not correspond in all respects to the true meaning of the provision. Where the text is not entirely clear and there are several possible interpretations, the true scope of the provision will need to be narrowed by taking into account all the pertinent factors, such as its relationship with other legal provisions and its context (systematic interpretation), the goal pursued, especially the protected interest (teleological interpretation), as well as the intent of the legislator as it is reflected, among others, from the drafting history of the piece of legislation in question (historical interpretation).
8. When assessing which contracts should be taken into account for the purpose of mitigation, CAS panels have established that the focus must be on the “income earned” by the player in the relevant period and should not be restricted to the remuneration of the “subsequent contract”. As specified in the FIFA Commentary on the RSTP, mitigation should be construed by “*any new contract for the period during which the terminated contract would have been in force had it been allowed to run its full term*”.

I. PARTIES

1. Club Africain (the “Appellant” or the “Club”) is a Tunisian professional football club with its registered head office in Tunis, affiliated to the Tunisian Football Federation (the “TFF”), which is a member association of the Fédération Internationale de Football Association (the “FIFA”). FIFA is the international governing body of football and exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials, and players belonging to its affiliates. FIFA is an association under Articles 60 et seq. of the Swiss Civil Code with headquarters in Zurich, Switzerland.
2. Gilmerson dos Santos Mota (the “Respondent” or the “Player”) is a Brazilian professional football player, born on 27 February 1992 in Salvador da Bahia, Brazil, currently playing for the Union Sportive de Ben Guerdane, at Bengardane, Tunisia.
3. The Club and the Player are collectively referred to as the “Parties”.

II. INTRODUCTION

4. The Appellant is challenging the decision rendered by the FIFA Dispute Resolution Chamber (the “FIFA DRC”) on 18 August 2021 (case ref. FPSD-2436), which grounds were communicated to the Parties on 9 September 2021 (the “FIFA Decision” or the “Appealed Decision”), in accordance with Article R55 of the Code of Sports-related Arbitration (the “CAS Code”).
5. The dispute between the Parties concerns the legal consequences in result of the Player’s unilateral termination of the employment agreement with the Club.

III. FACTUAL BACKGROUND

6. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award (the “Award”) only to the submissions and evidence it considers necessary to explain its reasoning.

A. The employment relation between the Parties

7. The Parties concluded an employment agreement valid from 1 July 2020 (the “Employment Agreement”). The Parties disagree as to the initial term of the Employment Agreement, which is one of the issues to be analysed in this Award.
8. Pursuant to Article 4 of the Employment Agreement, and in addition to certain match/title bonus and agreed allowances, the Player was entitled to receive the following monthly remuneration:
 - Season 2020/21* – USD 5,000
 - Season 2021/22* – USD 6,000
 - Season 2022/23* – USD 7,000

*According to TMS the season ends on 30 June of the relevant year.

9. The other relevant contractual provisions of the Employment Agreement are the following:

Article 3: Duree du Contrat

“Le présent contrat est conclu entre les parties contractantes pour une durée de deux (2) saisons sportives plus une saison supplémentaire en option en faveur du CLUB AFRICAÏN.

Il commence à courir à compter du 01/07/2020 et prend fin le 30/06/2023, sauf si le dernier match officiel d'une compétition nationale auquel prend part le club a lieu après le 30 juin, auquel cas le contrat prend fin à la date de survenance du match en question".

[Original wording in French].

Article 3 – Duration of the Contract

"This contract is concluded (...) for a period of two (2) sports season plus one additional optional season in favour of the CLUB AFRICAIN.

It starts from 01/07/2020 and end on 07/01/2023 unless the last official match of a national competition in which the club takes part occurs after June 30th, in which case the contract ends on the date of occurrence of the match in question".

[Free English translation by the Sole Arbitrator, since the translation made by the Appellant was disputed].

Article 5 – Obligations of the Professional Player

"The player (...) undertakes to comply (...) with the provisions:

- (...)
- *Play the matches by doing his best when is selected;*
- *Respond to the invitation of the coach, at the times and places decided by the coach, to take part in training, groupings and official or friendly competitions in which the club participates, in Tunisia or abroad;*
- (...)
- *Respect the club's internal rules;*
- *To adhere to the statutes, regulations and decisions of FIFA, the confederation, the national association and the professional league.*
- (...)".

Article 14 – Dispute Settlement Procedure

"In the case of a dispute or/and dispute arising from the execution and/or interpretation of the clauses of the contract, the parties are obliged to give priority to all means and procedures with a view to an amicable settlement of the dispute.

In the case of failure, the dispute is submitted exclusively to the dispute resolution bodies of the F.T.F".

[The English translation of the above clauses was done by Appellant and the Respondent did not raise any objection to the translation produced].

10. In March 2020, due to the Covid-19 pandemic and the suspension of the football competitions in Tunisia, the TFF decided to suspend official matches of the 2019/20 Ligue Professionnelle 1 until August 2020 and the 2020/21 season was expected to start in late October 2020.
11. As a result of the suspension of the football competitions, the Parties agreed that the Player would remain at his previous club Union Sportive de Ben Guerdane until the end of 2019/20 season and join the Club as of October 2020.
12. In October 2020, the Player joined the Club's pre-season training. However, the Player noticed that the Club had not registered him before the TFF, since it was serving a transfer ban.

B. The dispute between the Parties – The unilateral termination of the Employment Agreement by the Player

13. As of December 2020, the Player no longer received any payment from the Club.
14. On 2 March 2021, the Player travelled from Tunisia to Brazil.
15. On 9 March 2021, the Player sent a default notice to the Club requesting it to proceed with his registration before the TFF and to comply with the payment of his outstanding salaries in the amount of USD 10,000, corresponding to his January and February 2021 salaries. The Player granted the Club a 15-day deadline to comply and underlined that the Club's default could lead to the termination of the contractual relationship under Articles 14 and 14bis of the FIFA Regulations on the Status and Transfer of Players (the "RSTP").
16. On 26 March 2021, two days after the expiry of the 15-day deadline granted in the Player's notice, the Club sent a response to the Player's counsels informing, *inter alia*, the following:

"(...)

We hereby inform you that the Club Africain held its elective general assembly on 02/21/2021, and since this date, the club is represented by a new elected board of directors.

(...) we do not have a complete and precise idea on the ongoing disputes involving the club.

We have nevertheless received verbal information that you have sent on behalf of your client (...) a notice to the club.

We, therefore, wish to inform you that if this information turns out to be true, you would have sent a notice to the persons who no longer represent the club (...).

(...)

Moreover, we would like to inform you that the club is seeking an amicable solution with your client (...) on the basis of the following facts:

- *The club has honoured all its commitments to the player*
- *The player has not honoured his commitments to the club*
- *The player has not delivered his bank details to the club especially as the FIFA rules of good sports governance require that the payment shall be made by a reliable banking means*
- *The club cannot currently make the payment of January 2021 requested by the player since he did not communicate a known bank account to the new committee, reminding you that he did not mention in his notice neither his bank details nor that of his legal representative.*
- *The player has been absent without just cause since the beginning of February 2021 from where he cannot request payment for said period*
- *The player has left the country for an unknown destination and without the notice or written permission of his club.*

(...) we remind you that the sporting qualification of the player remains a sporting choice made by the technical staff and that the new technical staff of the club could not assess to the technical and physical qualities of the player who has been absent without just cause since the beginning of February.

As a result, the club asks the player to come personally to the club's training centre (...) no later than Monday 29/03/2021 at 11 a.m. local time.

Whereas in the absence, the club reserves its right to sue the player as provided for in the FIFA regulations.

(...)"

17. On 26 March 2021, immediately after receiving the above Club's communication, the Player sent another notification to the Club informing that his salaries of December 2020 and January/February 2021 were not paid and that he remained unregistered before the TFF, granting the Appellant an additional 5 days to remedy the default. The Player also informed his bank details and stated that failure to proceed with the payment would trigger the termination of the Employment Agreement with just cause.
18. On 1 April 2021, the Parties organized a videoconference with the aim to settle the dispute regarding the outstanding salaries and, on 5 April 2021, the Club submitted to the Player the following proposal:

"(...)

- *We propose to terminate the contract with effective date March 31st, 2021.*

- *We propose to pay all outstanding salaries until March 31st, 2021.*
 - *We propose to pay all travel expenses to the player to travel back to Brazil”.*
19. On 5 April 2021, the Player rejected the proposal and “*granted to the Club a final deadline until the following day to provide evidence that it had complied with the requests put forward in his previous notifications, otherwise he would terminate the Employment Contract without any prior notice*”.
20. On 7 April 2021, the Player sent an email to the Club whereby he stated that no payment had been received by him since November 2020 and that no evidence regarding the ability of the Club to register him before the TFF had been presented. As such, the Player unilaterally terminated the Employment Agreement with immediate effect based on the “*(...) persistent and severe breach by Club Africain of its contractual duties*” invoking just cause in accordance with Articles 14 and 14bis RSTP.

C. The Player’s new employment contracts

21. On 9 June 2021, the Player concluded an employment contract with the Brazilian football club “Sport Club Camaçariense”, valid from 9 June to 7 September 2021, based on which the Player was entitled to a monthly compensation of Brazilian Real (BRL) 1,800 (approximately USD 351) with the total compensation for the period being BRL 5,340 (approximately USD 1,041.30) (the “Camaçariense Contract” or “First Contract”)
22. On 12 August 2021, with effects from 10 August 2021, the Player concluded another employment contract with the Club US Ben Guerdane (the “Second Contract”), valid from 10 August 2021 to 30 June 2023, based on which the Player was entitled, among other allowances and benefits, to:
- For the 2021/2022 season: TND¹ 60,000 (approximately USD 20,840) performance bonus and a monthly salary of TND 5,000 (approximately USD 1,736.11); and
 - For the 2022/23 season: a TND 70,000 (approximately USD 24,314) performance bonus and a monthly salary of TND 5,000 (approximately USD 1,736).

D. The Player’s claim before the FIFA

23. On 3 May 2021, the Player filed before FIFA a claim against the Club under Article 12bis and Article 14 RSTP, requesting the following:
- a. The payment of his outstanding remuneration in the total amount of USD 20,000 (i.e., the salaries related to December 2020 and January/February and March 2021 in the amount of USD 5,000 each);

¹ Tunisian Dinar.

- b. The payment of USD 171,000 as compensation for breach of contract;
 - c. The payment of USD 37,999.98 as additional compensation corresponding to six months of his average monthly salary for the remaining period of the Employment Agreement;
 - d. The payment of 5% p.a. over the amounts due by the Club, from the respective due dates until the date of effective payment;
 - e. The sanctions under Articles 12bis and 17.4 RSTP; and
 - f. The payment of all administrative and procedural costs related to the FIFA procedure.
24. The Club was invited to reply to the Player's claim but failed to present any response/ defence.
25. On 18 August 2020, the FIFA DRC passed the Appealed Decision. The operative part of the Appeal Decision states the following:
- "1. *The claim of the [Player], is partially accepted.*
 - 2. *The [Club] has to pay to the [Player], the following amounts:*
 - (a) *USD 20.000 as outstanding remuneration plus 5% interest p.a. as from the respective due dates until the date of the effective payment, as follows:*
 - *on the amount of USD 5,000, as from 1 January 2021;*
 - *on the amount of USD 5.000 as from 1 February 2021;*
 - *on the amount of USD 5.000 as from 1 March 2021; and*
 - *on the amount of USD 5.000 as from 1 April 2021.*
 - (b) *USD 171.000 as compensation for breach of contract, plus 5% interest p.a. as 3 May 2021.*
 - 3. *Any further claims (...) are rejected.*
 - (...)
 - 5. *Pursuant to article 24bis of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not paid within 45 days of notification of this decision, the following consequences shall apply:*
 - 1. *The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of three entire and consecutive registration periods.*

2. *The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not paid by the end of the three entire and consecutive registration periods.*
6. *The consequences shall only be enforced at the request of the Claimant in accordance with article 24bis paragraphs 7 and 8 and article 24ter of the Regulations on the Status and Transfer of Players.*

(...)"
26. On 8 September 2021, the grounds of the Appealed Decision were communicated to the Appellant.
27. In summary, the FIFA DRC Judge concluded that the Club had *"repeatedly been in breach of its contractual obligations"* and that the Player had just cause to terminate the Employment Agreement on 7 April 2021 (Article 14bis RSTP). Therefore, the FIFA DRC considered the Club liable to pay the Player all his outstanding salaries, plus 5% interest p.a. on the amounts from the respective due dates until the date of effective payment. In addition, the Club was also considered liable to pay a compensation (Article 17 RSTP) for the breach of the Employment Agreement in the amount of USD 171,000, plus 5% interest p.a. as from 3 May 2021 (the date of the claim). In the calculation of this compensation, the FIFA DRC took into account the remuneration due to the Player until the end of Employment Agreement (April 2021 to June 2023) and the professional situation of the Player upon the early termination occurred with the Brazilian club Sport Club Camaçariense that contributed to mitigate his damages.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 28 September 2021, in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), the Appellant filed its statement of appeal (the "Statement of Appeal") with the Court of Arbitration for Sport ("CAS") challenging the Appealed Decision and requested the matter to be decided by a Sole Arbitrator.
29. On 4 October 2021, the Respondent communicated its agreement with the appointment of a Sole Arbitrator to decide the matter but requested the President of the Appeals Arbitration Division to select English as the language of the procedure in accordance with Article R29 of the CAS Code.
30. On 8 October 2021, the Appellant requested that the procedures be carried out in a bilingual form in French and English.
31. On 13 October 2021, the Respondent objected the request for a bilingual procedure to be carried out and requested that the proceedings be conducted solely in English.
32. On 27 October 2021, in accordance with Article R51 of the CAS Code, the Appellant filed its Appeal Brief in French.

33. On 2 November 2021, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division decided that the proceedings would be conducted solely in English.
34. On 5 November 2021, following the Respondent's request, CAS granted an extension of 10 days to submit its answer to the Appeal Brief (the "Answer").
35. On 22 November 2021, the Appellant filed the English translation of its Appeal Brief and the Respondent was invited to present its Answer within 20 days, in accordance with Article R55 of the CAS Code.
36. On the same date, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Arbitral Tribunal had been constituted as follows:

Sole Arbitrator: Mr Rui Botica Santos, Attorney-at-Law, Lisbon, Portugal
37. On 22 December 2021, the Appellant filed a submission producing the copy of the Second Contract, which it managed to obtain from the TFF upon a formal request.
38. On the same date, the CAS Court Office invited the Respondent to comment on the admissibility of the Appellant's unsolicited submission.
39. On 27 December 2021, the Respondent filed its Answer, pursuant to Article R55 of the CAS Code, and stated its objections to the admissibility of the Appellant's unsolicited submission. The Respondent considered that the unsolicited submission and its enclosures were inadmissible under Article 56 of the CAS Code, because (i) the Parties did not agree on the said new submission and (ii) the matter did not constitute an "*exceptional circumstance*". The Respondent also argued that (i) the Appellant voluntarily supplemented its submission with a new document after the expiry of the time limit set for its Appeal Brief, without being invited or ordered to do so by the Sole Arbitrator and only a few days before the end of the deadline set for the Respondent to file its Answer; and (ii) the evidentiary request of the Appellant would not be possible under Article R44.3 of the CAS Code, since it was directed only to the TFF, which is not a party to the present arbitration.
40. On 28 December 2021, the CAS Court Office invited the Parties to communicate whether they preferred a hearing to be held on this matter or if the Sole Arbitrator could issue a decision based solely on the Parties' submissions.
41. On the same date, the Appellant informed that it preferred a hearing to be held and submitted its comments regarding the Respondent's objection concerning the admissibility of the unsolicited documents, arguing that (i) the unsolicited document had already been mentioned several times in the Statement of Appeal and in the Appeal Brief, (ii) that it had already requested such document from the TFF and that (iii) the Respondent's contract with his new club is an important document and needed for the calculation of the compensation.

42. On 4 January 2022, the Sole Arbitrator, having duly considered the arguments of the Appellant and the objections raised by the Respondent, issued the following decision on the admissibility of the unsolicited submission and the attached evidence (Order No. 1):

“(…)

1. *The Appellant’s unsolicited submission of documents of 22 December 2021, containing the contract signed between the Respondent and the club Union Sportive de Ben Guerdane, is admitted.*
2. *The Respondent is invited to present its comments on the evidence submitted by the Appellant within 20 days upon receipt of this Order (by courier).*
3. *The relevance of the evidence presented will be assessed and decided on in the merits of the case”.*

43. The Sole Arbitrator’s decision was grounded as follows:

- The submission of unsolicited evidence does not need to be preceded by an invitation or prior authorization of the Sole Arbitrator to be accepted on the basis of exceptional circumstances and that is the correct the interpretation of Article R56 of the CAS Code, in accordance with its spirit;
- The unsolicited evidence presented may be relevant to the merits of the dispute, namely to calculate compensation due to breach of contract as decided by the FIFA DRC;
- The Respondent could not be surprised by the existence or content of the unsolicited evidence; and
- Moreover, the Appellant had already mentioned and based its alternative arguments on said document, which was also the subject of an evidentiary request made by the Club in its Statement of Appeal and Appeal Brief, whereby it even expressed that it was trying by its own means to obtain it.

In light of the above, the Sole Arbitrator expressed the following determinations:

- a. The Appellant’s request regarding the production of the Second Contract is moot;
 - b. The Respondent was invited to comment the eventual relevance of the Second Contract; and
 - c. The eventual relevance or impact of the Second Contract will be decided in the merits of the case.
44. On 4 January 2022, after consultation of the Parties, the Sole Arbitrator decided to hold a virtual hearing. The hearing was scheduled for 8 February 2022.

45. On 2 February 2022, the CAS Court Office issued the Order of Procedure, which was duly signed by the Parties.
46. On 8 February 2022, a hearing was held by videoconference. The following persons attended the hearing in addition to the Sole Arbitrator and Ms Sophie Roud, as CAS Counsel:

1. For the Appellant

- Mr Alaimi Tarek – Counsel
- Mrs Dorra Mghirbi – Counsel
- Mr Chiheb Ghazouani – Club’s General Secretary
- Mr Hamed Mbarek – Witness
- Mr Mohamed Chrif Zorai – Interpreter

2. For the Respondent

- Mr Victor Eleuterio – Counsel
- Mr Udo Seckelmann – Counsel
- Mr Rafael Fiuza – Counsel
- Mr Karel Nobre – Counsel

47. As a preliminary remark, the Parties were requested to confirm not having any objection to the appointment of the Sole Arbitrator, and they so confirmed.
48. The Parties were given the opportunity to present their case and make their submissions and arguments. After the Parties’ closing submissions, the hearing was closed, and the Sole Arbitrator reserved its decision to this Award.
49. Before the hearing concluded, the Parties expressly stated that they had no objection to the way that these proceedings have been conducted and that the equal treatment of the Parties and their right to be heard had been respected.

V. THE PARTIES’ SUBMISSIONS

50. The following summary of the Parties’ positions is illustrative and does not necessarily comprise each contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows:

A. The Appellant's submissions

51. The Appellant prayed the below reliefs in its Appeal Brief:

“(…)

1/ Mainly:

- **On the form:**
 - ***Annul** the decision of the [FIFA DRC] Number **FPSD-2436** dated **23.08.2021** notified with grounds on **08.09.2021** and **declare** that the [FIFA DRC] has no jurisdiction to rule on this dispute in application of the above-mentioned articles.*
 - *And **send back**, if necessary, the current case to the Federal Commission within the Tunisian Football Federation.*
- **On the bottom:**
 - *Annul the contested decision of the [FIFA DRC], and declare the rejection of the entire decision based on the following reasons:*

The formal nullity of the formal notice dated 09.03.2021 as well as all the effects due to the notice mainly the termination for just cause and the termination indemnity.

2/ Alternatively:

In case your honourable chamber declares the jurisdictional competence of [FIFA DRC] and declares the validity of the notice dated 09.03.2021 as well as its effects, please declare void the contested decision of the CRL Number FFPS-2436 and:

For salaries:

RECALCULATE the amounts of salaries approved by the contested decision and declare that the amounts owed to the player as well as salaries equal only to the sum of 10,000 USD (salaries for the months January and February 2021) which is blocked in the general treasury of the club.

For Compensation:

Mainly:

Annul the contested decision regarding the compensation for breach of contract for just cause since he terminated the contract unilaterally and refused any kind of conciliation with the club.

Subsidiarily:

RECALCULATE the amount of compensation judged by [FIFA DRC] based on the fact that:

The optional 3rd year is not calculated since it is a prospective year and he signed a new contract with Union Sportive de Ben Guerdan from the current sports season until 30.06.2023, which makes the amount correct of compensation is worth 82,000 USD.

The value of 82,000 USD will be calculated again according to the value of his new contract which absorbs the residual value of the prematurely terminated contract (in application of article 17 RSTJ).

C / Order the Tunisian Football Federation to communicate to your chamber a copy of the professional player contract signed between the Union Sportive de Ben Guerdan and the Player “Gilmerson Dos Santos Mota”.

D / Order the respondent to pay the sum of 10,000 USD for legal fees.

E / All costs and expenses of this procedure are the responsibility of the respondent.

F / Give the appellant a reasonable time to send you a copy of the player’s contract with Union Sportive du ben Gerdan, which the appellant has proceeded to obtain, as well as any other supporting documents for the current case”.

52. On 22 December 2021, the Club filed a complementary submission producing the Second Contract (see para. 22 above) and made the following amendment to its prayers for relief:

“(…)

- **Mainly:**

Annul the contested decision of the DRC (...) dated 23.08.2021 notified with grounds on 08.09.2021, regarding the compensation for breach of contract for just cause.

- **Subsidiarily:**

RECALCULATE the amount of compensation judged by DRC FIFA based on the fact that:

**The optional third year is not calculated since it is an optional year.*

**The value of 82,000 USD will be calculated again according to the value of his new player’s contract in application of articles, 3 and 4.1pf the contract and 17 RSTP which means the sum of compensation will be USD 40,000.*

**If [the Sole Arbitrator] judge right the decision of the DRC than the sum of compensation will be 83.500 USD (...)”*

53. The Appellant advanced the following grounds in support of its appeal:

A.1. *FIFA's lack of jurisdiction to decide the dispute*

- 54. The FIFA DRC Judge ignored Articles 23 and 22 RSTP which allows the contractual parties to appoint an independent arbitration tribunal – at national level – within the framework of the national association and/or the applicable collective bargaining agreement. Within FIFA regulations the contractual parties are free to choose their own mechanism of dispute resolution and the same principle applies under the Tunisian sporting regulations, under which the contractual parties have the possibility to choose a national arbitral court on condition that this agreement is written in the form of *“arbitration clause included in the contract”*.
- 55. The Parties agreed to settle any conflict related to the Employment Agreement through the *“dispute resolution bodies of the T.F.T”*. (Article 14 of the Employment Agreement – see para. 9 above).
- 56. The Player failed to comply with the agreed arbitration clause. First, because the Player has not complied with the imposed preliminary conciliation phase; and secondly, the Respondent did not file the claim before the dispute resolution bodies of the TFF, as imposed under the arbitration clause.
- 57. The Respondent also failed to demonstrate the absence of any competent national arbitral court.
- 58. Therefore, the FIFA DRC failed to conclude that it lacked jurisdiction to deal with the present dispute, as Article 14 of the Employment Agreement stipulated that the dispute resolution bodies of the TFF should be the exclusively competent bodies to settle the present dispute.

A.2. *On the substance – The relevant facts*

- 59. The Player has not respected his contractual obligations with the Club, mainly those mentioned in Article 5 of the Employment Agreement (see para. 9 above)
- 60. The Player abandoned the Club without just cause and refused to join the Club in violation of Article 5 of the Employment Agreement and Article 13 RSTP.
- 61. When the new board of the Club took over, on 21 February 2021, the Player was absent and, from 22 February 2021 on, he did not return to the Club or participate in the training sessions.
- 62. The Club was surprised by the Player's formal notice sent on 9 March 2021 claiming the payment of the salaries related to the months of January and February 2021, in the amount of USD 10,000, within 15 days.
- 63. On 26 March 2021, the Club sent a letter to the Player asking him *“to be present personally to the club's training center (...) no later than Monday 03/29/2021 at 11am local time”*. The Player has not returned to the Club.

64. On 5 April 2021, the Parties initiated conciliation discussions and the Club proposed the Player a friendly arrangement to terminate the Employment Agreement on 31 March 2021 (see paras. 18-19 above). However, the Player has rejected the Club's proposal and, by written notice sent on 7 April 2021, he decided to terminate the Employment Agreement.

A.3. On the substance – The relevant legal considerations

65. The Player failed to respect the contractual obligations established in Article 5 of the Employment Agreement, since he was absent without justification despite the direct and clear request from the Club to be present at the training camp.
66. The new Club's Management – elected on 21 February 2021 – confirmed that the Player was unjustifiably absent from the Club between 22 February and 25 October 2021. This fact was also confirmed by Mr Makram Abrougui, responsible for the senior team of the Club and the former and current technical staff of the Club. Furthermore, Mr Oussama Ben Younes, member of the former Club's Management, also testified that the Player was unjustifiably absent since 15 January 2021. Finally, the Club has also confirmed – with the relevant Administrative Authorities – that the Player has left Tunisian territory on 2 March 2021, without permission.
67. Moreover, the Player himself confessed that he had been absent and that he failed to respect his contractual commitments because he was not registered.
68. The registration of a Player has no relation to any contractual obligations and is a matter of sporting choice to be made by the Club's administrative office. Considering the Player's absence and failure to show up when requested, the Club decided not to register him.
69. In conclusion, and in relation to this substantive argument, the Appellant asks the CAS to “(...) *annul the decision (...) to consider and declare that the respondent did not respect his legal and contractual commitments and that the termination was made following his request and in an abusive manner, and without just cause*”.

A.4. On the substance – No entitlement to the remuneration claimed

70. The Player was not entitled to his salaries because he was not training or playing for the Club, neither in official nor friendly matches. This argument is supported by Article 4.1 of the Employment Agreement (the “Club's Obligations”) which establishes the following: “[i]n return for the player's obligations defined in article 5, the club undertakes to grant the player a specific remuneration (...)”.
71. Moreover, the Player's salaries were at his disposal at the Club's Treasury and he was informed that he only had to present himself to receive them.
72. The Player's attitude in terminating the Employment Agreement caused the loss of his right to receive the remuneration claimed. Therefore, the requirements of Article 14bis RSTP were not met because: (i) the Player was in unjustified absence; and (ii) overdue payments were at the Club's Treasury and at the Player's disposal.

73. The Player's formal payment notice sent to the Club on 9 March 2021 did not refer the bank details for the payment and for this reason the Club could not execute the requested payment. For this reason, the formal notice could not produce any legal effects.
74. The Player terminated the Employment Contract abusively and without any legal reason. The Club has honored its pecuniary obligations and tried to find an amicable solution to settle the dispute. The Player has refused to settle the dispute and at his own risk decided to leave Tunisia without permission.
75. Therefore, Article 14bis RSTP cannot apply since (i) the Player was unjustifiably absent; (ii) overdue payments were reserved for him at the Club's Treasury and (iii) the abusive termination of the Employment Agreement means that the Player is not entitled to compensation.

A.5. Subsidiarily – The FIFA DRC Judge made an error when calculating the compensation due to breach of contract

76. Nevertheless, even admitting that the Player was entitled to such compensation within the meaning of Article 17 RSTP, the compensation amount of USD 171,000 is incorrect and excessive.
77. The calculation of the compensation was made on the basis of an employment relationship for 3 sporting seasons, however, it is mentioned in Article 3 of the Employment Agreement that the initial term is two sporting seasons plus one optional. The optional additional season was subject to the Club's discretion and for this reason cannot be considered as part of the term of the Employment Agreement; consequently, the calculation of the compensation should have been made for 2 sporting seasons which renders the amount awarded by the FIFA DRC Judge incorrect.
78. Considering the Player's claim before FIFA (3 May 2021) and the remaining term of the Employment Agreement (30 June 2022), the compensation due should not surpass USD 82,000, which is the residual value of the Employment Agreement when calculated for two sports seasons:
 - a. USD 10,000 related to the rest of the 2020/2021 season; and
 - b. USD 72,000 related to the rest of the 2021/2022 season.

Moreover, the calculation should also consider, for the purpose of mitigation, any payments received or to be received by the Player during the contractual period, *i.e.* until the end of 2021/22 season.

79. Therefore, the FIFA DRC should have deducted from the established compensation amount (USD 82,000) the sum of USD 42,000, received (or to be received) under the Second Contract² (8 August 2021 until 30 June 2022), in result of the following amounts:
- a. TND 60,000, equivalent to USD 21,000, as performance bonus; and
 - b. TND 60,000, equivalent to USD 21,000, as monthly salary (12 x TND 5,000).
80. As per the above calculation the FIFA DRC should have established the compensation in the maximum amount of USD 40,000.
81. In case the CAS determines that the FIFA DRC rightfully decided that the third optional year should be considered to establish the residual value of the Employment Agreement, the compensation shall not exceed USD 171,000 (the amount due to the Player under for the remaining period of the Employment Agreement) minus the Player's earnings under the Second Contract for the period which coincides with the Employment Agreement's duration (TND 120,000 for season 2021/2022 and of TND 130,000 for season 2022/2023, which results in a total amount of TND 250,000, corresponding to USD 87,500). Therefore, in this alternative scenario the compensation to be paid in that case should be USD 83,500 (USD 171,000 – USD 87,500).

B. The Respondent's submissions

82. The Respondent filed its Answer to the Appeal Brief and made the following prayers for relief:
- “(…)
- a) *Dismiss the present appeal;*
 - b) *Confirm the Appealed Decision in totum;*
 - c) *Order the Club Africain to bear any and all administrative and procedural costs of the present arbitration; and*
 - d) *Order Club Africain to pay the Player a contribution towards legal fees and other expenses incurred in connection with the proceedings, pursuant to article 64.5 of the CAS Code, in an amount to be fixed at the discretion of the Panel”.*
83. The Respondent advanced the following grounds in support of its position:

² While the Appellant recognizes the existence of the Camaçariense Contract, it does not include in its calculations the deduction of the Player's earnings under this contract (*i.e.* USD 1,041.30).

B.1. The jurisdiction of FIFA

B.1.1. The Club's allegation of a mandatory "Preliminary Phase of Conciliation"

84. The Employment Agreement did not require "conciliation" as a mandatory step to be followed by the Parties before the filing of a claim. Clause 14 of the Employment Agreement only stipulated that the Parties should give "priority" to an "amicable settlement of the dispute".
85. Clause 14 of the Employment Agreement does not contain the word "conciliation" as stated by the Appellant and does not give any details about the "procedure" to be undertaken by the Parties prior any legal actions., therefore it cannot be considered as a mandatory step preceding the start of the present dispute.
86. Moreover, the Player took the initiative to contact the Club and tried to solve the dispute on an amicable basis (see paras. 18 and 19 above). The Player followed all necessary steps in good faith to settle the dispute amicably with the Club before filing the claim before FIFA and by doing so gave priority to an "amicable settlement of the dispute".

B.1.2. The Club accepted FIFA's jurisdiction

87. According to Article 186.2 of the Swiss Private International Law Act (PILA) "*The objection of lack of jurisdiction must be raised prior to any defence on the merits*".
88. The Club was duly summoned by FIFA to provide its position on the Player's claim and opted for not presenting any defence. By failing to submit a statement of defence and, in consequence, to challenge the jurisdiction of FIFA, the Appellant shall be deemed to have tacitly accepted such jurisdiction and shall be precluded from objecting to FIFA's jurisdiction at CAS level.
89. The 2021 edition of the Commentary on the FIFA RSTP (the "Commentary") is clear and states that:

"[T]he general rule is that FIFA is competent to hear employment-related disputes between clubs and players with an international dimension. National decision-making bodies may be asked to hear such cases, but they will not have jurisdiction unless the club and the player have incorporated a written, explicit, and exclusive arbitration clause nominating the national body to deal with any potential dispute. On the basis of article 22 paragraph 1 (b), the rule is that FIFA is competent to hear such cases, and cases heard by national bodies are the exception to that rule, not the other way round" (page 366).

"If one party invites FIFA to adjudicate on the dispute, and the other party does not contest FIFA jurisdiction, the parties are considered to have concluded a tacit agreement by action implying intention, which supersedes any previous written one. As CAS has confirmed, this approach is also legitimate where the respondent refuses to respond to the claim made against it". This understanding is also confirmed by several CAS cases: CAS 2012/A/2899, para. 12, 54 and 55; CAS 2015/A/4083 para. 103, 108 and 110" (page 371).

90. In addition, CAS Jurisprudence from case CAS 2012/A/2899, para. 55, also confirms this understanding:

“According to the law of the seat of the present arbitration, namely Swiss law, a plea of lack of jurisdiction must be raised prior to any defence on the merits (Article 186 para. 2 of the Swiss Federal Statutes on Private International Law). Therefore, it is not accepted that a party which did not raise any objection to the jurisdiction of FIFA while it could have done so in the course of the first instance procedure before its Players’ Status Committee, could object to the jurisdiction of FIFA in a subsequent CAS procedure. It is noted however that there is no provision in the FIFA Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber similar to Article 186 para. 2 of the Swiss Federal Statutes on Private International Law. The above-mentioned FIFA Rules provide that the FIFA Players’ Status Committee shall examine its jurisdiction ‘ex officio’, in the light of the relevant provisions RSTP. Nevertheless, a party proceeding before the FIFA Players’ Status Committee without raising any objection on the jurisdiction of FIFA must be deemed to have waived its right to challenge such jurisdiction in appeals (see CAS 2005/A/937, award of 7 April 2006)”.

91. The Club could have contested FIFA’s jurisdiction since it was invited to do so, however, it opted not to present any defence at all
92. Therefore, and considering the Club’s silence during the FIFA proceedings, the Appellant’s argument challenging FIFA’s jurisdiction shall be dismissed.

B.1.3. The TFF dispute resolution bodies do not comply with FIFA Circular no. 1010 and the FIFA NDRC Standard Regulations

93. The Respondent stated that the Appellant has the burden of proving (and failed to prove) that the domestic dispute resolution bodies at TFF complied with all parameters stipulated in Article 22 of the FIFA RSTP, FIFA Circular no. 1010 and the FIFA National Dispute Resolution Chamber Standard Regulations (“FIFA NRDC Standard Regulations”).
94. Pursuant to Article 22(b) of the FIFA RSTP: “[t]he independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs”. The aim of this provision is to protect the parties’ right to freely choose a national arbitration body as the forum for a certain dispute, but also to guarantee that those bodies are independent, duly constituted and respect essential procedural rights.
95. In addition, the Respondent also drew the attention to the minimum requirements for a national dispute resolution body to be recognized by FIFA, as imposed by FIFA Circular 1010, issued on 20 December 2005, namely: (i) parity in the constitution of the tribunal (parties must have equal influence over the appointment of the arbitrators); (ii) independence and impartiality (arbitrators – or the arbitration tribunal – must be rejected if there is any legitimate doubt over their independence or impartiality; (iii) a fair hearing of the case (each party must be granted the right to speak on all facts essential to the ruling, represent its legal point of view, file motions to take evidence and participate in the proceedings); (iv) contentions proceedings (each party must be entitled to examine and comment on the allegations filed by the other party and attempt

to rebut and disprove them with its own allegations and evidence); and (v) equal treatment (the arbitration tribunal must ensure that the parties are treated equally).

96. The above-referred principles are also reflected in the FIFA NDRC Standard Regulations as enforced by the world's football governing body since 1 January 2008. These regulations are not binding on national associations but contain relevant guidance and principles (CAS 2018/A/5659, preamble, para. 2; and CAS 2012/A/2983, para. 8.25).
97. The burden of proving that the TFF dispute resolution bodies comply with the abovementioned requirements rests with the party challenging the jurisdiction of FIFA (CAS 2020/A/7272, 7277, 7283 & 7318, para. 74; and CAS 2013/A/3172, para. 59 and 60).
98. From the documentation provided by the Appellant it is concluded that the members of the TFF dispute resolution bodies are appointed by the "Bureau Fédéral" among names proposed by the "Members" of the TFF (Article 52. 1 and 2 of the TFF Statutes); and according to Article 13 of the TFF Statutes the "Members" of the TFF are only clubs and leagues, which leads to the conclusion that such bodies have no representation of players.
99. Therefore, the Appellant failed to demonstrate that the TFF dispute resolution bodies fulfil the requirements of Article 22 of the FIFA RSTP and FIFA Circular no. 1010 is *per se* sufficient to dismiss the Appellant's jurisdictional challenge (CAS 2020/A/7272, 7277, 7283 & 7318; CAS 2020/A/7144, para. 123/124; and CAS 2013/A/3172, para. 59/60).

B.2. The termination of the Employment Agreement under the FIFA RSTP

B.2.1. The Player did not breach the Employment Agreement

100. The Player never stopped attending the Club's training sessions. On 17 or 18 February 2021, the Club did a 15-day mid-season training camp and the Player was not included in such training. The Club never complained about the absence of the Player, except on 26 March 2021, upon the Player's notification to the Club to comply with its contractual obligations and threatening it to terminate the Employment Agreement with just cause.
101. The Club had not complained about or opened internal disciplinary proceedings to sanction the alleged Player's absence/behaviour (CAS 2013/A/3354, para. 96).
102. As of February 2021, the Player's situation started becoming unsustainable, as the Player was (i) still unregistered and (ii) with almost three months of outstanding salaries.
103. Moreover, Article 82 of the Swiss Code of Obligations ("SCO") provides the following:

"A party to a bilateral contract may not demand performance until he has discharged or offered to discharge his own obligation, unless the terms or nature of the contract allow him to do so at a later date".

B.2.2. The Player had just cause to terminate the Employment Agreement

104. The Club's contractual violations started in October 2020, by failing to register the Player before the TFF.
105. The Player has always respected his contractual duties, in particular by participating in the Club's pre-season and training sessions.
106. As of December 2020, the Club stopped paying the Player's salaries. This Club's default persisted until the termination of the Employment Agreement (7 April 2021).
107. On 9 and 26 March 2021, the Club was duly notified to remedy the defaults (see para. 15 above).
108. The Club's excuse that the Player failed to provide his bank account details is not a serious argument, considering months of employment relationship between the Parties, and, nevertheless, this information was provided on 26 March 2021, i.e on the same day of the Club's request.
109. Despite this, the Player still granted the Club additional time for it to remedy its default and accepted to discuss a proposal for mutual termination of the Employment Agreement, however, no reasonable solution was presented by the Club.
110. The Club failed to discharge its burden of proof that the Player's outstanding salaries were only related to January and February 2020 (CAS 2009/A/1975, para. 71; CAS 2009/A/1810 & 1811, para. 46; and CAS 2003/A/506, para. 54).
111. The Club also failed to register the Player during his employment and, according to the STF (Judgment 4A_53/2001 of March 2011), it is recognized that *"(...) a professional football player playing in the premier division must, in order to retain his value on the market, not only train regularly with players of his level but also compete in matches with teams of the highest possible level"*.
112. After having been prevented from playing football for more than 5 months, 4 months of outstanding salaries (December 2020 and January to March 2021) and 29 days waiting for a possible settlement, it is obvious that the Player had just cause to terminate the Employment Agreement on 7 April 2021 (CAS 2015/A/4322; CAS 2013/A/3091, 3092 & 3093, para. 224 et seq.; and Swiss Federal Tribunal Judgment 4A_53/2001 of March 2011).

B.3. The compensation due to the Player

B.3.1. The 3-year term of the Employment Contract

113. It is true that the wording of Clause 3 of the Employment Agreement contains 1-year option *"in favour of the Appellant"*, but it is unclear whether this option would be an option for the extension or for the termination and until when it could be exercised and how. Nevertheless, this imprecise text about the "option" does not correspond to the true and common intention of the Parties, which was to establish an agreement for the duration of 3 seasons.

114. The wording of Clause 3 of the Employment Agreement is clear and states that the professional relationship started from 01/07/2020 and was scheduled to end on 30/06/2023 (see para. 9 above). This wording is clear and does not require any interpretation.
115. Moreover, the Club was the party drafting the Employment Agreement and for this reason it has to bear the risks of any inconsistency (*“interpretatio contra proferentem”*). (CAS 2016/A/4556, para. 131; and CAS 2009/A/1773 & 1774, preamble and para. 27).
116. Even when the wording of the contract is clear and unambiguous, under Article 18 of the SCO, a decision-making body must assess whether the terms used by the parties truly reflect their mutual intention (CAS 2017/A/5172, para. 69 et seq.; CAS 2013/A/3133, para. 61).
117. In conclusion, the FIFA DRC was correct in the calculation of the compensation awarded in the Appealed Decision.

B.3.2. The compensation was correctly mitigated

118. Article 17.1 (ii) of the FIFA RSTP states that:

“(...) in case the player signed a new contract by the time of the decision the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the “Mitigated Compensation”). Furthermore, and subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three months salaries (the “Additional Compensation”). In case of egregious circumstances, the Additional Compensation may be increased up to a maximum of six-monthly salaries. The overall compensation may never exceed the rest value of the prematurely terminated contract”.

119. As per Article 17.1 RSTP, the amount of compensation payable for the termination of a contract with just cause will only be mitigated if, by the time a decision is passed, the relevant player has already concluded an employment contract with a new club. By the time the Appealed Decision was issued, the only contract signed by the Player was the First Contract, which was duly considered by FIFA DRC (CAS 2019/A/6670, para. 87/88).
120. Furthermore, the wording of Article 17.1 (ii) RSTP appears to establish that the compensation shall be mitigated only by the “new contract” (singular) following termination, and not by all “new contracts” (plural).
121. In the present case, the literal wording of Article 17.1 (ii) RSTP is clear and as such the literal interpretation suffices. The CAS does not have the power to fill up gaps or complete the wording of regulatory provisions in order to achieve an outcome which it deems fairer or more logical (CAS 2018/A/5747, 5748 & 5749). Therefore, the Second Contract signed by the Player must be disregarded.
122. On a subsidiary request and considering the egregious circumstances of the termination (the overdue payables and the fact that Player was not registered to play for the Appellant), any

possible mitigation based on the Second Contract shall be offset with 6 months of additional compensation pursuant to Article 17.1 (ii) RSTP, which corresponds to USD 30,000.00.

B.3.3. Alternatively, the Second Contract may not be considered for mitigation purposes

123. If the Sole Arbitrator determines that more than one employment contract can be considered for mitigation purposes, the Second Contract cannot be taken into account since the FIFA DRC was not in a position to consider it.
124. The Second Contract was concluded on 12 August 2021, less than a week before the Appealed Decision was issued. A strictly literal interpretation of Article 17.1. (ii) RSTP, leads to the conclusion that every contract signed “*by the time of the decision*” can be considered, but this is inconsistent with (i) the Rules Governing the Procedures of the Player’ Status Committee and the Dispute Resolution Chamber (the “Procedural Rules”), (ii) the instructions given by FIFA to the Parties during the proceedings for neither supplement or amend their requests or arguments, nor produce new exhibits or to specify further evidence once the investigation phase is closed; and the (iii) true intent of FIFA when drafting, applying and interpreting Article 17.1 (ii) RSTP.
125. The abovementioned provisions were introduced in 2015 and, in accordance with FIFA Circular no. 1468, their goal is to accelerate the resolution of disputes and they essentially establish that after a certain point of the procedure (i.e. the closure of the investigation-phase), the parties can no longer file new evidence or make further requests. This understanding is also shared by CAS Arbitrator and current Chairperson of the Dispute Resolution Chamber of the FIFA Football Tribunal, Mr Frans De Weger:

“In this regard, a new para 4 to Article 9 of the Procedural Rules of the 2015 edition has been added, as introduced in FIFA Circular 1468.

According to this new paragraph, the parties shall not be authorized to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely, after notification of the closure of the investigation”.

126. Therefore, the Sole Arbitrator shall disregard the Second Contract in the calculation of the compensation due to the Player, as the FIFA DRC could not have considered it, without prejudice to the offset of any deductions made on the basis of this contract.

B.4. Subsidiarily: The Calculation of the Compensation

127. In the event that the Sole Arbitrators would accept to mitigate the compensation having into consideration the amounts under the Second Contract, the calculation presented by the Appellant is wrong.
128. Firstly, the Employment Contract’s duration was agreed for 3 years/seasons and not for 2 years, as explained above (see above paras. 118-122).

129. Secondly, the “performance bonuses” in clause 4.1. of the Second Contract are non-guaranteed payments and depend on the Player’s sporting performance. Any mitigation should be limited to USD 1,041.30 (salaries received under the Camaçariense Contract) plus USD 39,060.65 (salaries received or to be received under the Second Contract). Therefore, compensation shall not be less than USD 130,898.06.
130. Nevertheless, if considered the additional compensation under Article 17.1 (ii) RSTP in the amount of USD 30,000 – as explained above (see para. 127) –, the Appellant shall be ordered to pay an indemnity of no less than USD 160,898.06.

VI. JURISDICTION OF THE CAS

131. Article R47 of the 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 or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned”.

132. The jurisdiction of CAS is based on Article 58.1 of the FIFA Statutes and is not disputed by the Parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by the Parties.
133. It follows that the CAS has jurisdiction to hear this dispute.

VII. APPLICABLE LAW

134. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

“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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

135. In addition, Article 57.2 of the FIFA Statutes (2019 edition) stipulates the following:

“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

136. The Sole Arbitrator is satisfied that the various regulations of FIFA constitute the applicable law to the matter in dispute – namely the RSTP – and that, subsidiarily, Swiss law shall be applied should the need arise to fill a possible gap or *lacuna* in the various regulations of FIFA.

In accordance with Article 26 Nos. 1 and 2 RSTP (edition February 2021) and considering that the claim before FIFA was initiated on 3 May 2021, the February 2021 edition is applicable to the matter at hand as to the substance of the dispute.

VIII. ADMISSIBILITY

137. Article R49 of the 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late”.

138. Article 58 of the FIFA Statutes read as follows:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question”.

139. The Panel notes that the admissibility of the Appeal is not contested by the Respondent. The grounds of the Appealed Decision passed on 18 August 2021 were notified to the Appellant on 8 September 2021 and the Statement of Appeal was filed on 28 September 2021, *i.e.* within the 21-day deadline fixed under Article 58 of the FIFA Statutes.

140. It follows that the Appeal is admissible.

IX. MERITS

141. Prior to assessing the legal issues at stake, the Sole Arbitrator deems it useful to clarify the scope of the Appeal – what is this case about?

142. This Appeal relates to the Appellant’s challenge against the Appeal Decision which considered that the Player had just cause to terminate the Employment Agreement in accordance with Article 14b RSTP, since the Club failed to pay him the salaries of January, February, March and April 2021. As a consequence, the FIFA DRC ordered the club to pay:

- USD 20,000 as outstanding remuneration plus 5% interest *p.a.* from the respective due dates until date of effective payment; and
- USD 171,000 as compensation for breach of contract plus 5% interest *p.a.* from 3 May 2021.

143. Therefore, the issues for determination are:

- a) Was FIFA competent to decide this matter? If so,

- b) Did the Respondent have just cause to terminate the contract?
- c) Depending on the answer to the previous question, did FIFA award the correct compensation?

144. The Panel will address the above issues below.

A. The FIFA's Jurisdiction

145. The Club argued that the Player failed to respect Clause 14 of the Employment Agreement and that it (i) failed to comply with the mandatory "preliminary phase of conciliation"; and (ii) FIFA lacked jurisdiction to decide the matter, which instead should have been submitted to the dispute resolution bodies of the TFF. The Sole arbitrator will analyse these arguments in separate.

A.1. Did the Player fail to meet the requirement of a "preliminary phase of conciliation"?

146. The Sole Arbitrator notes the wording of paragraph 1 of Clause 14 of the Employment Agreement: "[i]n the case of a dispute and/or dispute arising from the execution and/or interpretation of the clauses of this contract, the parties are obliged to give priority to all means and procedures with a view to an amicable settlement of the dispute". The Sole Arbitrator also notes that the translation of this clause was provided by the Appellant and that it was not challenged by the Player. Therefore, this translation is considered accurate.
147. In the Sole Arbitrator's opinion, and pursuant to the jurisprudence of the CAS and of the Swiss Federal Tribunal ("STF") (see Judgment 4A_46/2022, para. 3.5.2 and Judgment 4A_18/2007) para. 4.3.2), the first element to be considered regarding the interpretation of a contractual clause is its wording, which shall be interpreted in accordance with the general principles governing the interpretation of expressions of will (Article 18 of the Swiss Code of Obligations or "SCO").
148. From the wording of the aforementioned contractual clause, one can easily comprehend that it does not impose, in a compulsory manner and prior to the beginning of a formal complaint, the fulfilment of any mediation or conciliation procedure. The wording of Clause 14 of the Employment Agreement only refers to giving "priority" to the amicable settlement of disputes, this being a commitment of the parties to make their "best efforts" not to promote any contractual termination without first trying, in an amicable way, to solve the "cause" that originated the dispute. Moreover, it is important to note that the wording of the contractual clause contains no reference to "conciliation" or "mediation".
149. It should also be highlighted that Clause 14 of the Employment Agreement does not describe the conciliation proceedings nor does it impose any sanction for the non-compliance with the allegedly mandatory "*preliminary phase of conciliation*".

150. The finding of the above elements reinforces the understanding that the Parties have merely established a vague commitment to try to settle their differences by agreement, without any limitation on their actions or judicial/arbitral diligences.
151. Pursuant to the jurisprudence of the STF Judgment 4A_46/2011 STF, the “... *lack of precision cannot argue in favor of the mandatory nature of the conciliation to be attempted*”.
152. In light of the above, the Sole Arbitrator is of the opinion that the alleged “*preliminary phase of conciliation*” cannot be considered a mandatory precedent step to start the claim before FIFA.
153. In any case, it can always be said that the Player promoted, and the Parties maintained, conversations and discussions regarding the possibility of amicably settling their dispute. In fact, the Club even sent a detailed settlement proposal which was promptly rejected by the Player.
154. In the opinion of the Sole Arbitrator, the evident disagreement of the parties on the resolution of the dispute did not justify the dragging of the negotiations. The main cause of the dispute concerned the Club’s failure to pay the Player’s salaries and the nature and simplicity of this issue did not justify prolonging any further negotiations. The payment of wages is a simple obligation that is imposed in a natural way and does not require major discussions. The Player notified the Club twice for it to regularize the payment of wages due, warnings which the Club ignored and devalued with the excuse that the Player did not attend the training sessions/matches. The position of the Parties in relation to the conflict was very clear and cannot be used as an excuse to justify the suspension of the complaint lodged by the Player with FIFA. As such, it cannot be said that the Player took any precipitated attitude by allegedly unjustifiably interrupting the negotiations. As previously stated, the nature of the conflict and the unreasonable position taken by the Club did not justify the prolongation of the negotiation process.

A.2. Did FIFA have jurisdiction to issue the Appealed Decision?

155. The Club invokes the violation of the choice of forum agreed by the Parties, under which it was stipulated that the settlement of disputes be submitted to the dispute resolution bodies of the TFF. In this regard, the Appellant invokes the second paragraph of Clause 14 of the Employment Agreement: “*In the case of failure [of the amicable settlement], the dispute is submitted exclusively to the dispute resolution bodies of the [TFF]*”.
156. In its turn, the Player invokes FIFA’s competence, among other arguments mentioned in section V., sub-section (B), of the Award, the fact that the Club did not invoke in FIFA’s proceedings its lack of competence.
157. The Sole Arbitrator acknowledges that the Parties have agreed to submit any dispute to the jurisdiction of the TFF bodies but agrees with the argument put forward by the Player that the Club should have challenged FIFA’s jurisdiction during the proceedings in question, and it is now too late to do so.

158. The Club does not dispute that, on 7 May 2021, it was duly served with a summons to contest the claim filed by the Player in the procedure for claiming outstanding salaries and compensation for the termination of his Employment Agreement with just cause.

159. By failing to submit its statement of defence and, in consequence, challenging FIFA's jurisdiction, the Appellant is deemed to have tacitly accepted such jurisdiction and shall now be precluded from objecting it before the CAS. This understanding is also supported by FIFA in its Commentary (p. 371):

"If one party invites FIFA to adjudicate on the dispute, and the other party does not contest FIFA jurisdiction, the parties are considered to have concluded a tacit agreement by action implying intention, which supersedes any previous written one. As CAS has confirmed, this approach is also legitimate where the respondent refuses to respond to the claim made against it" (emphasis added by the Sole Arbitrator).

160. The same understanding has also been held by CAS decisions, namely CAS case 2012/A/2899, para. 55:

"55. (...) Therefore, it is not accepted that a party which did not raise any objection to the jurisdiction of FIFA while it could have done so in the course of the first instance procedure before its Players' Status Committee, could object to the jurisdiction of FIFA in a subsequent CAS procedure. (...)".

161. In an even more critical position, we refer to the case CAS 2015/A/4083, para. 108 and 110:

"108. A combined Reading of Article 22(b) RSTP ("unless") and Article 12(3) of the DRC Procedural Rules suggests that the Appellant was obliged to actively point the DRC to the potential jurisdiction of Norwegian labour courts or an arbitral tribunal at a national level, not only by objecting to the competence of FIFA but also by providing material which would have allowed the DRC to assess whether the arbitral tribunal at national level fulfilled the requirements set out by FIFA. (...)".

162. Pursuant to this CAS case law, the Club also had the burden of proving that the "dispute resolution bodies of TFF" complied with all parameters stipulated in Article 22 of the FIFA RSTP, FIFA Circular No. 1010 and the FIFA National Dispute Resolution Chamber Standard Regulations, in order to be considered competent to deal with the present case. In other words, and as highlighted by the Player, the FIFA DRC could not be required to investigate ex-officio whether the "dispute resolution bodies of TFF" complied with the above requirements in order to be considered an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs in the sense of Article 22 (b) of the FIFA RSTP (CAS 2014/A/3656, para. 123 *et seq.*)

163. In view of the above, the Sole Arbitrator dismisses the Appellant's argument as to FIFA's incompetence to decide the present dispute.

B. Did the Respondent have just cause to terminate the Employment Agreement?

164. Having determined that the FIFA DRC was competent to issue the Appealed Decision, the Sole Arbitrator must now assess if the Player had just cause to terminate the Employment Agreement.
165. The Club argued that it complied with all of its financial commitments, however, the Player abandoned his job without just cause and refused to join the Club, thus breaching his contract. In fact, the Club argues that the Player left Tunisia on 2 March 2021 and travelled to Brazil without its permission.
166. The Sole Arbitrator notes that the Club did not challenge the fact that it had failed to pay, in due time, the salaries requested by the Player. The Appellant argued, in essence, that the Player had failed to fulfil its obligations and that the formal notice sent by the Player did not allow it to execute the payments due, since it did not contain any bank details. In addition, the Club stated that the amount to be paid to the player was *“at the Club Treasury”*.
167. In light of the above, it is established that the Club failed indeed to pay the salaries of December 2020 and January, February and March 2021 to the Player.
168. The Club has not presented any evidence supporting its excuses for the non-payment. The alleged failure of the Player to comply with its obligations is without any merits. The Player attended training sessions normally even though he was prevented from competing. The Club cannot ignore the fact that the Player’s registration was never completed.
169. It is important to highlight that Mr Hamed Mbarak, called as a witness by the Appellant, was not able to convince the Sole Arbitrator that the Player had failed to meet any of his obligations. In fact, the statement of Mr Hamem Mbarak was vague and his connections with the Club naturally led the Sole Arbitrator to carefully balance the weight of said statement.
170. In addition, the Appellant also failed to present as witnesses at the hearing the authors of the two other witness statements filed with the Appeal Brief, Mr Makrem Abrougui and Mr Oussama Ben Younes, which were also affiliated with the Club. Therefore, their written witness statements, which were also vague and unprecise, were not confirmed and the Sole Arbitrator disregarded their content due to these reasons
171. When the Player left the Club, there were already more than two salaries overdue and, as such, the Player’s non-performance of his contractual duties cannot be considered as unjustified. The Club also appears to have tolerated the Player’s absence, since such a matter was never brought up until the Player’s complaints and no disciplinary proceedings were ever brought against him.
172. Mr Hamed Mbarak stated at the hearing that there were discussions and verbal agreements which concerned the settlement of the dispute with the Player. However, such discussions and alleged verbal agreements were not incorporated in a written agreement. The Sole Arbitrator notes that, in accordance with Article 7 of the Employment Agreement, *“[a]ny amendment to this contract, for any reason whatsoever, must give rise to an amendment drawn up and filed in the same form as the*

original contract". In essence, this means that the Parties had already established that they would not be bound by any amendments which failed to meet the aforementioned requirements of form.

173. It is also unconceivable to think that the Club was prevented from paying the Player's salaries simply because the Player did not include his bank details in the formal notice. The rules of experience dictate that employers have the duty to maintain the records of their employees duly updated and the bank details for the payment of the salaries of their employees is always a crucial information. The collection and preservation of the employees' bank details is part of the elementary duties of a responsible employer.

174. As such, the Sole Arbitrator is convinced – based on the comfortable satisfaction standard of proof – that the Player had just cause to terminate the Employment Agreement in accordance with Article 14bis RSTP, which establishes that:

"In the case of a club unlawfully failing to pay a player at least two monthly salaries on their due dates, the player will be deemed to have a just cause to terminate his contract, provided that he has put the debtor club in default in writing and has granted a deadline of at least 15 days for the debtor club to fully comply with its financial obligation(s). Alternative provisions in contracts existing at the time of this provision coming into force may be considered".

175. In the present case, it is clear that (i) the Club failed to pay the salaries of December 2020, January, February and March 2021; and (ii) the Player has put the Club in default, by writing notice dated 9 March 2021, granting the Club to remedy the default within a 15-day deadline.

176. Therefore, the Player had just cause to terminate the Employment Agreement, as it was correctly determined in the Appealed Decision.

C. Did FIFA award the correct compensation?

177. Having determined the Player's just cause to terminate the Employment Agreement, the Sole Arbitrator proceeds now with the analysis of the compensation awarded to the Player by FIFA DRC.

178. The Club, which had the burden of proof, has not demonstrated the payment of the salaries claimed by the Player. Therefore, the Sole Arbitrator concurs with FIFA DRC: the Club failed to fulfil its obligation to pay the amount of USD 20,000 which corresponds to the salaries of December 2020, and January, February, and March 2021 (each USD 5,000.00), plus 5% interest *p.a.*, from the respective due dates in accordance with well-established jurisprudence of the CAS and of the FIFA DRC.

179. In summary, the Club is ordered to pay the following amounts:

- a. USD 5,000.00 as remuneration for December 2020, plus interest of 5% *p.a.*, since 1 January 2021;

- b. USD 5,000.00 as remuneration for January 2021, plus interest of 5% *p.a.*, since 1 February 2021;
 - c. USD 5,000.00 as remuneration for February 2021, plus interest of 5% *p.a.*, since 1 March 2021; and
 - d. USD 5,000.00 as remuneration for March 2021, plus interest of 5% *p.a.*, since 1 April 2021.
180. Furthermore, in line with Articles 337b and 337c of the SCO, the Player is entitled to the reparation of the damages suffered pursuant to the principle of the positive interest, as well explained in CAS 2015/A/4346, para. 90 and 93-95:

“90. In fact, according to the well-known FIFA doctrine and consistent CAS jurisprudence, in case of termination of an employment contract with just cause, the other party which has given rise to premature termination, is liable to pay compensation for damages suffered by the injured party (see Commentary under art. 14 FIFA Regulations; CAS 2008/A/1447).

(...)

*93. In fact, consistent with the well-established CAS jurisprudence, **the injured party is entitled to a whole reparation of the damages suffered, pursuant to the principle of the “positive interest”, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been, had the contract been fulfilled to its end** (CAS 2012/A/2698; CAS 2008/A/1447).*

*94. Therefore, following the application of art. 337b and 337c of the SCO by analogy, according to CAS case law, the damages to be taken into account are not only those that may have caused the act or the omission that justify the termination (in the present case, the outstanding salaries), but also the **“positive interest” which, in case of termination of an employment contract, as is the present case, corresponds to the salaries and other material income or benefits that the player would have earned if the contract would have been performed until its natural expiration** (CAS 2008/A/1147; CAS 205/A/801; CAS 2006/A/1061; CAS 2006/A/1602).*

95. Moreover, the Panel observes that art. 337c (1) and (2) provides the following: “(1) If the employer dismisses the employee without notice in the absence of a valid reason, the latter shall have a claim for compensation of what he would have earned if the employment relationship had been terminated by observing the notice period or until the expiration of the fixed agreement period. (2) The employee must permit a set-off against this amount for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn” (the French version reads as follows: “(1) Lorsque l’employeur résilie immédiatement le contrat sans justes motifs, le travailleur a droit à ce qu’il aurait gagné, si les rapports de travail avaient pris fin à l’échéance du délai de congé ou à la cassation du contrat conclu pour une durée déterminée. (2) On impute sur ce montant ce que le travailleur a épargné par suite de la cessation du contrat de travail ainsi que le revenu qu’il a tiré d’un autre travail ou le revenu auquel il a intentionnellement renoncé”)” (emphasis added by the Sole Arbitrator).

181. The compensation for the breach of contract must be aimed at reinstating the Player, as the injured party, to the position it would have been if the contract had been fulfilled to its end (CAS 2012/A/2698, para. 138; CAS 2008/A/1447, para. 31). Since the Player's just cause to terminate the Employment Agreement was based on the Club's failure to comply with its financial obligations, Article 17.1 of the FIFA RSTP shall apply and guide the Sole Arbitrator in determining the fair compensation due to the Player.

182. The jurisprudence of the CAS sheds some light as to how compensation under Article 17 RSTP should be determined (CAS 2015/A/4346, paras. 91-92):

"According to art. 17 para 1 of the FIFA Regulations, compensation for breach of contract shall be calculated, unless otherwise specifically provided for in the employment contract, with due consideration for some objective criteria (to be considered as non-exhaustive examples) including in particular "the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortized over the term of the contract) and whether the contractual breach falls within a protected period)".

In the absence of any compensation clause in the Employment Contract, the FIFA DRC correctly applied the other parameters set out under art. 17 of the FIFA Regulations, particularly taking into account the entire remuneration payable to the Player under the Employment Contract for the remaining time of its duration, i.e. the sporting season 2014/2015 and 2015/2016, that is EUR 850,000, as the basis for the determination of the amount of compensation to be awarded to the Player".

183. In light of the guidelines of Article 17 RSTP and the special circumstances of this case, the compensation to be awarded to the Player shall be assessed taking into consideration (i) the remaining duration of the Employment Agreement; and (ii) the applicable mitigating factors, if any. These two issues will be analysed in the following sections.

C.1. The term of the Employment Agreement and the interpretation of Clause 3 of the Employment Agreement

184. The term of the Employment Agreement is established in Clause 3 (see para. 9 above).

185. The Sole Arbitrator shares the Player's opinion that the wording of Clause 3 is far from being clear.

186. While the first paragraph of the clause suggests that the contract is concluded for two years with the possibility of the Club unilaterally renewing it for an additional period of one year; the second paragraph expresses a more affirmative agreement to the effect that the contract has been concluded for three years (3 seasons), beginning on 1 July 2020 and ending on 30 June 2023.

187. The wording of the two paragraphs of the relevant clause is not consistent, and neither of the Parties presented or proved the existence of preparatory negotiating statements - to the conclusion of the Employment Agreement - which could somehow clarify the real intention of the Parties as to the initial term of the professional relationship. Considering this background,

it can already be stated that the *corpus* and *animus* of the Employment Agreement point in the sense that the Club wanted to bind the Player to a three-year contract. This conclusion is drawn from the letter of the first paragraph of Clause 3 of the Employment Agreement, as the option to renew or not the contractual relationship is a unilateral decision of the Club. In this context, the Sole Arbitrator has no doubts in recognizing that from the Player's perspective the contractual commitment made was for three years. This was the meaning of his contractual expectation. And the Club? The latter seems to have wanted to benefit, based on the lack of clarity of the wording of the clause in question, from the faculty to unilaterally terminate the contractual relationship at the end of the second year of the contract, in a flexible and unclear way.

188. In the Sole Arbitrator's view, the lack of clarity regarding the Club's unilateral option to renew or not the term of the Employment Agreement cannot be valued to the detriment of the Player. The reasons for this understanding are simple. First, because the Club did not specify any notice and/or procedures for the renewal or non-renewal; second, because the unilateral option to renew or not renew, left the Player in an unacceptable and uncertain situation as to when and under what conditions such option would be exercised; and third, the lack of contractual clarity should not be construed to the Player's disadvantage - *interpretatio contra stipulatorem*. The omission of the terms and conditions of the renewal/non-renewal of the contractual relationship, as well as the lack of a reasonable notice for the exercise of the unilateral option, is a gap that cannot benefit the strong party of the contractual relationship (in this case the Club). Otherwise, the respect for the general principle of contractual good faith would be at stake.
189. This reasoning may be further supported by the conduct of the Parties and the respect for the general principles of good faith and the protection of the parties' trust in the performance of a contract. The conduct of the parties in the manner in which the contract was executed is also an important element in the interpretation of the contract. The argument that the Club had the option of not renewing the Employment Agreement beyond the second year loses even more consistency because of the Club's failure to fulfill its obligations. Trying now to use a contractual inaccuracy to reduce the amount of compensation is a clearly opportunistic and even abusive interpretation.
190. Taking into consideration the above, it is the Sole Arbitrator's understanding that the Employment Agreement was, or should be considered, concluded for a period of 3 years and this term should be used as the reference for the assessment of the compensation due to the Player, under the terms of Article 17 RSTP.

C.2. In mitigating the compensation to the Player, shall the remuneration under the Second Contract be considered?

191. The Sole Arbitrator notes that after the termination of the Employment Agreement by the Player, he entered into an employment contract with the club Camaçariense, which was in force between 9 June and 7 September 2021. During this period, the Player earned the remuneration of USD 1,041.30 and this amount was considered by FIFA DRC in the mitigation of the compensation due to him.

192. On 12 August 2021, with effects between 10 August 2021 and 30 June 2023, the Player entered into the Second Contract, based on which he was entitled, among other allowances and benefits, to:
- (i) For the 2021/2022 season: TND 60,000 (approximately USD 20,840) performance bonus and a monthly salary of TND 5,000 (approximately USD 1,736.11); and
 - (ii) For the 2022/23 season: a TND 70,000 (approximately USD 24,314) performance bonus and a monthly salary of TND 5,000 (approximately USD 1,736.11).
193. The Appellant claims that the FIFA DRC should have also considered the above remuneration when determining the adequate compensation to be paid to the Player, since the Second Contract was concluded before the Appealed Decision was passed (on 18 August 2021).
194. In order to determine if the FIFA DRC correctly operated the calculation of the compensation due to the Player, two additional issues must be addressed:
- (a) Does Article 17.1 (ii) RSTP refer only to one subsequent employment agreement, or should the FIFA DRC have considered all executed contracts until its decision? In case FIFA has to consider all contracts concluded by a player,
 - (b) Should CAS – under the provision allowing it to decide *de novo* – consider in the mitigation of the compensation to be awarded the remuneration earned by the Player under the Second Contract?

C.2.1. The correct interpretation of Article 17.1 (ii) RSTP

195. The Sole Arbitrator must now assess whether the amount awarded by FIFA DRC to the Player complies with the guidelines set forth in Article 17.1 (ii) RSTP, whose wording we herein restate:
- “ii. In case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the “Mitigated Compensation”). Furthermore, and subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three monthly salaries (the “Additional Compensation”). In case of egregious circumstances, the Additional Compensation may be increased up to a maximum of six-monthly salaries. The overall compensation may never exceed the rest of the prematurely terminated contract”.*
196. By applying the referred provision, FIFA DRC took into consideration the value of the subsequent contract signed by the Player with Club Camaçariense (USD 1,041.30), but not the Second Contract, subsequently entered into. It is assumed that FIFA DRC was unaware of the existence of this employment contract, which was only disclosed in the context of this Appeal. FIFA’s lack of knowledge was most likely due to the fact that said contract was concluded very close to the date when the Appealed Decision was passed.

197. But now, the Club claims that the remuneration earned by the Player under the Second Contract should be considered for the purposes of mitigating the compensation awarded to the Player.
198. In turn, the Player expressed a different understanding. In the Player's opinion, mitigation can only take into consideration the remuneration earned in the first subsequent employment contract and not all future contracts. This understanding is basically supported by two arguments. First, because "(...) *there is nothing in the language of article 17, par. 1, lit ii, of the FIFA RSTP suggesting that the rule maker intended that more than one contract be considered in the calculation of Mitigated Compensation*"; and second, because the Second Contract was concluded at the procedural time when FIFA DRC no longer had the opportunity to consider it.
199. Considering the Parties' divergent views on the matter, the Sole Arbitrator first analyzes and decides whether - under Article 17 RSTP - the mitigation of compensation is restricted to the "subsequent new contract" (singular) or whether it can take into account all "subsequent new contracts" (plural). Basically, the issue is about the interpretation of the beginning of the relevant provision that states "*in case the player signed a new contract by the time of the decision (...)*" (emphasis added by the Sole Arbitrator).
200. The Sole Arbitrator recognizes that the first and basic element of the interpretation of a rule is its wording (SFT, 4A_392/2008, decision of 22 December 2008, at 4.2.1), but in the absence of clarity of the wording, the interpreter must use other elements that help clarify its meaning, such as the systematic interpretation, the teleological interpretation and the historical interpretation – CAS 2015/A/4222, preamble 2; and CAS 2018/A/5747, 5748 & 5749, para. 41; which states the following:

"41. According to the SFT, the starting point for interpreting is indeed its wording (literal interpretation). There is no reason to depart from the plain text, unless there are objective reasons to think that it does not correspond in all respects to the true meaning of the provision under review (SFT 4A_600/2016, 28 June 2017, consid. 3.3.4.2). This may result from the drafting history of the provision, from its purpose, or from the systematic interpretation of the law. Where the text is not entirely clear and there are several possible interpretations, the true scope of the provision will need to be narrowed by taking into account all the pertinent factors, such as its relationship with other legal provisions and its context (systematic interpretation), the goal pursued, especially the protected interest (teleological interpretation), as well as the intent of the legislator as it is reflected, among others, from the drafting history of the piece of legislation in question (historical interpretation) (ATF 132 III 226 at 3.3.5 and references ATF 131 II 361 at 4.2)".
201. The literal wording of Article 17.1 (ii) RSTP does not provide a satisfactory answer to the issue at hand. Interpreting this provision in a strictly formalistic perspective would constitute a denial of the remaining forms of interpretation available under Swiss Law. Therefore, and *in casu*, the Sole Arbitrator is of the view that the correct interpretation should take into consideration the teleological element of the provision, namely the intention of FIFA and the purposes of the rule.
202. In addition to this, the Commentary (p.168), in what concerns Article 17.1 (ii) RSTP, expressly states that "(...) *the wording of article 17 confirms the established jurisprudence of the DRC, described above, that the compensation due to the player should be calculated based on the residual value of the contract that was*

*terminated early, minus the value of **any new contract** for the period during which the terminated contract would have been in force had it been allowed to run its full term. Compensation paid according to this procedure is known as “mitigated compensation”* (emphasis added by the Sole Arbitrator).

203. In the Sole Arbitrator’s view, mitigation should have its focus on the “income earned” by the player in the relevant period and should not be restricted to the remuneration of the “subsequent contract”. FIFA’s intention was to consider any contractual amounts to which the player was entitled for the same period of reference. If this were not the case, there could be abuses or incentive to simulations. The *ratio* of the provision in question aims at restoring the Player’s income in line with what he was entitled to earn until the end of the contract which was prematurely terminated with just cause and prevent a player benefiting from double remuneration.
204. Taking the above into consideration, the Sole Arbitrator is of the opinion that the correct interpretation of the relevant provision implies the value of any new contract signed by a player for the period corresponding to the time remaining on the prematurely terminated contract. Based on this determination, the Sole Arbitrator understands that the remuneration earned by the Player under the Second Contract should, in theory, be considered for purposes of mitigation of the compensation awarded.

C.2.2. Should CAS revise and increase the mitigation of the compensation awarded by FIFA?

205. Before entering into the main question of determining whether the Second Contract may or not be considered for the purposes of compensation mitigation, it is important to once again highlight that the present appeal is limited by (i) the scope of the dispute before the FIFA DRC and by (ii) the prayers for relief set forward by the Appellant. In essence, this means that the Sole Arbitrator must decide on the issue raised before the FIFA DRC, which was the termination of the Employment Agreement between Appellant and Respondent and is limited in the amount which it can award as compensation (USD 171,000).
206. Moreover, the Sole Arbitrator wishes to clarify that the Second Contract was indeed accepted by the CAS and duly considered, as its *de novo* power allows it to consider evidence which was not presented before the first instance.
207. The Appealed Decision was passed on 18 August 2021 and the Second Contract was signed on 12 August 2021. There are no doubts that the Second Contract was concluded before the Appealed Decision.
208. In the Club’s view the time frame – “*by the time of the decision*” – refers to the act of notification of the decision itself; whereas in the Player’s view, the meaningful sense must be the time when the members composing the panel of decision-makers deliberate and make the decision itself.
209. In relation to this issue the Commentary (p. 168) states the following:

“The alternate position is where a player who succeeds in finding new employment following the breach of contract and associated early termination of their previous contract. Here, too, the decisive date for establishing whether the player has found such employment is the day on which the DRC hands down its decision”.

210. The aforementioned Commentary, which uses the expression *“the day on which the DRC hands down its decision”*, also does not clarify the moment in time up to which FIFA may consider mitigation of compensation. The deadline by which FIFA should consider the elements for mitigation of a compensation must be in line with the FIFA Procedural Rules, which provide that the parties shall not be permitted to amend or supplement their submissions, produce new exhibits or new evidence after notification of the termination of FIFA’s investigation (Article 9, paras. 3 and 5 of the FIFA Procedural Rules).
211. In the Sole Arbitrator’s opinion, the expression *“by the time of the decision”* is not without its doubts, however, the Commentary (p. 168) even refers to *“(…) the compensation due to the player should be calculated based on the residual value of the contract that was terminated early, minus the value of any new contract for the period during which the terminated contract would have been in force had it been allowed to run its full term”* (emphasis added by the Sole Arbitrator).
212. In light of the above, it is clear that the RSTP is much more concerned with the material aspect and consequences as opposed to the procedural aspects. In fact, given the wording of Article 17 RSTP and in line the Commentary, the *ratio* of the provision is essentially aimed at avoiding that a player ends up receiving a “double remuneration”, i.e., compensation for the damages incurred due to the loss of the previous employment and remuneration from a new employment earned during the period in which said employment would have normally been running.
213. Naturally, this means that any remuneration which is earned by virtue of an employment contract which was entered into for the period whereby the primitive employment contract would be running is, in principle, able to mitigate the compensation due to a player under Article 17 RSTP; however, it is important to remind that since said mitigation must be decided in a FIFA DRC proceeding, said body should only consider contracts which were already in force when the decision was issued – principle of legal certainty.
214. In line with the aforementioned interpretation of the RSTP, the communication of the decision by the FIFA DRC is the relevant moment to determine if a new employment contract can be considered for the purposes of compensation mitigation. Therefore, the Sole Arbitrator should consider the Second Contract for the purposes of compensation mitigation, since it was concluded before the Appealed Decision was communicated.
215. The Sole Arbitrator considers that this interpretation is also in line with the FIFA Procedural Rules, since the closing of the investigation phase of the proceedings before the DRC is not definitive and said investigation can always be reopened in the face of exceptional circumstances.
216. Furthermore, a brief reference to the fact that the Club has decided not to intervene in the FIFA DRC proceedings. Most probably, the Club’s indifference to the Player’s claim was also one of the causes that led FIFA not to take into consideration possible steps that could have

minimized the amount of compensation awarded to the Player. In the Sole Arbitrator's view this situation should not prevent the mitigation of the compensation awarded by FIFA DRC but should have an impact in the allocation of the costs of this appeal proceedings. In fact, considering the Club's interest in the outcome of the first instance proceedings, it should have been more diligent and present its defence before FIFA DRC, in which case it could have deliberated if any exceptional circumstance justified the admission of the Second Contract, if acknowledged by the Club at a later stage.

217. The Club's behaviour was, as such, the main "driver" of the current proceedings, which could have been avoided if it had exercised normal diligence and participated in the proceedings before the FIFA DRC – as a result, the Club shall be the one to bear the costs of the proceedings.
218. In light of the above, the Sole Arbitrator is of the opinion that the remuneration earned by the Player under the Second Contract must be considered in the mitigation of the compensation to be awarded to the Player.

C.2.3. What is the correct amount to be awarded as compensation to the Player?

219. Considering the preceding findings, the Sole Arbitrator will now proceed to determine what is the correct amount to be awarded to the Player as compensation for the termination of the Employment Agreement.
220. Firstly, it's important to recall that the Player is entitled to USD 20,000 as outstanding remunerations, plus interest of 5% *p.a.*, as from the respective due dates, all until the date of effective payment (see para. 179 above).
221. Secondly, taking into consideration Article 17.1 of the RSTP, the Player is also entitled to receive from the Club a compensation for breach of contract.
222. In the present case, the Employment Agreement does not stipulate any liquidate damages clause. Therefore, the compensation should be determined accordingly to the applicable FIFA regulations.
223. At the time of the termination, the Employment Agreement would run for another 27 months (April 2021 to June 2023). Consequently, the remaining value of the Employment Agreement since its early termination was USD 171,000. This amount shall constitute the basis for final determination of the compensation for breach the Employment Agreement.
224. In line with the Appealed Decision, which correctly mitigated the amounts earned by the Player under the First Contract, the total amount of USD 1,041.30 shall be deducted from the remaining value of the Employment Agreement.
225. As per the Second Contract (from 10 August 2021 until 30 June 2023) the Player is receiving a fixed monthly salary of TND 5,000 plus possible performance bonuses of TND 60,000 and TND 70,000. In the Sole Arbitrator's views, only the fixed monthly salary of TND 5,000 should

be considered in the mitigation of the compensation, since the Appellant has failed to prove that any of the referred conditional bonuses have been paid to the Player.

226. Considering the above, the monthly salaries corresponding to the overlapping period between the Employment Agreement and the Second Contract (August 2021 to June 2023) shall be deducted from the remaining value of the Employment Agreement. This value is approximately USD 37,470³, which corresponds to 22 full monthly salaries and 1 partial monthly salary for the remaining 22 days of August 2021.
227. After correctly deducting the aforementioned amounts, the compensation due to the Player should amount to USD 132,488.07.
228. The Sole Arbitrator agrees with FIFA DRC that, in addition to the compensation amount and as per Article 17.1 (ii) of the RSTP, the Club should pay an additional compensation between 3 and 6 monthly salaries.
229. FIFA DRC – as correctly pointed out in the Appealed Decision – considered the payment of an additional amount corresponding to 3-months salaries (USD 15,000), since the termination of the Employment Agreement was due to overdue payables and the Player was denied registration for over 5 months. This behaviour is clearly indicative of the Club's attitude towards the Player, since it demonstrates that at no point did it intend to let him do his job as an athlete. By not registering the Player the Club effectively denied him his right to work, since a Player which is not even allowed to play, but only to train, effectively loses one of the most important parts of his job which relates to the competition itself.
230. In result of the mitigation, the Sole Arbitrator understands that the 3-month salaries additional compensation awarded by FIFA can now be reflected in the compensation amount because with its incorporation the total compensation does exceed the remaining value of the Employment Agreement.
231. In conclusion, the Sole Arbitrator decided that the Appellant is liable to pay to the Respondent the total amount of USD 147,488.07 (corresponding to USD 132,488.07 + USD 15,000), as well as 5% interest *p.a.* on the above amount as from 3 May 2021, the date when the FIFA DRC claim was filed by the Respondent.

D. Conclusion

232. In light of the previous findings, the Sole Arbitrator determines that the Appellant is ordered to pay the Respondent the following amounts:
 - a) USD 147,488.07, as compensation due to the breach of contract, plus interest of 5% *p.a.*, since 3 May 2021; and

³ This value corresponds to an approximate conversion of TND to USD considering the medium exchange rates between those currencies in May 2022

- b) USD 20,000 as outstanding remunerations, plus interest of 5% *p.a.*, as from the respective due dates, all until the date of effective payment (see para. 179 above);

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Club Africain on 27 September 2021 against the decision issued by the FIFA Dispute Resolution Chamber Judge passed on 18 August 2021 is partially upheld.
2. Club Africain shall pay to Mr Gilmerson dos Santos Mota the following amounts:
 - a) USD 20,000 (twenty thousand US dollars) as outstanding remunerations, plus interest of 5% *p.a.*, as from the respective due dates until the date of effective payment, as follows:
 - (i) on the amount of USD 5,000 (five thousand US dollars), as from 1 January 2021;
 - (ii) on the amount of USD 5,000 (five thousand US dollars), as from 1 February 2021;
 - (iii) on the amount of USD 5,000 (five thousand US dollars), as from 1 March 2021;
and
 - (iv) on the amount of USD 5,000 (five thousand US dollars), as from 1 April 2021.
 - b) USD 147,488.07 (one hundred forty-seven thousand four hundred and eighty-eight US dollars and seven cents), as compensation due to the breach of contract, plus interest of 5% *p.a.*, since 3 May 2021.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.