Arbitration CAS 2021/A/8471 Al-Hilal Khartoum Club v. Jesi Last, award of 6 February 2023

Panel: Mr Manfred Nan (The Netherlands), President; Mr Michele Bernasconi (Switzerland); Mr Olivier Carrard (Switzerland)

Football
Termination of an employment contract with just cause by the player
Club's abusive conduct
Compensation for damages
Validity of a derogatory contractual clause

1. **Pursuant to Article 14 of the FIFA Regulations on the Status and Transfer of Player (RSTP) a player can terminate his employment contract early for just cause when his club's conduct is so abusive that he can no longer be reasonably expected to continue his employment relationship and/or tends to put undue pressure on him to sign contractual documents. This is the case when he is invited to accept a mutual termination agreement, while being excluded from training sessions and evicted from his accommodation without reason, regardless of his subsequent behaviour.**

2. **The aggrieved player is entitled to claim compensation for damages under Article 17 RSTP, which establishes the principle of "positive interest". Such compensation includes the remuneration provided for in the employment contract and its residual duration, subject to any financial gains made after early termination.**

3. **A contractual clause under which both parties may terminate the employment contract without just cause with compensation equivalent to only one month's salary is invalid in the light of Article 13 RSTP, which aims to guarantee contractual stability. Moreover, it cannot be invoked in one case and set aside in another, at the risk of contravening the principle of good faith.**

I. PARTIES

1. Al-Hilal Khartoum Club (the "Appellant" or the "Club") is a professional football club with its registered office in Omdurman, Sudan. The Club is registered with the Sudan Football Association (the "SFA"), which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

2. Mr Jesi Last (the "Respondent" or the "Player"), is a professional football player of Zimbabwean nationality.

3. The Club and the Player are hereinafter jointly referred to as the "Parties".

II. INTRODUCTION

4. The present appeal arbitration proceedings concern an employment-related disputed between the Club and the Player.

5. Following claims lodged by both Parties, the Single Judge of the Dispute Resolution Chamber of FIFA (the "FIFA DRC") decided that the Player had just cause to terminate his employment contract dated 24 September 2020 with the Club (the "Employment Contract") and that the Club was liable to pay outstanding remuneration (USD 2,500 net) and compensation for breach of contract (USD 152,193 net) to the Player, plus interest (the "Appealed Decision").

6. The Club is challenging the Appealed Decision before the Court of Arbitration for Sport ("CAS"), claiming that (i) the Player did not have just cause to terminate the Employment Contract; (ii) the Player was not owed outstanding remuneration; (iii) the Player shall not be awarded compensation, but that instead the Club shall be awarded compensation for breach of contract from the Player in the amount of USD 160,000; and (iv) sporting sanctions be imposed on the Player.

III. FACTUAL BACKGROUND

7. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties, the hearing and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence considered necessary to explain its reasoning.

A. Background Facts

8. On 24 September 2020, the Parties concluded the Employment Contract for a period of three years, valid as from 20 October 2020 until 19 October 2023. Pursuant to the Employment Contract, the Player was entitled to (i) a sign-on fee of USD 45,000 net; (ii) USD 2,500 net as monthly salary, to be paid by the end of each month; and (iii) housing and car/transportation. Furthermore, clauses 10(3)-(6) of the Employment Contract provide, *inter alia*, as follows:

> *"3. This Contract may be terminated by either party, without consequences for the terminating party, where there exists just cause at the time of the contract termination by the knowledge and concern of SFA.*

4. *If the Club terminates this Contract without having just cause, the Club shall pay to the Player compensation equal to the total amount of: MONTH SALARY.*

5. *If the Player terminates the Contract without having just cause, the Player shall pay to the Club compensation equal to the total amount of: MONTH SALARY.*

6. *The Parties expressly agree that the compensation amounts stipulated under provisions of paragraphs 4 and 5 of this Article 10 above are fair and respect the principles of parity and reciprocity of the Parties in light of the overall circumstances related to the Contract's conclusion and execution".*

9. On 2 May 2021, Mr Mehajar Eltayeb Elfadel Esmaael, the Club's Executive Director, sent the Player via WhatsApp a draft of a mutual termination agreement dated 21 April 2021, proposing to terminate the Employment Contract and agreeing to pay the Player an amount of USD 7,500.

10. On the same date, the Player responded by WhatsApp that the Club's Executive Director should *"Tolk* [sic] *to my agent"* and, following a request of the Club's Executive Director, provided the telephone number of his agent.

11. On 7 May 2021, the Player put the Club in default and granted it a 15-day deadline to proceed with the payment of USD 5,000, corresponding to the outstanding salaries of March and April 2021.

12. On 27 May 2021, the Player sent the Club a second default notice, (i) reiterating his request for payment of USD 5,000; (ii) reminding the Club that the salary for May 2021 would fall due soon; (iii) urging the Club to reinstate him to full training with the first team; and (iv) requesting the Club to return his passport.

13. On the same date, the Club's Executive Director invited the Player by WhatsApp to confirm in writing his refusal to sign the mutual termination agreement.

14. On 1 June 2021, the Club paid the Player the monthly salaries of March, April and May 2021.

15. On 4 June 2021, the Player requested the Club to *"stop requesting* [him] *to sign a mutual termination agreement"*, as well as to return his passport. The Player also indicated that he considered that the Club had no ground to terminate the Employment Contract and that he did *"not recognise the validity of a one month payment should you decide to terminate the contract without just cause, it's illegitimate"*.

16. On 9 June 2021, the Club informed the Player that it considered clause 10 of the Employment Contract to be valid and enforceable and repeated its proposal to the Player to terminate the Employment Contract by mutual agreement, *"otherwise the Club will be forced to terminate the* [Employment Contract] *with the Player, pursuant article 10, but in such case the compensation due to the Player shall be only of one month salary – Article 10.4"*.

17. On 17 June 2021, the Player, with reference to jurisprudence of FIFA and CAS, reiterated his position that he considered clause 10 of the Employment Contract to be *"clearly disproportionate and illegitimate"*. The Player also repeated his request to be allowed to train with the team before 23 June 2021.

18. On 19 June 2021, the Club informed the Player that it was aware that he had left Sudan for his home country Zimbabwe and had not presented himself at the Club's facilities. The Club indicated that it considered this to be an abandonment of employment and maintained that the Player was in breach of the Employment Contract. The Club also repeated its proposal to mutually terminate the Employment Contract and that it would otherwise be *"forced to terminate the* [Employment Contract] *with the Player, with just cause and with the right to a compensation to be paid by the Player to the Club, pursuant article 14 of the Regulations on the Status and Transfer of Players of FIFA* [the "FIFA RSTP"]*, and even if not so, subsidiary, the compensation due to the player shall be only of one month salary – article 10.4"*.

19. On 21 June 2021, the Player informed the Club that he had left Sudan because he was not allowed to train with the first team anymore and because he was vacated from his accommodation. The Player indicated that he was willing to return to Sudan, provided that the Club confirmed that (i) he was part of the first team and was able to train with the group; (ii) the Club would provide him with accommodation; and (iii) the Club counted on his services for the remainder of the Employment Contract.

20. On the same date, 21 June 2021, the Club reiterated its position that the Player had abandoned his work and insisted on the mutual termination of the Employment Contract.

21. On 22 June 2021, the Player reiterated his position that he would return to Sudan, subject to a written confirmation from the Club that it would remedy its breaches. The Player also reserved the right to terminate the Employment Contract with just cause.

22. On 23 June 2021, the Club denied that it was in breach of the Employment Contract and insisted on the mutual termination of the Employment Contract.

23. On 28 June 2021, the Player informed the Club that he terminated the Employment Contract (the "Termination Letter") as follows:

> *"I refer to my previous communications and note that the club has failed to confirm in writing that I am 1) part of the first team, 2) able to train with the rest of the group and 3) that it counts on my services for the future. The club has also failed to confirm that it will arrange my accommodation. I therefore consider that you have repeatedly and severely breached the contract and that you do not wish to remedy those breaches.*
>
> *As a result thereof, I wish to formally inform you that I herewith terminate the* [Employment Contract] *invoking just cause and that I am therefore no longer contractually bound to your club".*

24. During the proceedings before the FIFA DRC, the Player signed an employment contract with the Zimbabwean club Ngezi Platinum Stars FC, valid from 1 September 2021 until 31

December 2023. In accordance with this employment contract, the Player was entitled to a sign-on fee of approximately USD 1,710.97, as well as a total remuneration of approximately USD 6,095.33.

B. Proceedings before the FIFA Dispute Resolution Chamber

25. On 2 July 2021, the Player filed a claim against the Club before the FIFA DRC, maintaining that he had just cause to terminate the Employment Contract, claiming USD 2,500 net as outstanding salary over the month of June 2021, and compensation for breach of contract in the amount of USD 160,000 net (i.e. the residual value of the Employment Contract at the moment of termination), plus interest. The Player also requested the FIFA DRC to impose sporting sanctions on the Club.

26. The Club disputed the substance of the Player's claim, maintaining that the Player had no just cause to terminate the Employment Contract, but that the Player breached the Employment Contract; the Club claimed compensation for breach of contract in the amount of USD 160,000.

27. On 6 October 2021, the single judge of the FIFA DRC (the "Single Judge") rendered the Appealed Decision, with the following operative part:

> *"1. The claim of the* [Player] *is partially accepted.*
>
> *2. The* [Club] *has to pay to the* [Player] *the following amounts:*
>
> - *USD 2,500 net as outstanding remuneration plus 5% interest p.a. as from 1 July 2021 until the date of effective payment; and*
> - *USD 152,193 net as compensation for breach of contract plus 5% interest p.a. as from 28 June 2021 until the date of effective payment.*
>
> *3. Any further claims of the* [Player] *are rejected.*
>
> *4. Full payment (including all applicable interest) shall be made to the bank account indicated in the enclosed Bank Account Registration Form.*
>
> *5. Pursuant to art. 24bis of the Regulations on the Status and Transfer of Players if full payment (including all applicable interest) is not made 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 the ban* [sic] *shall be 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 made by the end of the three entire and consecutive registration periods.*

6. *The consequences shall only be enforced at the request of the* [Player] *in accordance with art. 24bis par. 7 and 8 and art. 24ter of the Regulations on the Status and Transfer of Players.*

7. *This decision is rendered without costs"* (emphasis omitted by the Panel).

28. On 4 November 2021, the grounds of the Appealed Decision were communicated to the Parties, determining, *inter alia*, as follows:

- As to the termination of the Employment Contract by the Player, the Single Judge *"was comfortable to determine that the pieces of evidence brought forward by the player could sufficiently demonstrate that the club substantially breached its contractual duties, entailing that he had just cause to terminate the* [Employment Contract]. *In particular, the Single Judge found it pivotal to her conclusion the fact that:*

  a. *the player sent the club several correspondences giving express notice of its contractual breaches and requesting the appropriate measures in order to resume his work;*

  b. *the club has never provided any evidence or valid argumentation capable of establishing to a comfortable satisfaction degree that it was not in breach of contract i.e. that the player had not been segregated from the rest of the team, or that he had not been evicted from his accommodation;*

  c. *in spite of having the opportunity to do so, the club did not request the player to come back to its premises or to re-join its squad, but simply alleged that the player had unilaterally abandoned his work; and*

  d. *the club clearly and repetitively pointed out its will to terminate the employment contract in the correspondences exchanged with the player, corroborating with the player's argumentation that it did not have interest in the continuation of their employment relationship.*

- *In light of such controverted behaviour adopted by the club and taking into consideration the overall developments of the case – especially the number of correspondences exchanged between the parties – the Single Judge was of the opinion that the player could in good faith believe that, in spite of a hypothetical notice informing about its default, the club would have persisted in the non-compliance with the terms of the employment contract.*

- *At this point, the Single Judge also wished to highlight that the club's conduct towards the player were considered to be abusive and unacceptable with regards to the values protected by the* [FIFA RSTP].

- *Therefore, the Single Judge concluded that the player had just cause to terminate the* [Employment Contract]. *As such, she established that the club shall be liable to the consequences that follow".*

- As to the outstanding remuneration, *"the Single Judge referred to the general legal principle of pacta sunt servanda and decided that the club was liable to pay to the player the full salary of June 2021 as outstanding remuneration (i.e. USD 2,500 net).*

- *In addition, taking into consideration the player's request as well as the constant practice of the* [FIFA DRC] *in this regard, the Single Judge decided to award him interest at the rate of 5% p.a. on the outstanding amount as from 1 July 2021 until the date of effective payment".*

- As to the compensation for breach of contract, *"the Single Judge held that she first of all had to clarify as to whether the pertinent employment contract contained a provision by means of which the parties had beforehand agreed upon an amount of compensation payable by the contractual parties in the event of breach of contract. In this regard, the Single Judge, based on the parties' submissions, went on analysing the content of art. 10 of the* [Employment Contract].

- *Initially, the Single Judge recalled the long-standing jurisprudence of the* [FIFA DRC] *and determined that (in any scenario) the abovementioned provision could not be deemed valid and binding to the parties, because it was disproportional and potestative – especially when taking into consideration that the* [Employment Contract] *was signed for a three-year period. Likewise, the Single Judge also highlighted that the club itself was in agreement with this position, bearing in mind the content of the counterclaim.*

- *Notwithstanding the above and for the sake of completeness, the Single Judge also pointed out that the wording of said art. 10 of the* [Employment Contract] *was not conclusive, taking into consideration that it established the amount of compensation payable in the event: (i) the club terminated the* [Employment Contract] *without just cause; or (ii) the player terminated the* [Employment Contract] *without just cause. Consequently, the Single Judge was of the opinion that said provision was not relevant to the dispute at stake given that it did not regulate the amount due to the player in case of the* [Employment Contract] *being terminated with just cause.*

- *As a consequence, the Single Judge determined that the amount of compensation payable by the club to the player had to be assessed in application of the other parameters set out in art. 17 par. 1 of the* [FIFA RSTP]. *The Single Judge recalled that said provision provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of compensation payable.*

- *Bearing in mind the foregoing as well as the claim of the player, the Single Judge proceeded with the calculation of the monies payable to the player under the terms of the contract from the date of its unilateral termination until its end date. Consequently, she concluded that the amount of USD 160,000 net (i.e. the residual value of the* [Employment Contract]*) should serve as the basis for the determination of the amount of compensation for breach of contract.*

- *In continuation, the Single Judge verified as to whether the player had signed an employment contract with another club during the relevant period of time, by means of which he would have been enabled to reduce his loss of income. According to the constant practice of the* [FIFA DRC] *as well as art. 17 par. 1 lit ii) of the* [FIFA RSTP]*, such remuneration under a new employment*

contract shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the player's general obligation to mitigate his damages.

- *Indeed, the player found employment with Zimbabwean club, Ngezi Platinum Stars FC, valid as from 1 September 2021 until 31 December 2023. In accordance with the pertinent employment contract, the player was entitled to a sign-on fee of approximately USD 1,710.97, as well as a total remuneration of approximately USD 6,095.33. Therefore, the Single Judge concluded that the player mitigated his damages in the total amount of USD 7,806.30.*

- *Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Single Judge decided that the club must pay the amount of USD 152,193 net to the player (i.e. USD 160,000 minus USD 7,806.30), which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter.*

- *Lastly, taking into consideration the player's request, the Single Judge decided to award the player interest on said compensation at the rate of 5% p.a. as of 28 June 2021 until the date of effective payment.*

- […]*".*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

29. On 25 November 2021, the Club filed a Statement of Appeal with the CAS against the Appealed Decision, in accordance with Articles R47 and R48 of the 2021 edition of the Code of Sports-related Arbitration (the "CAS Code"). In this submission, the Club named the Player as the sole respondent and requested that the case be submitted to a sole arbitrator.

30. On 3 December 2021, the Player objected to the appointment of a sole arbitrator and requested a panel of arbitrators to be appointed.

31. On 6 December 2021, the CAS Court Office informed the Parties that the President of the Appeals Arbitration Division had decided to submit the present procedure to a panel composed of three arbitrators.

32. On 7 December 2021, the Club informed the CAS Court Office that its Statement of Appeal was to be considered as its Appeal Brief in accordance with Article R51 CAS Code.

33. On 13 December 2021, the Club nominated Mr Michele A.R. Bernasconi, Attorney-at-Law in Zurich, Switzerland, as arbitrator.

34. On the same date, the Player nominated Mr Olivier Carrard, Attorney-at-Law in Geneva, Switzerland, as arbitrator.

35. On 14 December 2021, FIFA renounced its right to request its possible intervention in the present arbitration proceedings pursuant to Article R52 para. 2 and R41 para. 3 CAS Code.

36. On 16 December 2021, the Player maintained that both the Club's Statement of Appeal as well as the notification that the Statement of Appeal was to be considered as the Appeal Brief were filed late and requested CAS to terminate the proceedings for such reasons.

37. On the same date, 16 December 2021, the CAS Court Office informed the Parties that the Club had filed its Statement of Appeal on 25 November 2021, but that the CAS Court Office had provided the Club with the required information to access the CAS e-Filing system only on 29 November 2021, following which the Club uploaded its Statement of Appeal on the same date and therefore complied with Article R31 para. 3 CAS Code. The CAS Court Office also clarified that the Club had filed evidence of filing its Appeal Brief on 6 December 2021, within the given time limit. The CAS Court Office invited the Player to confirm whether he wished to maintain or withdraw his request to immediately terminate the proceedings.

38. On 18 December 2021, the Player informed the CAS Court Office that he withdrew his request to immediately terminate the proceedings.

39. On 13 January 2022, the CAS Court Office informed the Parties that, pursuant to Article R54 CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel appointed to decide the procedure was constituted as follows:

President: Mr Manfred Nan, Attorney-at-Law, Amsterdam, the Netherlands

Arbitrators: Mr Michele A.R. Bernasconi, Attorney-at-Law, Zurich, Switzerland

Mr Olivier Carrard, Attorney-at-Law, Geneva, Switzerland

40. On 4 February 2022, pursuant to Article R55 CAS Code, the Player filed his Answer.

41. On 8 February 2022, following a request from the CAS Court Office, the Player indicated that he did not *per se* consider it necessary for a hearing to be held, whereas the Club indicated that it preferred a hearing to be held.

42. On 14 February 2022, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing.

43. On 7 March 2022, following an invitation from the CAS Court Office to both Parties to express their preference for an in-person hearing or a hearing by video-conference, to which invitation neither of the Parties responded, the CAS Court office informed the Parties that the Panel had decided to hold a hearing by video-conference.

44. On 18 March 2022, both Parties returned duly signed copies of the Order of Procedure to the CAS Court Office.

45. On 6 April 2022, the CAS Court Office informed the Parties that Mr Dennis Koolaard, Attorney-at-Law in Amsterdam, the Netherlands, had been appointed as *Ad hoc* Clerk.

46. On 19 April 2022, a hearing was held by video-conference.

47. In addition to the Panel, Mr Björn Hessert, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

a) For the Appellant:

1) Dr Pedro Macieirinha, Counsel;
2) Mr Eltahir Eltayeb Younis, Director of the Club;
3) Mr Mehajar Eltayeb Elfadel Esmaael, Executive Manager and Chief of TMS of the Club;
4) Mr Mohamed Abdala Abdelrahman, Interpreter.

b) For the Respondent:

1) Mr Jesi Last, the Player;
2) Mr Felix Majani, Counsel;
3) Mr Desmond Maringwa, Counsel;
4) Mr Simba Believe Nyamariwata, Interpreter.

48. The Panel heard evidence from Mr Mehajar Eltayeb Elfadel Esmaael, Executive Manager and Chief of TMS of the Club, witness called by the Club, and from the Player.

49. The Club had previously indicated that it also wished to hear evidence from Mr Eltahir Eltayeb Younis, but during the hearing the Club waived his testimony with the agreement of the Player.

50. Mr Mehajar Eltayeb Elfadel Esmaael was invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. Both Parties and the Panel had full opportunity to examine and cross-examine the witness.

51. Both Parties were given full opportunity to present their cases, submit their arguments and answer the questions posed by the members of the Panel.

52. Before the hearing was concluded, both Parties expressly stated that they had no objection to the procedure adopted by the Panel and that their right to be heard had been respected.

53. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

54. The Club's submissions, in essence, may be summarised as follows:

i. In general

- Only when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, a contract may be terminated prematurely. A premature termination of an employment contract can only be used as an *ultima ratio*.

- In the present dispute, the Player neither terminated the Employment Contract upon expiry, nor by mutual agreement. The Player terminated the Employment Contract without just cause.

- Following the Player's default letters, the Club paid to the Player the total amount of USD 7,500 for the three outstanding salaries of March, April and May 2021. In view of this, the Club complied with its financial obligations towards the Player. The Player did not have just cause to terminate the Employment Contract for outstanding salaries.

ii. Time limit for default notices

- The Player did not grant the Club a time limit of 10 or 15 days to comply with its contractual obligations. The *"failure of* [the Player] *to put* [the Club] *on those dates prevents him to terminate the contract with just cause for any breach of the club's contractual obligations* [sic]*"*.

- On 11 June 2021, the Player only provided the Club a time limit of 7 days to comply. On 17 June 2021, the Player only granted a time limit of 6 days to comply. On 21 June 2021, the Player only granted the Club a time limit of 3 days to comply. On 22 June 2021, the Player did not grant any time limit to the Player to comply. On 28 June 2021, only 6 days after this last default letter, the Player terminated the Employment Contract. For each default letter a new time limit for the Club's compliance with its alleged contractual obligations should have commenced.

iii. The Club's alleged failure to comply with its contractual obligations

- The Club did not breach any of its contractual obligations, nor did it act in an abusive manner aimed at forcing the Player to terminate the Employment Contract.

- The Club paid the Player the remuneration set forth in the Employment Contract.

- The Club sent the Player a draft amicable termination agreement. On 2 May 2021, the Club *"told to the Club's representative to talk with is* [sic] *agent about Amicable Termination of Contract. The one who signed his contract, said* [the Player] *to* [the Club]. [sic]*"*. Upon the telephone number of the Player's agent being provided by the Player, the Club *"couldn't contact the player's agent, because he was always uncontactable. In*

view of the aforementioned, the [Club] *realized that* [the Player] *refused to sign the Amicable Termination of Contract"*.

- As from the Player's definite refusal to terminate the Employment Contract by mutual agreement, *"the* [Club] *put* [the Player] *in default by abandonment of employment and absence of work"*.

iv. The Player's absence from work

- As the Player recognises, he left Sudan for his home country Zimbabwe, and did not present himself in the Club's facilities, nor demanded for training. This situation is considered abandonment of employment and absence from work.

- The case law of the FIFA DRC assists to clarify the prerequisites for the existence of just cause for the dismissal of a player in cases of abandonment of employment.

- The two prerequisites (prolonged absence of the player, and no authorisation for absence from the club) are complied with. On 19, 21 and 23 June 2021, the Club notified the Player to report to work. The Club can therefore not be held liable for the Player's unilateral decision, *"which meant that he did not have access to training dates and times"*.

- Considering the above, there is no doubt that according to the FIFA RSTP, the Player terminated the Employment Contract unlawfully and that it was the Player who infringed the most elementary and *"nuclear"* duties of an employment relationship.

v. The principle of exception non adimpleti contractus

- In accordance with this principle, a party cannot request the fulfilment of the other party's contractual obligations if it is in breach of its own obligations.

- The Player was in breach of his obligation to perform his footballing activity for the Club and therefore he had no just cause to terminate the Employment Contract.

vi. The consequences of the Player's unilateral termination of the Employment Contract

- The Club shall not be liable to pay to the Player the full salary of June 2021 as outstanding remuneration. The Player shall not be awarded interest.

- The Club shall not pay to the Player any amount of compensation, as this is neither a reasonable nor a justified amount, because the Club did not breach the Employment Contract. The Player shall not be awarded interest.

vii. The Club's claim

- The Player terminated the Employment Contract without just cause. Pursuant to clause 10(5) of the Employment Contract, in such case, the Player shall pay to the Club compensation equal to a monthly salary. This clause is however incompatible with the general principles of contractual stability. Therefore, Article 17 FIFA RSTP is applicable.

- Considering that the Employment Contract was terminated by the Player without just cause and that the original duration of the Employment Contract ran until 19 October 2023, the remaining value of the Employment Contract corresponds to USD 160,000 (28 months x USD 2,500 + USD 45,000 + USD 45,000). This amount shall be awarded to the Club as compensation for breach of contract.

- On a subsidiary basis, in case clause 10(5) of the Employment Contract is considered valid, the Player shall pay to the Club compensation equal to one month salary, i.e. USD 2,500, plus interest.

55. On this basis, the Club submits the following prayers for relief in its Appeal Brief:

"1 – Firstly, it shall be considered that:

a. the player had not just cause to terminate the employment contract.

b. the Appellant shall not be subject to any consequences of the unjustified breach of contract committed by the Player.

c. the club shall not be liable to pay to the player the full salary of June 2021 as outstanding remuneration (i.e. USD 2,500 net).

d. the Respondent shall not be awarded interest at the rate of 5% p.a. on the alleged outstanding amount as from 1 July 2021 until the date of effective payment.

e. the Appellant club shall not pay to Respondent player any amount of compensation in the case at stake.

f. the club shall not pay the amount of USD 152,193 net to the player (i.e. USD 160,000 minus USD 7,806.30), which isn't a reasonable nor justified amount of compensation because de [sic] *Appellant didn't breach the contract in the present matter.*

g. the player shall not be awarded interest on compensation at the rate of 5% p.a. as of 28 June 2021 until the date of alleged effective payment.

h. in view of the aforementioned, the Decision of the Dispute Resolution Chamber shall be annulled and replaced.

i. the claim of the Respondent Jesi Last, shall be rejected.

j. the Appellant, Al-Hilal, has not to pay the Respondent *the following amounts:*

- *USD2,500 net as outstanding remuneration plus 5% interest p.a. as from 1 July 2021 until the date of effective payment; and*
- *USD 152,193 net as compensation for breach of contract plus 5% interest p.a. as from 28 June 2021 until the date of effective payment.*

2 – Secondly, it shall be declared that:

a. the employment contract was terminated by the Player without just cause on 28 June 2021;

b. considering that the original duration of the employment contract ran until 19 October 2023, the remaining value of the contract corresponds to USD 160,000 (28 months × USD 2,500 + USD 45,000 + USD 45,000), which must be awarded to the Club as compensation for breach of contract.

c. the Club is entitled to receive from the Player the amount of USD 160,000 as compensation for breach of contract + 5% interest of the aforementioned amount calculated a [sic] *from the date of termination of the contract until the date of effective payment;*

d. Moreover, sporting sanction shall be imposed to the Player.

If not so, subsidiary, it shall be declared that:

a. the employment contract was terminated by the Player without just cause on 28 June 2021;

b. considering that the employment contract was terminated by the Player without just cause on 28 June 2021 and that the monthly salary was USD 2,500, the compensation amount shall be of USD 2,500 USD [sic]*, plus interest at 5% rate since 28 June 2021 until the effective payment, which must be awarded to the Club as compensation for breach of contract,*

c. the Club is entitled to receive from the Player the amount of USD 2,500 as compensation for breach of contract + 5% interest of the aforementioned amount calculated a from [sic] *the date of termination of the contract until the date of effective payment.*

d. the Player shall be condemned to pay to the Club the amount of USD 2,500 as compensation for breach of contract + 5% interest of the aforementioned amount calculated a from [sic] *the date of termination of the contract until the date of effective payment;*

e. Moreover, sporting sanctions shall be imposed to the Player.

The Counter/Claim shall be accepted". [emphasis omitted by the Panel]

B. The Respondent

56. The Player's submissions, in essence, may be summarised as follows:

i. In general

- The Player had just cause to terminate the Employment Contract, because the Club – as from March 2021 – was no longer interested in the services of the Player and adopted an abusive stance aimed at forcing the Player to agree to a mutual termination of the Employment Contract. This conduct is in violation of Article 14(2) FIFA RSTP.

- The content of the Parties' correspondence is self-explanatory: the Club wanted to put an end to the contractual relationship and excluded the Player from its squad and accommodation.

- Contrary to what the Club tries to portray, the Employment Contract did not give the Club the right to terminate the Employment Contract, nor did it impose an obligation on the Player to agree to a premature termination.

- The Club's references to a "negotiation" are incorrect, as there was no negotiation. The "negotiation" of the Club in April and May 2021 was in fact a unilateral abusive process. The Club used the situation of overdue salaries as a way to "motivate" the Player to accept the termination.

- The Player was not simply demoted to the second team, but he was fully excluded from team practice with no alternatives being provided to him.

ii. The principle of exception non adimpleti contractus

- As to the Club's reliance on the principle of *exception non adimpleti contractus*, it was the Club which did not fulfil its contractual obligations first, by (i) excluding the Player from training; (ii) not providing the Player with accommodation; and (iii) pressuring him to agree with a "mutual termination" of the Employment Contract.

- When the Club on 23 June 2021 again refused to confirm that it would reinstate the Player to training, provide him with accommodation and counted on him as an employee, what other measures could the Player have taken to "save" the employment relationship?

- As a matter of fact, the Player was extremely lenient to the Club. On 7 May 2021, he sent a notice to the Club asking it to pay the two outstanding salaries within 15 days. When the Club had not done so by 22 May 2021, he could have already terminated the Employment Contract on the basis of Article 14bis FIFA RSTP, yet he decided to give the Club another chance to remedy the breaches. This course of action shows without a doubt that the Player wanted to continue the Employment Contract.

iii. Time limit for default notices

- The FIFA RSTP do not specify any number of days for a default notice, except for the 15-day notice of Article 14bis FIFA RSTP. However, this provision specifically refers to the scenario in which two monthly salaries are outstanding. The current case does not fall under Article 14bis FIFA RSTP.

- In any case, as from 7 May 2021, the Player informed the Club that he expected to be reinstated in the team and that he did not want to sign the termination agreement. The Employment Contract was terminated on 28 June 2021 only, so the Club had more than 6 weeks to remedy the breaches.

iv. The Club's alleged failure to comply with its contractual obligations

- The Club contends that it always respected the Employment Contract and its obligations as an employer, but this is not correct as (i) the Club pressured the Player into signing the termination agreement; (ii) the Player was excluded from training; (iii) the Club vacated the Player's accommodation; and (iv) the Club relied on clause 10(4) of the Employment Contract as a buy-out clause, which is clearly wrong. The Club was aware that clause 10(4) of the Employment Contract did not give the Club the right to terminate the Employment Contract, otherwise the Club would have simply invoked this provision to terminate the Employment Contract.

v. The Player's absence from work

- The Club is putting all emphasis on the fact that the Player left Sudan. While this is true, the reason for doing so was that – after weeks of being excluded from the team – the Club took away the Player's accommodation. This action is not disputed by the Club. Obviously, under such circumstances, there was no reason for the Player to remain in Sudan. If the reasoning of the Club would be followed, the Player would have to return to Sudan, even though he was not allowed to train, without being provided with accommodation, to keep being confronted with a club that asked him to sign a mutual termination agreement or that it would otherwise terminate the Employment Contract.

- In any event, the Club never terminated the Employment Contract for the Player's short absence, so the Club cannot rely on this argument to begin with. Instead, the Player terminated the Employment Contract for the abusive conduct of the Club.

vi. The consequences of the Player's unilateral termination of the Employment Contract

- The Club did not request any reduction of the compensation awarded to the Player in case the Panel confirms that the Player terminated the Employment Contract with just cause and it is also not relying anymore on clause 10(4) of the Employment

Contract that less compensation is due. Therefore, if the Panel concludes that the Player terminated the Employment Contract without just cause, it must also award the exact amount as awarded by the FIFA DRC, as any other determination would violate the legal principle of *ultra petita*.

- In any case, the FIFA DRC's calculation of compensation was correct. The rest value of the Employment Contract was USD 160,000 and the Player found new employment at Ngezi Platinum Stars FC, where he would earn a total remuneration of USD 7,806.97. The salary of June 2021 was also correctly granted as outstanding remuneration in the amount of USD 2,500.

vii. The Club's claim

- The Club's claim in the amount of USD 160,000 – or alternatively – USD 2,500, as compensation for breach of contract is to be dismissed, as the Player did not terminate the Employment Contract without just cause.

- Interesting though – and which must be emphasised – is that this time the Club itself argues that clause 10(5) of the Employment Contract is null and void. The Panel is reminded that the Club from the very start and consistently used clause 10(4) of the Employment Contract to tell the Player that he was obliged to agree to a mutual termination.

- Hence, the Club's claim is to be rejected in full.

57. On this basis, the Player submits the following prayers for relief in his Answer:

"1. Reject the Appeal of the Appellant

2. Confirm the decision of the FIFA DRC

3. Order the Appellant to pay the full arbitration costs

4. Order the Appellant to pay the Respondent an amount towards his costs".

VI. JURISDICTION

58. Article R47 para. 1 CAS Code provides the following:

> *"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".*

59. The jurisdiction of CAS, which is not disputed, derives from Article 57(1) FIFA Statutes (2021 Edition), as it determines that *"[a]ppeals 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", and Article R47 para. 1 CAS Code. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by the Parties.

60. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VII. ADMISSIBILITY

61. Article R49 CAS Code provides, *inter alia*, as follows:

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

62. The appeal was filed within the deadline of 21 days set by Article 57(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

63. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

64. Article R58 CAS Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

65. Article 56(2) FIFA Statutes provides 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".*

66. The Club makes no submissions on the law to be applied, but it refers in its submissions to the FIFA RSTP and Swiss law. The Club annexed the FIFA RSTP (edition August 2021) to its Appeal Brief.

67. With reference to Article R58 CAS Code and Article 56(2) FIFA Statutes, the Player contends that the current dispute should be decided applying the FIFA RSTP as well as Swiss law. The Player does not make reference to any particular edition of the FIFA RSTP.

68. The Panel finds that the applicable regulations are the Statutes and various regulations of FIFA, in particular the FIFA RSTP. As to the applicable edition of the FIFA RSTP, the Panel notes that, since the Player's claim was lodged with the FIFA DRC on 2 July 2021, the February 2021 edition is applicable, as was also held by the FIFA DRC in the Appealed Decision.

69. Additionally, in accordance with Article 56(2) FIFA Statutes, Swiss law is applicable should the need arise to fill a possible gap in the various rules of FIFA.

IX. MERITS

A. The Main Issues

70. The main issues to be resolved by the Panel are the following:

i. Did the Player have just cause to terminate the Employment Contract?
ii. What are the consequences thereof?

i. Did the Player have just cause to terminate the Employment Contract?

71. Since the Player terminated the employment relationship with the Club on 28 June 2021, the Panel finds that the Player has the burden of proof to establish that he had just cause to do so.

72. In the Termination Letter dated 28 June 2021, the Player invoked the following grounds for terminating the Employment Contract:

> *"I refer to my previous communications and note that the club has failed to confirm in writing that I am 1) part of the first team, 2) able to train with the rest of the group and 3) that it counts on my services for the future. The club has also failed to confirm that it will arrange my accommodation. I therefore consider that you have repeatedly and severely breached the contract and that you do not wish to remedy those breaches".*

73. On the other hand, the Club holds that it did not breach any of its contractual obligations and that it did not act in an abusive manner aimed at forcing the Player to terminate the Employment Contract, but that it was rather the Player who did not comply with his contractual obligations by abandoning his workplace.

a) The applicable regulatory framework

74. Article 14 FIFA RSTP provides as follows:

> *"1. A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.*

2. *Any abusive conduct of a party aiming at forcing the counterparty to terminate or change the terms of the contract shall entitle the counterparty (a player or a club) to terminate the contract with just cause".*

75. Besides Article 14, the FIFA RSTP also provide for more specific reasons to terminate an employment relationship, namely Article 14bis (terminating a contract for outstanding salaries) and Article 15 (sporting just cause), but these provisions are not invoked in the matter at hand.

76. Rather, the Player maintains that the behaviour of the Club in trying to convince him to sign a mutual termination agreement qualifies as "abusive conduct" in the sense of Article 14(2) FIFA RSTP and that the actions of the Club generally constitute just cause to terminate the employment relationship.

77. As to the general provision of Article 14(1) FIFA RSTP, it is longstanding and consistent CAS jurisprudence that:

> *"The RSTP 2001 do not define when there is 'just cause' to terminate a contract. In its established legal practice, CAS has therefore referred to Swiss law in order to determine the purport of the term "just cause". Pursuant to this, an employment contract which has been concluded for a fixed term, can only be terminated prior to expiry of the term of the contract if there are 'valid reasons' or if the parties reach mutual agreement on the end of the contract (see also ATF 110 I 167; WYLER R., Droit du travail, Berne 2002, p. 323 and STAEHELIN/VISCHER, Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht, Teilband V 2c, Der Arbeitsvertrag, Art. 319-362 OR, Zurich 1996, marg. no. 17 ad Art. 334, p. 479). In this regard Art. 337 para. 2 of the Code of Obligations (CO) states – according to the translation into English by the Swiss-American Chamber of Commerce: 'A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship'. According to Swiss case law, whether there is 'good cause' for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446; ATF 2 February 2001, 4C.240/2000 no. 3 b aa). Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545). In other words, it may be deemed to be a case for applying the clausula rebus sic stantibus (ATF 5 May 2003, 4C.67/2003 no. 2). According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 5 May 2003, 4C.67/2003 no. 2; WYLER R., op. cit., p. 364 and TERCIER P., Les contrats spéciaux, Zurich et al. 2003, no. 3402, p. 496). Pursuant to the established case law of the Swiss Federal Supreme Court, early termination for valid reasons must, however, be restrictively admitted (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 127 III 351; WYLER R., op. cit., p. 364 and TERCIER P., op. cit., no. 3394, p. 495)"* (CAS 2006/A/1180, para. 25 of the abstract published on the CAS website).

78. The Panel fully adheres to such legal framework, which has been applied also in recent CAS jurisprudence (cf. CAS 2019/A/6171 & 6175, para. 93; CAS 2017/A/5312, para. 82; CAS 2020/A/6727, para. 113). The Panel will therefore examine whether the Club's conduct was of such a nature that the Player could no longer be reasonably expected to continue his employment relationship with the Club.

79. However, in making such assessment, and given the particular circumstances of this case, the Panel will particularly rely on Article 14(2) FIFA RSTP.

80. The Panel notes that Article 14(2) was newly implemented in the June 2018 version of the FIFA RSTP. In FIFA Circular no. 1625 dated 26 April 2018 it is, *inter alia*, explained to the stakeholders that Article 14 FIFA RSTP *"has been amended to include a new paragraph concerning abusive situations where the stance of a party (either a player or a club) is intended to force the counterparty to terminate or change the terms of the contract"*.

b) Assessment of the Club's conduct

81. As to the reasons for terminating the Employment Contract, the Player maintains that he was forced to leave his apartment and that the Club did not arrange new accommodation for him. This allegation remained undisputed by the Club.

82. Clause 6 of Schedule 1 to the Employment Contract provides as follows:

> *"The Club shall provide the Player for each season with housing* […]*"*.

83. The Panel finds that the Club's failure to provide the Player with housing was thus a clear violation of the Club's duties under the Employment Contract.

84. The Panel considers the failure to provide the Player with housing particularly severe, because the Player was apparently evicted from his apartment only following his refusal to conclude a mutual termination agreement with the Club.

85. Indeed, the Club first provided the Player with a draft mutual termination agreement on 2 May 2021, following which the Club repeatedly requested the Player to sign such contract. As mentioned above, the Player's allegation that he was evicted from his accommodation on 12 June 2021 remained uncontested.

86. Following the Player's refusal to enter into a mutual agreement (which was of course his right), the Club first appears to have put pressure on the Player by disallowing him to take part in training sessions with the first team of the Club and later, when this first measure did not convince the Player to agree to the mutual termination, evicting him from his apartment.

87. The Club also did not advance substantiated objections against the argument of the Player that he had not been allowed to participate in training sessions with the first team of the

Club from the end of April 2021 until mid-June 2021; the Club merely argued that the Player did not present any evidence to establish that he could not participate in the training sessions.

88. The Panel finds that the Player did provide evidence. First, the Player repeatedly requested the Club to be permitted to participate in training sessions again, which letters remained unanswered by the Club. Furthermore, the Player testified that he was prevented to participate in training sessions and the Panel has no reason to doubt the veracity of the Player's testimony. Finally, if it were true that the Player was not prevented from participating in training sessions, but that he decided himself not to participate, the Panel would have expected the Club to reproach the Player for his absence, but it did not.

89. As an employee of the Club, the Player was in principle entitled to participate in training sessions. The general entitlement to participate in training sessions has been acknowledged in CAS jurisprudence:

> *"The Sole Arbitrator looks at the facts stated by the Parties, particularly that the Player was excluded from training sessions with the Appellant's first team. Pursuant to Swiss law, and in accordance with CAS jurisprudence 'the employer has the obligation to protect the employees' personality (Article 328 of the Swiss Code of Obligations). The case law has deduced thereof a right for some categories of employees to be employed, in particular for employees who's inoccupation can prejudice the future career development. The employer has to provide these employees with the activity they have been employed for and for which they are qualified. The employer is therefore not authorized to employ them at different or less interesting positions than the one they have been hired for* […]. *If the employer breaches this obligation, the employee has the right to immediately terminate the agreement" (see CAS 2005/A/937, para. 8.4.4).*
>
> *The fact that the Respondent was excluded from the training sessions with the Appellant's first team remained uncontested. The Appellant even informed the Respondent that he did not count on the Respondent's services anymore and therefore the Appellant was in breach of the Agreement"* [CAS 2013/A/3398, paras. 59-60 of the abstract published on the CAS website].

90. In any event, clause 4(2)(5) of the Employment Contract provides the Player with a contractual right to be provided with training by the Club:

> *"During the contractual period, the Club will make the following elements available to the Player:*
>
> […]
>
> *Training programme, pending sudden changes".*

91. The Club also failed to provide the Player with any justification for his exclusion from training. Despite multiple requests of the Player to be reinstated in the team, the Club never confirmed to the Player that he could participate in training sessions again.

92. Insofar as Mr Mehajar Eltayeb Elfadel Esmaael testified that the Player himself stopped attending training sessions as from 21 April 2021, the Panel notes, again, that the Club at no point in time issued any communication to the Player inviting him to report himself for the

training sessions. There is also no evidence that the Club commenced any internal disciplinary proceedings against the Player.

93. While the Club refers to "negotiations" about a mutual termination of the Employment Contract, there is no evidence on file that negotiations ever took place. The Player informed the Club that it should contact his agent and the Club maintains that it was not able to contact the Player's agent, without however submitting any evidence of how and when it tried to contact the Player's agent. Accordingly, the Club simply provided the Player repeatedly with the same draft mutual termination agreement and tried to pressure him into signing it, without actually engaging in any negotiations. During such period, the Panel is satisfied that the Club did not rely on nor request the working performance of the Player.

94. The Panel also considers it inappropriate from the Club to twist the facts by arguing that the Player did not have just cause to terminate the Employment Contract by alleging that it was the Player who breached the Employment Contract by deciding to abandon his workplace. In fact, the Player only left Sudan after the Club had refused to let the Player participate in training sessions and deprived him from having the contractually due accommodation. The principle of *exception non adimpleti contractus* invoked by the Club, actually applies, under the circumstances of this case, in favour of the Player: because the Club did not comply with its own obligations under the Employment Contract by preventing the Player from participating in training sessions and by evicting him from his accommodation, the Club could no longer legitimately demand from the Player that he complied with his contractual obligations.

95. In any event, the Player at all times indicated to be ready to return to the Club as soon as the Club would allow him to participate in training sessions and to provide him with housing, which the Club refused to do. While Mr Mehajar Eltayeb Elfadel Esmaael testified that the Club did request the Player to return to Sudan and that the evidence for this was on his computer, the Panel notes that no satisfying evidence is on file that the Club ever invited the Player to return. Any evidence that may be stored on Mr Mehajar Eltayeb Elfadel Esmaael's computer should have been submitted to CAS with the Club's Appeal Brief, or the Club should have asked leave from the Panel to submit such evidence at a later stage of the proceedings, but no such request was lodged.

96. The Panel considers that under the circumstances of the present case, where the Club had first asked the Player to accept a mutual termination agreement and, thereafter, the Club had shown no interest for the services of the Player, the demand by the Club that the Player shall return to Sudan – without ensuring the Player that he could participate in training sessions and that he would be provided with housing – is an abusive behaviour on the side of the Club.

97. While a football player should generally be aware that leaving the country of his employer without permission may be considered a breach of his contractual duties as employee, the Panel finds that in the present case the Player's decision to leave Sudan was justified in the circumstances.

98. The mere fact that the Club ultimately (albeit late) paid the Player the salaries owed to him over the months of March, April and May 2021 has no impact on the Panel's assessment, because this was only the Club's duty under the Employment Contract.

99. Taking all afore-mentioned elements together, the Panel finds that this is a clear case of "abusive conduct" of a club, aimed at *"forcing the counterparty to terminate* […] *the contract"*, which is exactly the type of behaviour that Article 14(2) FIFA RSTP aims to prevent and therefore qualifies as a just cause in the sense of Article 14(1) FIFA RSTP.

100. Indeed, the Panel finds the Club's behaviour to be so abusive that the Club should consider itself fortunate that the FIFA DRC did not directly impose sporting sanctions on it on the basis of Article 17(4) FIFA RSTP, considering that the Club's violations also occurred during the "protected period".

c) Default notices

101. As to the Club's argument that the Player did not comply with the formal requirement to provide the Club with a 15-day notice period before terminating the Employment Contract, the Panel notes that the 15-day notice period is applicable in case of termination based on outstanding salaries alone (pursuant to Article 14bis FIFA RSTP), but that Article 14 FIFA RSTP does not provide for any formal prerequisites with respect to default notices.

102. In any event, the Player repeatedly notified the Club of its alleged failure to comply with the terms of the Employment Contract (i.e. by letters dated 27 May 2021, 4 June 2021, 17 June 2021, 21 June 2021 and 22 June 2021) before ultimately terminating the Employment Contract on 28 June 2021. The Panel finds that the Player left a reasonable period for the Club to cure the violations of the Employment Contract, before proceeding with the termination.

103. Had the 15-day notice period been applicable, *quod non*, the Panel notes that the Player, in his letter to the Club dated 27 May 2021, already asked to be reinstated to full training with the first team, but that such default had not been cured by the time the Player terminated the Employment Contract on 18 June 2021. Accordingly, the Player in any event provided the Club with a 15-day notice period. The issuance of a new default notice does not interrupt the notice period that commenced with a prior default notice.

d) Conclusion

104. Consequently, the Panel finds that the Player had just cause to terminate the Employment Contract on 28 June 2021.

ii. What are the consequences thereof?

a) The counterclaim filed by the Club

105. In light of the conclusion that the Player had just cause to terminate the Employment Contract, the Club's claim for USD 160,000 as compensation for breach of contract by the Player is dismissed.

106. Besides the fact that the Club never terminated the Employment Contract, the Club's argument that the Player unilaterally breached his contractual duties by leaving Sudan shall be dismissed, for the reasons set out above.

107. As indicated *supra*, the Player only left his workplace after the Club disallowed him to participate in training sessions, evicted him from his accommodation and tried to pressure him into signing a mutual termination agreement.

108. Furthermore, the Player at all material times indicated that he would return to the Club as soon as the Club would comply with its contractual obligations towards him.

109. Consequently, the Club's claim for compensation for breach of contract in the amount of USD 160,000, plus interest, and its request that sporting sanctions be imposed on the Player, are dismissed.

b) Outstanding salaries

110. With respect to the Player's claim for outstanding salaries, the FIFA DRC decided in the Appealed Decision that the Club, in accordance with the legal principle of *pacta sunt servanda*, was liable to pay the Player USD 2,500. This amount corresponds to the Player's salary of June 2021.

111. Besides a generic statement that *"[t]he club shall not be liable to pay to the player the full salary of June 2021 as outstanding remuneration (i.e. USD 2,500 net)"*, the Club did not submit any specific arguments as to why such amount would not be due to the Player.

112. In any event, the Panel finds it reasonable and fair that the Club pays the Player outstanding remuneration for the month of June 2021 in the amount of USD 2,500 net.

c) Compensation for breach of contract

113. Having established that the Player had just cause to terminate the Employment Contract on 28 June 2021, the Panel will now deal with the issue of compensation for breach of contract.

114. Article 17(1) FIFA RSTP provides as follows:

> *"The following provisions apply if a contract is terminated without just cause:*

> *1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, 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 (amortised over the term of the contract) and whether the contractual breach falls within a protected period.*
>
> *Bearing in mind the aforementioned principles, compensation due to a player shall be calculated as follows:*
>
> *i. in case the player did not sign any new contract following the termination of his previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated;*
>
> *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 value of the prematurely terminated contract.*
>
> *iii. Collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law may deviate from the principles stipulated in the points i. and ii. above. The terms of such an agreement shall prevail".*

115. With the reference *"unless otherwise provided for in the contract"*, Article 17(1) FIFA RSTP in principle allows contractual parties to determine in advance what compensation amount shall be due, or how it would need to be calculated, in case of unilateral breach of the agreement.

116. The Panel finds that clause 10 of the Employment Contract is such contractual determination:

> *"3. This Contract may be terminated by either party, without consequences for the terminating party, where there exists just cause at the time of the contract termination by the knowledge and concern of SFA.*
>
> *4. If the Club terminates this Contract without having just cause, the Club shall pay to the Player compensation equal to the total amount of: MONTH SALARY.*

> 5. *If the Player terminated the contract without having just cause, the Player shall pay to the Club compensation equal to the total amount of: MONTH SALARY.*
>
> 6. *The Parties expressly agree that the compensation amounts stipulated under provisions of paragraphs 4 and 5 of this Article 10 above are fair and respect the principles of parity and reciprocity of the parties in light of the overall circumstances related to the Contract's conclusion and execution".*

117. However, the Panel notes that the FIFA DRC held in the Appealed Decision that clause 10 of the Employment Contract *"could not be deemed valid and binding to the parties, because it was disproportional and potestative – especially when taking into consideration that the* [Employment Contract] *was signed for a three-year period".*

118. Besides disputing that the Player did not have just cause to terminate the Employment Contract, the Club did not advance any specific subsidiary arguments on the basis of which the amount of compensation for breach of contract awarded to the Player in the Appealed Decision should be reduced.

119. The Club simply submits that clause 10(4) of the Employment Contract *"is valid, because it is of bilateral nature".*

120. However, the Panel finds the Club's submissions in this respect to be contradictory and, therefore, lacking of credibility, as notwithstanding the content of clause 10(5), the Club itself did not claim one month salary from the Player (EUR 2,500), but the full remaining value of the Employment Contract (EUR 160,000).

121. In fact, with respect to clause 10(5) of the Employment Contract, the Club explicitly submitted that *"this clause is incompatible with the general principles of contractual stability* […] *[a]s well as is* [sic] *contrary to the consequences of terminating a contract without just cause stated in article 17* [FIFA RSTP]. *Therefore in the present case, it has to be applicable in* [sic] *article 17* [FIFA RSTP]*".*

122. The Club did not provide any justification as to why clause 10(4) of the Employment Contract would be valid, but clause 10(5) not.

123. Furthermore, another pointer suggesting that the Club considered clause 10 of the Employment Contract invalid is that clause 10(4) of the Employment Contract provided that the compensation for breach of contract in case of an unjustified termination was only one month salary, but that the Club offered the Player three months of salary to terminate the Employment Contract. The Panel finds that this suggests that the Club was aware that clause 10(4) of the Employment Contract could not be enforced.

124. In any event, the Panel finds that clauses 10(4) and (5) of the Employment Contract are indeed inapplicable and invalid.

125. First of all, clause 10(4) addresses the specific situation where the Club terminates the Employment Contract without just cause, it does not address the situation in the matter at hand, i.e. the situation where the Player terminates the Employment Contract with just cause.

126. Furthermore, as correctly noted by the FIFA DRC in the Appealed Decision, the Panel finds that interpreting the content of clause 10(4) of the Employment Contract in combination with the term of the Employment Contract (i.e. 3 years), leads to the conclusion that clause 10(4) is a so-called "potestative condition", i.e. *"a condition whose fulfillment was completely within the power of the obligated party"* (Merriam-Webster online dictionary), resulting in a situation that the Employment Contract could basically be terminated at any point in time without justification for only a symbolic amount of compensation. While clauses 10(4) and (5) are reciprocal, allowing the Parties to terminate the Employment Contract without just cause at any point in time with only a symbolic amount of compensation to be paid undermines the principle of contractual stability, which is protected by Article 13 FIFA RSTP: *"A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement"*.

127. Consequently, the Panel finds that the amount of compensation for breach of contract to be paid by the Club to the Player is to be determined on the basis of Article 17(1) FIFA RSTP.

d) The applicable regulatory framework

128. The Panel takes due note of previous CAS jurisprudence establishing that the purpose of Article 17(1) FIFA RSTP is basically nothing else than to reinforce contractual stability, i.e. to strengthen the legal principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (cf. CAS 2008/A/1519-1520, para. 80, with further references to: CAS 2005/A/876, p. 17*: "*[…] *it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability'* […]*"*; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 92: *"*[…] *the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability* […]*"*; confirmed in CAS 2008/A/1568, para. 6.37).

129. In respect of the calculation of compensation in accordance with Article 17(1) FIFA RSTP and the application of the principle of "positive interest", the Panel follows the framework set out by a previous CAS panel as follows:

> *"When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.*
>
> *As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or 'expectation interest'), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitution, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.*

> *The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469, N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehelin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also Wyler, Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (…).*
>
> *The principle of the 'positive interest' shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations"* (CAS 2008/A/1519-1520, paras. 85 *et seq.* of the abstract published on the CAS website).

130. Considering the development in CAS jurisprudence, this is now the common approach adopted by CAS panels (see, *inter alia*, CAS 2018/A/6017, CAS 2017/A/5366, CAS 2016/A/4843, CAS 2015/A/4046 & 4047, CAS 2015/A/4346, CAS 2010/A/2146 & 2147 and CAS 2008/A/1519 & 1520). As such, CAS panels have a considerable discretion in determining the amount of compensation to be paid, which has been accepted in CAS jurisprudence (see, *inter alia*, CAS 2018/A/6017 and CAS 2018/A/5607).

131. The Panel finds that the legal framework set out above and the principle of positive interest are applicable to the present case and adheres thereto. Against this background, the Panel will proceed to assess the Player's objective damages, before applying its discretion in adjusting this total amount of objective damage to an appropriate amount of damages, if deemed necessary.

e) Determining the amount of compensation for breach of contract

132. Initially, the Panel notes, as already mentioned above, that it is undisputed by the Parties that the residual value of the Employment Contract at the time of termination was USD 160,000 net.

133. Furthermore, it is undisputed that the Player signed an employment contract with Ngezi Platinum Stars FC valid as from 1 September 2021 until 31 December 2023 for a total amount of USD 7,806.30.

134. Pursuant to Article 17(1)(ii) FIFA RSTP, the Player's salary with Ngezi Platinum Stars FC is to be deducted from the residual value of the Employment Contract, resulting in an amount of compensation for breach of contract of USD 152,193 net (i.e. USD 160,000 -/- USD 7,807).

135. Given that this is the amount of compensation awarded to the Player by the FIFA DRC in the Appealed Decision, the Panel is barred from awarding a higher amount of compensation and it sees no reason to award a lower amount of compensation.

136. Consequently, the Panel finds that the Player is entitled to receive compensation for breach of contract from the Club in an amount of USD 152,193 net from the Club.

f) Interest

137. The FIFA DRC awarded interest over the amount of outstanding remuneration as from 1 July 2021 and over the amount of compensation as from 28 June 2021, both at a rate of 5% *per annum* and until the date of effective payment.

138. The Club did not raise any specific objection in this respect, besides generally submitting that *"[t]he Player shall not be awarded interest on compensation at the rate of 5% p.a. as of 28 June 2021 until the date of alleged effective payment"*.

139. In the absence of any specific provisions concerning interest in the FIFA RSTP, the Panel observes that Article 339(1) SCO provides as follows in a free translation into English:

> *"When the employment relationship ends, all claims arising therefrom fall due"*.

140. Furthermore, Article 73(1) SCO provides as follows in a free translation into English:

> *"Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum"*.

141. In the light of these provisions, the Panel finds that the amount of compensation payable fell due on the date of the termination.

142. Consequently, the Panel finds that the Appealed Decision is also to be confirmed insofar as interest is concerned.

B. Conclusion

143. Based on the foregoing, the Panel holds that:

i) The Player terminated the Employment Contract with just cause on 28 June 2021;
ii) The Player is entitled to receive from the Club outstanding remuneration in the amount of USD 2,500 net, plus interest at a rate of 5% *p.a.* as from 1 July 2021 until the date of effective payment;
iii) The Player is entitled to receive compensation for breach of contract from the Club in the amount of USD 152,193 net, plus interest at a rate of 5% *p.a.* as from 28 June 2021 until the date of effective payment;
iv) The Appealed Decision is confirmed in full and the Club's appeal is dismissed.

144. In view of the conclusions reached, the Panel is satisfied that all other and further motions or prayers for relief shall be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 25 November 2021 by Al-Hilal Khartoum Club against Mr Jesi Last with respect to the decision issued on 6 October 2021 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is dismissed.

2. The decision issued on 6 October 2021 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed.

3. (…).

4. (…).

5. All other and further motions or prayers for relief are dismissed.