Arbitration CAS 2022/A/8754 Tout Puissant Mazembe v. Suzana Singano Ramadhani Yahaya, award of 25 July 2023

Panel: Mr Lars Hilliger (Denmark), Sole Arbitrator

Football
Termination of an employment contract
Burden of proof
Just cause of termination
Financial consequences of the termination of contract

1. **According to the principle of *actori incumbit probatio*, in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. Therefore, it is up to the club alleging that the contract was terminated by mutual consent between the parties to discharge the burden of proof. In this respect, it is not decisive that the transfer of the player was registered in TMS as a permanent transfer of the player *"out of contract/free of payment"* as this may be a way for the club to have the player registered with a club, outside the open transfer windows, even if this did not correctly reflect reality. On the other hand, it is up to the player to discharge the burden of proof to establish that the contract was in fact terminated with just cause based on the circumstances of the case.**

2. **Under Swiss law, just cause exists whenever the terminating party cannot be expected in good faith to continue the employment relationship (Article 337 par. 2 of the SCO), and only material breach of a contract can possibly be considered just cause for the termination of an employment contract. As set out in the FIFA Commentary on the Regulations for the Status and Transfer of Players (RSTP), a club has the duty to protect the personality rights of a player – as an employee. Furthermore, among a player´s fundamental rights under an employment contact, is not only his right to a timely payment of his remuneration, but also his right to access training and to be given the possibility to compete with his fellow teammates, in the team's official matches. Thus, a club that fails to register a player and even to allow him to train with the team despite a default letter sent by the player, *de facto* prevents him from being eligible to play for the club. As a result, the player has just cause to terminate the contract in accordance with Article 14 of the FIFA RSTP.**

3. **As a consequence of the player's termination with just cause, and in accordance with the principle of *pacta sunt servanda*, the club is liable to pay to the player the outstanding amounts under the contract at the time of termination. In addition, according to Article 17 (1) of the FIFA RSTP, a party in breach is required to pay compensation. In accordance with Swiss law and with the principles set out in Article**

17 (1) of the FIFA RSTP, the freedom of the parties to a contract is to be given the utmost importance. Thus, consideration should be given to a penalty clause validly agreed between the parties. The FIFA RSTP do not contain any provisions regarding penalty clauses, and Swiss law is therefore applicable to this issue. Article 163(3) of the Swiss Code of Obligations provides that the judge may reduce penalties which he finds excessive. However, since the parties are bound by their agreement, and the principle of freedom of contract commands, the reduction of the penalty is reserved for exceptional cases only, when the penalty is considered as grossly unfair.

I. THE PARTIES

1. Tout Puissant Mazembe (the "Club") is a professional football club from Congo DR affiliated with the Congo DR Football Federation (the "FECOFA"), which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA").

2. Suzana Singano Ramadhani Yahaya ("Mr Ramadhani" or the "Player") is a professional football player of Tanzanian nationality.

II. FACTUAL BACKGROUND

3. The facts set out below are a summary of the main relevant facts as established by the Sole Arbitrator on the basis of the decision rendered by the Dispute Resolution Chamber of the FIFA Tribunal (the "FIFA DRC") on 27 January 2022 (the "Appealed Decision") and based on the Parties' written and oral submissions and evidence. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 11 July 2019, the Player and the Club entered into a Professional Football Player Contract (the "Contract"), valid from 1 August 2019 until 30 July 2024, regarding the Player's employment with the Club as a professional football player.

5. The Contract, stated *inter alia*, as follows:

"[…]

The objective of the present contract is, for both parties, to participate in official and / or friendly football competitions in the Democratic Republic of Congo and abroad organized under the auspices of FECOFA, CAF and FIFA.

1. PURPOSE
The Club engages the Player on the basis of an employment contract for a professional football player, as part of a full-time contract. […]

[…]

5. RENUMERATION
5.1. The Club pays the Player compensation consisting of a fixed salary, various bonuses and other contractual benefits in kind. Alt amounts in this article are net. Match bonuses and/or incentives for winning matches, domestic and international competitions in accordance with the regulations applicable to all the players as determined by the Club.
5.2 The Player is entitled to a fixed monthly salary of four thousand united states dollars ($4,000) for the duration of the football season.
5.3 The Club may review the salary periodically (annually) and award an increment based on good consistent performance.
5.4. The player is entitled to a signing on fee of Fifty thousand united states dollars ($50,000) payable in two instalments, 50 (fifty) percent upon the signing of this contract and 50 (fifty) percent within 30 days of the signing of this contract. […]

9. BREACH FOR JUST CAUSE
The Club may terminate this contract for just cause without notice or compensation. The following reasons include the following:
- *theft or fraud;*
- *intentionally causing damage to the property or the reputation of the club;*
- *Unjustified and repeated absences,*
- *the use, possession or trafficking of a prohibited substance;*
- *drunkenness affecting player performance;*
- *conviction for a crime or offense involving a breach of morality or probity*
- *Any act contrary to good morals;*
- *the persistent refusal to undergo a medical examination;*
- *Betting on meetings or events involving the Club;*
- *The breach or failure to comply with any provision of this Agreement.*

10. INDEMNIFICATION
Player agrees to indemnify and hold the Club harmless from any loss, damage, expense, prosecution and action directly related to, caused by or arising out of Player's breach or breach of the obligations, terms and conditions included in this Agreement

In accordance with the provisions of Article 17 of the FIFA Regulations for the Status and transfer of Players, the sum of $2 million is due as compensation in the event of a unilateral breach and/or termination of this contract.

[…]

13. APPLICABLE LAW AND DISPUTE RESOLUTION
Both parties agree that the present Agreement shall be governed and interpreted in accordance with the FIFA Regulations, with Swiss law applying in a subsidiary manner.

Any dispute arising from the breach of this Agreement or breach thereof shall be subject to the exclusive jurisdiction of the FIFA Dispute Resolution Chamber. The decision of the FIFA Dispute Resolution Chamber may be appealed before the Court of Arbitration for Sport of Lausanne.

[…]

15. GENERAL PROVISIONS
15.1. This Agreement constitutes the sole agreement between the Parties and supersedes any prior agreement between the Parties, whether oral or written/ and any negotiation between the Parties.

15.2 No modification of this Contract or of any part thereof shall be binding on the parties unless it has been the subject of a written document stating that the Contract has been amended from time to time. […]*".*

6. On 11 September 2020, the Club and the Player concluded an addendum to the Contract (the "Addendum"), extending the term of the Contract until 30 July 2025 (the "Term").

7. By Loan Agreement dated 25 September 2020 (the "Loan Agreement") between the Club, the Player and the Zambian professional football club Nkana Football Club ("Nkana FC"), the three parties agreed to transfer the registration of the Player to Nkana FC on a temporary basis for the period from 10 September 2020 until 30 June 2021 (the "Loan Period").

8. The Loan Agreement stated, *inter alia*, as follows:

"CLAUSE ONE
l. l MAZEMBE hereby transfers to NKANA the registration of the Professional Football player, RAMADHANI YAI1AYA SUZANA SINGANO, on a temporary basis, for the period being 10th September, 2020 to 30th June, 2021, the football season, 2020/21(the "LOAN PERIOD").

CLAUSE TWO
2.1 THE PLAYER declares and accepts the Loan Agreement committing himself to the service of NKANA during the period stated above.

CLAUSE THREE
3.1 THE PLAYER, declares expressly and voluntarily, that he renounces any claim to wages, subsidies of any kind and/or bonuses from MAZEMBE during the Loan Period.

CLAUSE FOUR
4.1 During the Loan Period, NKANA shall remunerate THE PLAYER as defined in the related employment contract for the tenure of the Loan Period.

CLAUSE FIVE
5.1 NKANA attributes the right to MAZEMBE, in all and in any period for the transfer of players, the option to recall THE PLAYER, by means of simple notification written to NKANA.

CLAUSE SIX
6.1 The responsibility for any Injury to THE PLAYER, during the Loan Period, shall be for the account of NKANA in terms of treatment and recovery;
6.2 NKANA shall procure insurance for THE PLAYER during the Loan Period to safeguard the interests of MAZEMBE and the Player in case of injury and/or any other such causes.

CLAUSE SEVEN
7.1 In consideration of the Loan Period, MAZEMBE grants NKANA the registration in lieu of the sum of USS 5,000.00 (Five Thousand United States Dollars) payable on or before 30th Nov 2020.

CLAUSE EIGHT
8.1 This agreement is subject to and is governed by and in accordance with the FIFA Regulations. Any and all disputes will be handled by the competent FIFA committee. In the event that FIFA shall not be competent to hear any particular dispute arising out of or in connection with this agreement, such dispute shall be finally settled in accordance with the Rules of the Code of Sports related Arbitration of the Court of Arbitration for sport (C.A.S) located in LAUSANNE, SWITZERLAND and the decision of the C.A.S. shall be final and binding on the parties HERETO".

9. According to the Club, it was the expectation that the registration period in Zambia, which had been closed since 31 July 2020 in accordance with normal practice, would be extended by the Football Association of Zambia ("FAZ") until the end of October 2022 in line with the FIFA guidelines *"Covid-19 Football Regulatory Issues"*. However, the necessary administrative steps in order to have the registration period extended were never taken, and the registration of the loan of the Player in accordance with the Loan Agreement was consequently no longer possible.

10. In this context, on 14 October 2020, Nkana FC wrote as follows to the Player, which the Player signed in acknowledgement of receipt:

"RE.: REGISTRATION TO PLAY NKANA FC

We refer to our discussions pertaining to your playing football for Nkana FC, and in particular, your specific request to be registered as a player following your arrival at Kitwe, Zambia.

We have decided, following recommendations from the technical bench, to engage TP Mazembe for your immediate release.

In this regard, we advise that in order for us to register you as a player for Nkana FC we are obliged to request TP Mazembe to release you permanently in order that you may officially become a player of Nkana FC henceforth.

Please take this as official notification of our intent".

11. By letter of 16 October 2020, Nkana FC wrote to the Club as follows:

"RE: REQUEST FOR ITC AND REGISTRATION OF THE TWO PLAYERS ISAAC AMOAH AND RAMADHANI SINGANO

We make reference to the above subject.

We write to officially request for the following documents to enable us request for itc and register the players for our local league.

As you may be aware the international transfer window for Zambia was closed on 31st July 2020 but due to Covid 19 the window was supposed to be pushed to October 2020 on which the Country TMS Manager says he has not received the changes yet. To help us request the ITC without difficulties, we request that you give us release letters for the two players.

We remain committed to pay the agreed $10,000 loan fee on the two players by 30th November 2020.

We also request for Club TPO from TP Mazembe for the purpose of Transfer Matching System".

12. On 17 October 2020, the Club issued a letter backdated to 15 July 2020 (the "Release Letter") to the Player with the following wording:

"RE: RELEASE OF A PLAYER – RAMADHANI SINGANO

We refer to the above captioned matter.

TP Mazembe would like to inform you that you have been released to join a team of your choice.

We would like to thank you for the services rendered during your stay with the club and wish you all the best in your future endeavour.

We wish to confirm that TTP Mazembe Englebert will have no outstanding contract engagements with you during the period you are not with us".

13. Subsequently, the Player was duly registered with Nkana FC permanently as a free agent and the Release Letter was uploaded on the TMS.

14. On 11 February 2021, Nkana FC unilaterally terminated the employment relationship with the Player.

15. According to the Player, in June 2021, the Player reached out to the Club in order to be reinstated into the team, but with no reply from the Club.

16. By email of 22 August 2021, the Player wrote to the Club as follows:

"I hope you are doing well.

It is close three weeks since the club resumed pre season training. However, I have not been given an opportunity to train with the rest of the team despite Mr(manager)kitenge promise to meet me. As it is I am on my own and would dearly like to play and train with my teammates. I understand that the team will leave for pre season camp in Morocco. I kindly request to be part of the travelling.

Thank you very much".

17. On 31 August 2021, and without any reply from the Club, the Player returned to Tanzania, and on 2 September 2021, the Player sent the Club another email (the "Default Letter") with the following wording:

"I hope you are doing well.

Please make arrangements to pay my July and August 2021 salary together with my outstanding signing on fees.

Further, kindly have me registered as one of the players eligible to represent the club in the 2020-2021 season and send me official proof of the same. As you are aware, l used my money to travel to the Democratic Republic of Congo from Tanzania at a cost of USD 2,000 in August 2021. I also had to use my money (USD 500) to pay for accommodation while in the DRC for pre season, only for the club to deny me access to, and an opportunity to train with my teammates. l was left behind when the rest of the team travelled to Morocco on 26th August 2021 for a pre season camp. I was left with no option but to return home.

I therefore grant you 15 days to (i) pay all my outstanding salaries and signing on fees, (ii) register me for the 2021-2022 season (iii) refund me USD 2,500 being the travel and accommodation expenses I incurred to report for pre season in August 2021, and thereafter send me a ticket to return to DRC for pre season.

Thank you very much".

18. Finally, on 17 September 2021, the Player forwarded his notice of termination (the "Termination Notice") to the Club, stating as follows:

RE: Player Ramadhani Yahaya Singano - Termination Notice

We refer to the above matter on behalf of the player Ramadhani Yahaya Singano (the Player).

Reference is made to the player's emails dated 22"d August 2021 and 1st September 2021, copies of which are enclosed for reference.

Further thereto, we notice your failure to remedy the breaches complained in the aforementioned letters by failing to pay the Player his July and August 2021 salary together with his outstanding signing on fees of USD 25,000. In addition, you have denied the Player his right to train with his teammates by excluding him from the rest of the team throughout the preseason period. You have also failed to refund the Player his travel and accommodation expenses for pre season, among other material breaches.

We are therefore instructed to inform you that the Player hereby terminates the employment contract entered into with TP Mazembe Englebert on 11th July 2019 with immediate effect.

The resultant consequences, including a claim for overdue payables and damages for breach of contract shall follow.

The Player wishes the club the very best for the future".

III. PROCEEDINGS BEFORE THE FIFA DISPUTE RESOLUTION CHAMBER

19. On 21 September 2021, the Player lodged a claim in front of FIFA against the Club claiming that he had just cause to terminate the Contract, since the Club had breached it by i) failing to pay him his remuneration on a timely fashion; ii) failing to register him; and iii) not allowing him to train and play with his teammates.

20. The Player requested that the Club be ordered to pay as follows:

"a) USD 37,766 as outstanding remuneration plus 5% interest p.a. as from their due dates, broken down as follows:

i. July and August 2021 salaries: USD 8,000;

ii. Salary for the period 1 September 2021 to 17 September 2021: USD 2,266;

iii. Outstanding sign-on fees; USD 25,000;

iv. Travel and accommodation expenses regarding his trip to Congo DR: USD 2,500.

b. USD 2,000,000 as compensation for breach of contract on the basis of clause 10 of the contract;

c. Alternatively, USD 193,600 as compensation based on the residual value of the contract (USD 181,600) plus additional compensation of 3 salaries (USD 12,000), both with interest of 5 % p.a. as from 18 September 2021".

21. The Club did not reply timely to the Player's claim in spite of having been invited to do so *"by no later than 17 October 2021"* as set out by FIFA in its email to the Club of 27 September 2021.

22. However, by letter of 25 October 2021, the Club requested to be awarded a new deadline to file its answer to the Player's claim, which request was denied by FIFA by letter of 26 October 2021.

23. The FIFA DRC, having confirmed its competence and the application of the August 2021 edition of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), then referred to the October 2021 edition of the Procedural Rules Governing the Football Tribunal (the "FIFA Procedural Rules") and recalled the basic principle of burden of proof,

according to which any party claiming a right on the basis of an alleged fact carries the respective burden of proof.

24. The FIFA DRC also referred to Article 23 (3) of the FIFA RSTP, according to which the decision-making bodies of FIFA are not allowed to hear any dispute if more than two years have elapses since the event giving rise to the dispute, which time limit must be examined ex officio in each individual case.

25. As the claim was lodged in front of FIFA on 21 September 2021, any amount fallen due before 21 September 2019 is affected by the statute of limitation.

26. As the requested payment of the second instalment of the sign-on fee fell due on 11 August 2019, this part of the claim is affected by the statute of limitation and therefore is to be considered inadmissible.

27. With regard to the substance of the matter, the FIFA DRC took note of the Player's allegation that he had just cause to terminate the Contract, based, *inter alia*, on the alleged non-payment of certain financial obligations by the Club as per the Contract, in accordance with Article 14bis of the FIFA RSTP.

28. The FIFA DRC further noted that the Club had failed to present its response in spite of having been invited to do so and, by extension, considered that the Club had renounced its right to defence and, accordingly, accepted the allegations of the Player.

29. Moreover, the FIFA DRC referred to Article 14bis (1) of the FIFA RSTP and noted that the Player claimed not having received his remuneration corresponding to the salaries for July and August 2021 and that he had provided written evidence of having put the Club in default on 1 September 2021, i.e. at least 15 days before unilaterally terminating the Contract on 17 September 2021.

30. As the Club had the legal burden of proving that it indeed complied with its financial terms of the Contract, the Player's claim remained uncontested, and the FIFA DRC concluded that the Player had just cause to terminate the Contract based on Article 14bis of the FIFA RSTP, without having the need to analyse the issue of the Player's registration and alleged removal from the Club's first team.

31. As a consequence, and in accordance with the principle of *pacta sunt servanda*, it was decided that the Club is liable to pay to the Player the amounts which were outstanding under the Contract at the time of termination, i.e. USD 10,266.

32. With regard to the calculation of the amount of compensation payable to the Player, the FIFA DRC referred to Article 17 (1) of the FIFA RSTP, according to which a party in breach is required to pay compensation, noting that clause 10 of the Contract stated, *inter alia*, as follows: *"In accordance with the provisions of Article 17 of [the FIFA RSTP], the sum of USD 2 million is due as compensation in the event of a unilateral breach and/or termination of this contract"*.

33. After analysing the content of the aforementioned clause, the FIFA DRC concluded that it fulfilled the criteria of reciprocity and proportionality in line with the chamber's longstanding jurisprudence and therefore was to be applied in the case at hand to determine the amount of compensation payable to the Player by the Club, and the FIFA DRC consequently decided that the amount of USD 2,000,000, as per the compensation clause agreed between the Parties in the Contract, is due and owing to the Player by the Club.

34. Finally, and with reference to Article 14bis4 (1) and (2) of the FIFA RSTP, the FIFA DRC decided that in the event that the Club would fail to pay the amounts due to the Player within 45 days of the notification of the decision, a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods, will become effective for the Club in accordance with Article 24 (2), (4) and (7) of the FIFA RSTP.

35. On 27 January 2022, and based on the abovementioned considerations, the FIFA DRC rendered the Appealed Decision and decided that:

"1. The claim of [the Player] is partially accepted insofar as it is admissible.

2. [The Club] has to pay to [the Player] the following amounts(s):

- USD 4,000 as outstanding remuneration plus 5% interest p.a. as from 1 August 2021 until the date of effective payment;
- USD 4,000 as outstanding remuneration plus 5% interest p.a. as from 1 September 2021 until the date of effective payment;
- USD 2,266 as outstanding remuneration plus 5% interest p.a. as from 18 September 2021 until the date of effective payment;
- USD 2,000,000 as compensation for breach of contract without just cause plus 5% interest p.a. as from 21 September 2021 until the date of effective payment

3. Any further claims of the [the Player] are rejected.

4. Full payment (including all applicable interest) shall be made to the bank accounts indicated in the enclosed Bank Account Registration Forms.

5. Pursuant to art. 24 of the Regulations on the Status and Transfer of Players (August 2021 edition), 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 Club] shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration the ban 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. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.

7. This decision is rendered without costs".

36. On 1 March 2022, the grounds of the Appealed Decision were notified to the Parties.

IV. PROCEEDINGS BEFORE THE CAS

37. On 22 March 2022, the Appellant filed its Statement of Appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), and on 21 April 2022, it filed its Appeal Brief in accordance with Article R51 of the CAS Code.

38. On 1 May 2022, the Player filed his Answer in accordance with Article R55 of the CAS Code.

39. By letter dated 28 March 2022, the Parties were informed by the CAS Court Office that the Panel had been constituted as follows: Mr Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark, as Sole Arbitrator.

40. By letter of 11 May 2022, the Parties were informed that the Sole Arbitrator had decided to hold a hearing in this matter and that the hearing should be conducted by videoconference.

41. On 8 June 2022, the Respondent requested to submit three new exhibits, which request the Appellant was invited to comment on.

42. By letter of 16 June 2022 from the CAS Court Office, the Parties were informed that the Sole Arbitrator was not satisfied that exceptional circumstances existed to justify such a request, as provided for by Article R56 of the CAS Code, and the Respondent's request was consequently rejected.

43. The Parties both signed and returned the Order of Procedure.

44. On 24 June 2022, a hearing was held by videoconference.

45. In addition to the Sole Arbitrator, Mr Giovanni Maria Fares, Counsel to the CAS, and the following persons attended the hearing:

<u>For the Club</u>:

Mr Sven Demeulemeester, legal counsel

Mr Hadrien Flamant, legal counsel

Mr Charles Chakatazya, former CEO of Nkana FC, witness

Mr Frederic Kitengie, General Manager of the Club, witness

Mr Andre Mtine, witness.

For the Player:

Mr Ramadhan Singano,

Mrs Elena Mundaray, legal counsel

Mr Antonio Quintero, legal counsel.

46. At the outset of the hearing, the Parties confirmed that they had no objections to the appointment of the Sole Arbitrator.

47. The Parties and their witnesses were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

48. After the Parties' final submission, the Sole Arbitrator closed the hearing and reserved his final award. The Sole Arbitrator took into account in his subsequent deliberations all the evidence and arguments presented by the Parties although they may not have been expressly summarised in the present Award.

49. Upon the closure of the hearing, the Parties expressly stated that they had no objections in respect of their right to be heard and to have been treated equally and fairly in these arbitration proceedings.

V. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

50. The following outline of the Parties' requests for relief and positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator has, however, carefully considered all the submissions and evidence filed by the Parties with the CAS, even if there is no specific reference to such submissions or evidence in the following summary.

A. The Club

51. In its Appeal Brief of 21 April 2022, the Club requested the CAS to:

"1) Declare this Appeal admissible;

2) Annul [the Appealed Decision] in its entirety;

3) Declare that the contractual relationship was terminated by mutual consent on 17 October 2020;

4) Declare that no amounts is due by either party;

Or in the alternative to point 3 and 4:

5) Declare that [the Player] terminated the Contract without just cause on 17 September 2021;

6) Order [the Player] to pay [the Club] compensation for breach of contract in the amount of USD 140,000, plus an interest of 5% p.a. as from 18 September 2021 until the date of effective payment;

Or in the alternative to point 5 and 6:

7) Declare that [the Player] terminated the Contract with just cause on 17 September 2021;

8) Order [the Club] to pay [the Player] outstanding remuneration in the amount of USD 1,290;

9) Reduce the amount of penalty contained in Article 10 of the Contract to USD 24,000, which constitutes a reasonable amount;

And in any event, to order [the Player] to:

10) Bear the costs of the proceedings before the Court of Arbitration for Sport including the CHF 1,000 paid by [the Club] as CAS Court Office Fee;

11) Award a contribution to be established at its discretion to cover the legal fees and expenses of [the Club]".

52. In support of its requests for relief, the Club submitted, *inter alia*, as follows:

- Pursuant to Article R57 of the CAS Code, the Sole Arbitrator has the full power to review the facts and the law.

- For some unknown reason, the General Manager of the Club did not receive from FIFA the notification of the Player's claim, which is the only reason why the Club did not submit its reply before FIFA.

- In view of the above and in line with CAS jurisprudence (CAS 2016/A/4852), the Sole Arbitrator must conclude that the Club's failure to reply did not constitute an abusive conduct and thus, based on the *de novo* principle, must fully review the arguments and evidence submitted by the Club in the present proceedings.

- According to Article 13 of the FIFA RSTP, a contract between a professional and a club can be terminated by mutual agreement.

- Furthermore, it follows from CAS jurisprudence that *"if both parties, through their respective conduct and attitude, have shown that they are no longer interested in maintaining their contractual*

relationship, it follows that the employment contract has been terminated by mutual consent and that no compensation for unilateral termination of contract must be awarded" (CAS 2012/A/2967).

- The Contract was in fact terminated by mutual agreement and based on the will of the Player and Nkana FC to work together, both of whom asked the Club to definitively release the Player so he could join Nkana FC on a permanent basis and outside the registration period.

- However, as the registration period had already closed, and in order to satisfy the wishes of the Player and Nkana FC, the Club backdated the Release Letter based on the mutual agreement between the Parties.

- The Player was well informed about this and had countersigned a letter from Nkana FC, in which it was fully explained that the Club would have to release the Player permanently in order for him to be able to be registered with Nkana FC outside of the registration period.

- Following the termination of the Contract, the Player was registered with Nkana FC in the TMS "out of contract/free of payment", and the contract between the Player and his new club was concluded with an option to extend it by more than a season.

- As such, the Player confirmed his consent to the termination and used it to his advantage.

- In any case, the Player has not submitted any evidence showing that he would have reserved his rights towards the Club in connection with the termination.

- As such, to claim that the contractual relationship between the Parties was still in force in September 2021 constitutes a violation of the principle of *venire contra factum proprium*.

- Consequently, insofar as the contractual relationship between the Parties was mutually terminated on 17 October 2020, the claim of the Player based on an alleged breach of contract in September 2021 must be rejected.

- In the unlikely event that the Contract is not considered terminated in October 2020, it was the Player who breached it without just cause on 17 September 2021.

- The Player never complied with the requirements provided for in Article 14bis of the FIFA RSTP in order to terminate the Contract with just cause.

- The Default Letter was only forwarded to the Club on 2 September 2021, and the Termination Notice was forwarded to the Club as early as 17 September 2021, i.e. on the 14th day.

- Therefore, the Player terminated the Contract in breach of Article 14bis of the FIFA RSTP.

- Moreover, the Player acted in bad faith when it was declared that the Default Letter was sent to the Club on 1 September 2021.

- Moreover, at the time of the Default Letter, the amount of outstanding salary to the Player was not equal to at least two monthly salaries.

- In accordance with Article 319 par. 1 of the Swiss Code of Obligations (the "SCO"), salary is only to be paid to an employee based on the amount of time he works.

- It is not disputed that between 1 July and 21 August 2021, the Player was not in Congo DR with the Club and therefore not able to provide services to the Club, and during this time, the Player never reached out to the Club.

- The Club was by no means contractually obligated to provide air tickets and accommodation to the Player.

- Moreover, on 31 August 2021, the Player left Congo DR and returned to Tanzania, thus no longer in a position to provide services to the Club.

- As such, the Player would in any case only be entitled to receive his salary for the period between 22 August and 31 August 2021, i.e. when he was in Congo DR.

- Furthermore, the Appealed Decision was correct in stating that the alleged claim relating to sign-on fee is time-barred and hence cannot be taken into consideration.

- At the time of the Default Letter, only 10 days' salary was outstanding, which is why the Contract was in any case terminated by the Player without just cause.

- As the Player terminated the Contract without just cause, the Player is liable to pay compensation to the Club in accordance with Article 17 (1) of the FIFA RSTP.

- In accordance with this article, the amount of compensation must in principle be primarily determined in accordance with the penalty clause agreed by the Parties and included in the Contract, i.e. the sum of USD 2,000,000.

- The penalty clause is a valid penalty clause in accordance with Article 160 et seq of the SCO, however, and also in accordance with the SCO, a decision-making body as the CAS is under an obligation to reduce an agreed penalty amount if the amount is considered excessive, meaning *"unreasonably exceeding the amount admissible for a sense of justice and equity"*, although such possible reduction must be executed *"with a certain restraint"*.

- Considering the applicable criteria, the agreed amount may be excessive considering (i) that the Player was not an established player of the Club and (ii) that the Club considered the contractual relationship as terminated as of October 2020.

- On the other hand, by lodging a groundless claim against the Club, the Player caused serious damages to the Club's reputation and obliged it to incur significant legal costs that could have been avoided.

- As such, the Sole Arbitrator should reduce the penalty to be paid by the Player to the Club to the reasonable amount of USD 140,000, i.e. the residual value of the Contract.

- If, *per impossible*, the Sole Arbitrator is to find that the Player terminated the Contract with just cause, he must in any event conclude that the Appealed Decision did not correctly assess the financial consequences of the termination.

- As stated above, the Player is in any case only entitled to be remunerated for his salary for the period from 22 August until 31 August 2021, i.e. USD 1,290.

- With regard to any payable compensation, the penalty clause in the Contract is a valid penalty clause, but the amount should be reduced insofar as it is grossly excessive.

- When analysing the reasonable nature of a penalty, the main criterion must be the creditor's interest (CAS 2015/A/4139).

- In particular, the deciding body must assess whether the creditor would enrich himself if the full contractual penalty was awarded or whether there is a disproportion between the actual or probable damage and the damage anticipated by the parties as possible.

- In the present case, the following elements justify the reduction of the agreed penalty amount: (i) the Player accepted to be released from the Contract in order to join Nkana FC, which demonstrates that the existence and protection of the Contract was not of paramount importance to him; (ii) the Player's lack of interest in the contractual relationship is also evidenced by his late return to Congo DR and him leaving the country before forwarding the Default Letter to the Club; and (iii) finally, the Player terminated the Contract before the expiry of the 15-day deadline given on 2 September 2021.

- Moreover, the excessiveness is indisputable considering the monthly salary provided for in the Contract, i.e. USD 4,000.

- Finally, it should be taken into consideration that the Club sincerely believed that the Player had been permanently released on 17 October 2020 and that it was therefore no longer bound to the Player, combined with the fact that the Player's attitude in this case is far from faultless.

- In light of the foregoing, it must be concluded that the penalty is clearly excessive and must be reduced to the equivalent of six months' salary, i.e. USD 24,000, which amount is considered reasonable.

B. The Player

53. In his Answer of 30 April 2022, the Player requested the CAS to:

"a) Dismiss the appeal filed by [the Club] against [the Appealed Decision];

b) Fully uphold [the Appealed Decision];

c) Award [the Player] the costs of this suit to the tune of CHF 10,000;

d) Order [the Club] to bear the costs of these arbitration proceedings;

e) Grant any further or other relief that this Honorable Court may deem fit".

54. In support of his requests for relief, the Player submitted, *inter alia*, as follows:

- Initially, and with reference to the applicable FIFA Procedural Rules, the Club is deemed to have received notice from FIFA concerning the Player's claim, which is why the Sole Arbitrator must dismiss any assertions to the contrary.

- As the CAS must limit itself to the scope of the issues and reliefs that were raised at the lower level (i.e. before FIFA), the new claims of the Club regarding the claim for compensation for alleged termination of the Contract without just cause is inadmissible.

- As a general rule, the payment of agreed wages is a material consideration in an employment relationship, and the Club undertook to pay the Player a monthly salary of USD 4,000.

- The Club failed to pay the Player his salary for July and August 2021.

- Furthermore, and in accordance with Article 5 (1) of the FIFA RSTP, a Player must be registered at an association to play for a club, and it was thus the duty of the Club to duly register the Player in order to make him eligible to play for the Club in accordance with Article 8 of the FIFA RSTP.

- However, the Club failed to duly register the Player for the 2021/2022 season, which constitutes a material breach of the contractual relationship between the Parties.

- Moreover, the Club acted in breach of the Player's rights by not allowing him to train with the other players of the team and by not including him in the team's pre-season training camp in Morocco.

- Article 337 par. 2 of the SCO defines just cause as *"any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship"*.

- Moreover, in accordance with CAS jurisprudence (e.g., CAS 2015/A/4055, para. 118) *"an employment contract may be terminated immediately for good reason when the main terms and conditions (either general/objective or specific/personal) under which it was entered into are no longer implemented"*.

- Furthermore, Articles 14 (2) and 14bis (1) of the FIFA RSTP provide when a termination of a contract is to be considered having just cause.

- Pursuant to Article 14bis of the FIFA RSTP, a player has just cause to terminate his contract in case the club unlawfully fails to pay him at least two monthly salaries on their due dates.

- On 17 September 2021, when the Player terminated the Contract, the Player was owed two months' overdue salary, being his salary for July and August 2021, plus a substantial signing-on fee of USD 25,000, and the Club was placed on notice to remedy this breach by the Default Letter of 2 September 2021.

- However, the Club neither reacted nor paid the outstanding amount, leaving the Player with no choice but to rightfully invoke Article 14bis (1) of the FIFA RSTP and terminate the Contract.

- Thus, the termination was made with just cause.

- With regard to the Club's submissions on the 15-day notice pursuant to Article 14bis of the FIFA RSTP, these are misguided, inapplicable and overtaken by events.

- In any event, by FIFA's letter dated 27 September 2021 to the Club, the Club was served with a copy of the Player's claim and, thus, served as a 15-day formal notice from the Player through FIFA to either remedy the breaches or respond to the allegations.

- The Club did neither, and the Appealed Decision was therefore in any case right in stating that the Contract had been terminated with just cause.

- Furthermore, and in any case, the Club's acts of breach were so severe and material that the Player did not have to send a 15-day default notice, and as early as 22 August 2021, the Player had asked the Club to reintegrate him into the team and allow him to train with his teammates. This request was left unanswered.

- The conduct of the Club, including its failure to duly register the Player. constitutes such severe breach of the Club's obligations under the Contract that the Player in any case

was entitled to terminate the Contract without any formal notice, which is also in accordance with Swiss law.

- Pursuant to Article 14 (2) of the FIFA RSTP *"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"*.

- As such, the Player was justified in terminating the Contract under this article for the following reasons: (i) non-payment of salaries and outstanding signing-on fee, (ii) failure to duly register the Player for the 2021-2022 CAF Club competitions, (iii) the exclusion of the Player from the training sessions and denying him the right to train and play with his teammates, (iiii) the refusal to send the Player an air ticket to return to Congo DR for the second time to join the team.

- With regard to any payable compensation, the penalty clause in the Contract is a valid penalty clause, and the Appealed Decision was correct in assessing that the Club should pay to the Player the amount of USD 2,000,000 as compensation for breach of the Contract.

- The Club's pleas to have the compensation reduced are baseless, flawed and misrepresented.

- The penalty clause was validly agreed between the Parties, and in accordance with the principle of *pacta sunt servanda,* such agreement must be held sacred in order to give full life, force and meaning to the Parties' wishes under the Contract.

- Furthermore, and pursuant to CAS jurisprudence, liquidated damages should not be deemed automatically excessive simply because they exceed the actual amount suffered by the injured party, as such clauses generally contain an element of punishment for the party at fault (CAS 2010/A/2202). Moreover, such penalty is payable even if the creditor has not suffered any loss or damage.

- In any case, a restrictive approach in reduction should be adopted in accordance with CAS jurisprudence.

- According to some Swiss scholars, a reduction of the indemnity under Article 163 par. 3 of the SCO is only conceivable in favour of the employee, and any reduction requested by the Club as the employer should consequently not be granted.

- The 6-year Contract was breached by the Club barely in its second year and within the protected period.

- As such, the penalty should not be reduced at all, and if a reduction is granted anyhow, it can only be reduced to an amount as close as possible to the Parties' original intention.

- With regard to the Club's request for compensation, such a claim must in any case be dismissed in view of the Club's breach of the Contract, forcing the Player to terminate the Contract with just cause.

- The Player disagrees but respects the Appealed Decision with regard to the rejection of his claim for the outstanding USD 25,000 signing-on fee and also the refusal to order the Club to reimburse his expenses incurred in connection with his return to Congo DR.

- However, the Player concurs with FIFA's assessment of the overdue payables owed to him by the Club and requests that the same be upheld.

- In this connection, the Player reached out to the Club from the beginning of June 2021, asking to be reintegrated into the team. All his calls went unanswered, and he finally sent his email to the Club on 22 August 2021.

- The 2020-2021 DRC season ended on 9 June 2021, and the team only resumed its training in the first week of August 2021 with the new season beginning on 15 September 2021.

VI. JURISDICTION

55. Article R47 of the CAS Code states, *inter alia*, 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".

56. With respect to the Appealed Decision, the jurisdiction of the CAS derives from Article 57 par. 1 of the FIFA Statutes, which reads 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".

57. Furthermore, it follows from clause 13 of the Contract that *"*[…] *The decision of the FIFA Dispute Resolution Chamber may be appealed before the Court of Arbitration for Sport of Lausanne".*

58. Neither of the Parties objected to the jurisdiction of the CAS, which was furthermore confirmed by the Parties signing the Order of Procedure.

59. It follows that the CAS has jurisdiction to decide on the Appeal.

VII. ADMISSIBILITY

60. The grounds of the Appealed Decision were notified to the Parties on 1 March 2022.

61. The Club filed its Statement of Appeal on 22 March 2022, i.e. within the statutory time limit set forth by the FIFA Statutes, which is not disputed.

62. Furthermore, the Club' Statement of Appeal complied with all the requirements of Article R48 of the CAS Code.

63. It follows that that the Appeal is admissible.

64. Under Article R57 of the CAS Code, the Sole Arbitrator has full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the Appealed Decision.

VIII. APPLICABLE LAW

65. Article R58 of the CAS Code states as follows:

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

66. The Sole Arbitrator further notes that Article 56 par. 2 of the FIFA Statutes reads as follows:

"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".

67. Based on the foregoing, and in accordance with the submissions of the Parties, the Sole Arbitrator is satisfied to accept the application of the various regulations of FIFA, in particular the FIFA RSTP, and, subsidiarily, the application of Swiss law.

IX. MERITS

68. Initially, the Sole Arbitrator notes that it is undisputed that on 11 July 2019, the Parties signed the Contract valid as from 1 August 2019 until 30 July 2024 and that the Contract stated, *inter alia*, as follows:

"[…]

The objective of the present contract is, for both parties, to participate in official and / or friendly football competitions in the Democratic Republic of Congo and abroad organized under the auspices of FECOFA, CAF and FIFA.

1. PURPOSE
The Club engages the Player on the basis of an employment contract for a professional football player, as part of a full-time contract. […]

[…]

5. RENUMERATION
5.1. The Club pays the Player compensation consisting of a fixed salary, various bonuses and other contractual benefits in kind. Alt amounts in this article are net. Match bonuses and/or incentives for winning matches, domestic and international competitions in accordance with the regulations applicable to all the players as determined by the Club.
5.2 The Player is entitled to a fixed monthly salary of four thousand united states dollars ($4,000) for the duration of the football season.
5.3 The Club may review the salary periodically (annually) and award an increment based on good consistent performance.
5.4. The player is entitled to a signing on fee of Fifty thousand united states dollars ($50,000) payable in two instalments, 50 (fifty) percent upon the signing of this contract and 50 (fifty) percent within 30 days of the signing of this contract.

[…]

10. INDEMNIFICATION
Player agrees to indemnify and hold the Club harmless from any loss, damage, expense, prosecution and action directly related to, caused by or arising out of Player's breach or breach of the obligations, terms and conditions included in this Agreement

In accordance with the provisions of Article 17 of the FIFA Regulations for the Status and transfer of Players, the sum of $2 million is due as compensation in the event of a unilateral breach and/or termination of this contract.

[…]".

69. On 11 September 2020, the Parties concluded the Addendum, extending the Term until 30 July 2025 and on 25 September 2020 the Parties and Nkana FC signed the Loan Agreement regarding the loan of the Player to Nkana FC for the period from 10 September 2020 until 30 June 2021.

70. Pursuant to the Loan Agreement, the Player renounced any claims for wages and any other kind of remuneration from the Club during the Loan Period, during which he would be rendering his services to Nkana FC, unless recalled by the Club. In consideration of the loan, Nkana FC was to pay to the Club the amount of USD 5,000.00.

71. However, against the expectations of the parties to the Loan Agreement, the registration period in Zambia was not extended after 31 July 2020, which made the registration of the loan of the Player in accordance with the Loan Agreement impossible.

72. In this regard, on 14 October 2020, Nkana FC wrote, *inter alia*, as follows to the Player:

"In this regard, we advise that in order for us to register you as a player for Nkana FC we are obliged to request TP Mazembe to release you permanently in order that you may officially become a player of Nkana FC henceforth.

Please take this as official notification of our intent".

and two days later, Nkana FC wrote to the Club as follows:

"RE: REQUEST FOR ITC AND REGISTRATION OF THE TWO PLAYERS ISAAC AMOAH AND RAMADHANI SINGANO

We make reference to the above subject.

We write to officially request for the following documents to enable us request for itc and register the players for our local league.

As you may be aware the international transfer window for Zambia was closed on 31st July 2020 but due to Covid 19 the window was supposed to be pushed to October 2020 on which the Country TMS Manager says he has not received the changes yet. To help us request the ITC without difficulties, we request that you give us release letters for the two players.

We remain committed to pay the agreed $10,000 loan fee on the two players by 30th November 2020.

We also request for Club TPO from TP Mazembe for the purpose of Transfer Matching System".

73. On 17 October 2020, but dated back to 15 July 2020, and based on this request, the Club issued the Release Letter, and the Player was then duly registered with Nkana FC permanently as a free agent, and the Release Letter was uploaded in the TMS. However, on 11 February 2021, Nkana FC terminated the employment relationship with the Player without just cause.

74. Following the request from the Player in August 2021 to be allowed to rejoin and resume training with the Club, to which the Club never replied, and following the Default Letter of 2 September 2021, the Player finally terminated the Contract by his Termination Notice of 17 September 2021.

75. While the Player on his side submits, *inter alia*, that he terminated the Contract with just cause on 17 September 2021 due to the Club´s breach of contract, the Club, on its side, submits, *inter alia*, that the Contract was in fact terminated by mutual agreement in October 2020 based on the intention of the Player and Nkana FC to have the Player joining the said club on a permanent basis. As such, there was in fact no contractual relationship between the Parties to be terminated by the Player in September 2021, on which basis alone the Player´s claim should be rejected.

76. Accordingly, the main issued to be decided by the Sole Arbitrator are:

a) When and by whom was the Contract terminated?

b) If the Contract was terminated by the Player in September 2021, did he terminate it with or without just cause?

c) What are the financial consequences of the termination of the Contract, if any?

a) When and by whom was the Contract terminated?

77. To reach a decision on this issue, the Sole Arbitrator has conducted an in-dept analysis of the facts of the case and the information and evidence gathered during the proceedings, including the information and evidence gathered during the proceedings before the FIFA Football Tribunal.

78. The Sole Arbitrator initially notes that Article 13 of the FIFA RSTP states that *"A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement"*.

79. The Sole Arbitrator further notes that if the parties to an employment contract, through their respective conduct and attitude, show that they are both no longer interested in maintaining their contractual relationship, such conduct and attitude might have as a consequence that the contract should be deemed terminated by mutual consent.

80. However, the Parties disagree over whether the Contract was in fact terminated by mutual agreement before the Player was registered with Nkana FC.

81. Based on the undisputed facts as set out above, the Sole Arbitrator finds that it is up to the Club to discharge the burden of proof to establish that the Contract, as extended by the Addendum, was in fact terminated by mutual agreement between the Parties in October 2020.

82. In doing so, the Sole Arbitrator adheres to the principle of *actori incumbit probatio*, which has been consistently observed in CAS jurisprudence, and according to which *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them […]. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (e.g. CAS 2003/A/506, para. 54; CAS 2009/A/1810&1811, para. 46; and CAS 2009/A/1975, para. 71ff).

83. However, the Sole Arbitrator finds that the Club has not adequately discharged the burden of proof to establish that the Contract was terminated by mutual agreement between the Parties.

84. In this regard, the Sole Arbitrator initially notes that the original intention of the Parties in September 2020, at a time when almost four years were still left of the Term of the Contract, was to transfer the Player on Loan to Nkana FC for a limited period of less than 10 months.

Nevertheless, and even with almost four years left of the Term and before entering into the Loan Agreement, the Parties signed the Addendum, thus extending the term of the Contract by a year, which to the Sole Arbitrator shows that the Club was still interested in the service of the Player upon the planned expiry of the Loan Agreement.

85. The Sole Arbitrator further notes that it was apparently only due to the difficulties in registering the Player caused by the then closed transfer window that the two clubs began discussing other possibilities.

86. The Club submits in this connection that it agreed to transfer the Player on a permanent basis, on which, and in agreement with the Player, it issued the Release Letter by which the Contract was to be considered terminated by mutual agreement.

87. However, and based on the circumstances of the case, the Sole Arbitrator is not satisfied that this was really the case.

88. First of all, the Sole Arbitrator notes that the Player explained, *inter alia*, that it was never his wish to be transferred to Nkana FC, but that he felt a certain pressure from the Club to accept to be loaned to the said club, which was desperately in need of new players.

89. The Player further explained that it was never proposed to him to terminate the Contract, nor was he ever informed or asked by anybody about the alleged mutual termination of the Contract. When Nkana FC terminated the employment relationship with the Player, he contacted the Club in order to return, but was told to wait until the end of the season, and then the Contract would begin again.

90. Moreover, the Sole Arbitrator notes that Mr Kinkumbu, the General Manager of the Club, explained, *inter alia*, that the Player never insisted on the loan to Nkana FC, but that he had to go since he was not good enough to be on the team of the Club. The Player was only released in order to be registered with Nkana FC, and the Release Letter was only issued in order to facilitate the loan of the Player to the said Club, with which he was already staying when the Release Letter was issued.

91. Finally, Mr Mtine, an employee of the Club who conducted the negotiations between the two clubs, explained, *inter alia*, that in his opinion the Player knew, or at least ought to have known, that the original loan was transformed into a permanent transfer due to the problems with the registration period.

92. Furthermore, and even if the Club did issue the Release Letter, which undisputedly was backdated in order to facilitate the imminent registration of the Player with Nkana FC, the Sole Arbitrator notes that in the said letter to the Player, the Club stated, *inter alia*, as follows: *"We wish to confirm that* [the Club] *will have no outstanding contract engagements with you during the period you are not with us"*, which in the eyes of the Sole Arbitrator indicates that the said period was only intended to be temporary.

93. In addition, the Sole Arbitrator notes that Nkana FC still paid (only) the agreed loan fee to the Club, as if the transfer of the Player was in fact still a loan as set out in the Loan Agreement. Apparently, no (further) compensation for the alleged transfer of the Player was ever paid from Nkana FC to the Club, and the Player and Nkana FC apparently never signed any "permanent" employment contract caused by the alleged new situation.

94. Based, *inter alia*, on the above circumstances, it has not been shown to the satisfaction of the Sole Arbitrator that it was in fact the real and mutual intention of the Parties that the Contract was supposed to be terminated in October 2020 in connection with the loan/transfer of the Player to Nkana FC.

95. On the contrary, the Sole Arbitrator is of the opinion that, regardless of the title and to some extent the content of the Release Letter, the idea was to create an artificial picture of a terminated contractual relationship between the Parties that would make the imminent registration of the Player with Nkana FC possible, even if the Player in reality was still under contract with the Club and as such was obliged and entitled to return to the Club after the expiry of the Loan agreement.

96. Finally, and for the sake of good order, the Sole Arbitrator notes that he does not find it decisive that the transfer of the Player was registered in TMS as a permanent transfer of the Player *"out of contract/free of payment"* as the Sole Arbitrator simply sees this as a way for the Club to have the Player registered with Nkana FC as intended in the Loan Agreement, outside the open transfer windows, even if this did not correctly reflect reality.

97. Since the Sole Arbitrator thus finds that the Contract was not terminated by mutual agreement in October 2020, the Sole Arbitrator sees no reason for not concluding that the Contract was still in force in August and September 2021 when the Player requested to resume training with the Club, which he was never allowed to do by the Club.

98. Moreover, and based on the above, the Sole Arbitrator is convinced that the Contract was then terminated by the Player by his Termination Letter of 17 September 2021.

b) Did the Player terminate the Contract with or without just cause?

99. Article 14 of the FIFA RSTP reads 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".

100. Under Swiss law, such just cause exists whenever the terminating party cannot be expected in good faith to continue the employment relationship (Article 337 par. 2 of the SCO), and in accordance with CAS jurisprudence, only material breach of a contract can possibly be considered just cause for the termination of an employment contract (CAS 2013/A/3091).

101. Article 14bis of the FIFA RSTP further states as follows:

"Terminating a contract with just cause for outstanding salaries

1. 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.

2. For any salaries of a player which are not due on a monthly basis, the pro-rata value corresponding to two months shall be considered. Delayed payment of an amount which is equal to at least two months shall also be deemed a just cause for the player to terminate his contract, subject to him complying with the notice of termination as per paragraph 1 above.[…]".

102. Based on the facts of the case and the Parties' submissions, including the fact that it is not disputed that the Contract has actually been terminated, the Sole Arbitrator finds that it is up to the Player to discharge the burden of proof to establish that the Contract was in fact terminated with just cause based on the circumstances of the case.

103. In the Appealed Decision, the FIFA DRC found that the pre-requisites of Article 14bis of the FIFA RSTP had been fulfilled, since the Club had failed to pay the Player his contractual remuneration for July and August 2021, and the FIFA DRC further found that the Player had put the Club in default on 1 September 2021, i.e. at least 15 days before the Player unilaterally terminated the Contract on 17 September 2021. As such, the FIFA DRC found that the Player had just cause to terminate the Contract based on Article 14bis of the FIFA RSTP, which is why the FIFA DRC found that it did not need to analyse the issue of the Player´s registration and alleged removal from the Club´s first team.

104. In this regard, the Appellant submits, *inter alia*, that the FIFA DRC was wrong in concluding that the pre-requisites of Article 14bis of the FIFA RSTP had been fulfilled for the mere reason that the Default Letter was undisputedly only forwarded to the Club on 2 September 2021, and the Club was consequently not granted at least 15 days to fulfil the alleged payment obligations. Furthermore, and in accordance with Article 319 of the SCO, according to which salary is only to be paid to an employee based on the amount of time he works, the Player was in any case not entitled to remuneration for the period between 1 July and 21 August 2021, at which time he was undisputedly not in Congo DR with the Club and thus not able to perform any work for the Club. Moreover, on 31 August 2021, the Player again left Congo DR and returned to Tanzania.

105. As such, the Player did not fulfil the pre-requisites of Article 14bis of the FIFA RSTP and therefore had no just cause to terminate the Contract on 17 September 2021.

106. The Player, on his side, confirms that the Default Letter was only forwarded to the Club on 2 September 2021, however, alleging that the Club´s submission in this regard is misguided, inapplicable and overtaken by events.

107. In any case, the Player further submits, *inter alia*, that he had just cause to terminate the Contract since the Club failed to duly register him for the 2021/2022 season and since the Club did not allow the Player to train with the rest of the team and did not include him in the team´s training camp in Morocco.

108. The Sole Arbitrator initially notes that in the Default Letter forwarded to the Club on 2 September 2021, the Player not only put the Club in default with regard to the alleged outstanding salaries, but also requested the Club to have him duly registered as one of the players eligible to represent the club, and he further stated that he was not allowed to train with the rest of team.

109. Furthermore, in his Termination Letter, the Player referred to the acts of breach mentioned in the Default Letter and explicitly stated, *inter alia*, that the Club had denied him of his right to train with his teammates and had excluded him from the team throughout the preseason period.

110. Pursuant to the Contract, the objective of the employment relationship was *"for both parties, to participate in official and / or friendly football competitions in the Democratic Republic of Congo and abroad organized under the auspices of FECOFA, CAF and FIFA"*.

111. In this regard, Article 5 (1) of the FIFA RSTP states as follows:

"Each association must have an electronic player registration system, which must assign each player a FIFA ID when the player is first registered. A player must be registered at an association to play for a club as either a professional or an amateur in accordance with the provisions of article 2. Only electronically registered players identified with a FIFA ID are eligible to participate in organised football. By the act of registering, a player agrees to abide by the FIFA Statutes and regulations, the confederations and the associations".

112. During these proceedings, the Club never disputed that during August and September 2021, the Player was not registered with the Club to be eligible to represent the Club, nor was it disputed that the Player was not allowed to train with the Club.

113. As set out in the FIFA Commentary on the RSTP (p. 144), a club has the duty to protect the personality rights of a player – as an employee.

114. Furthermore, it is set out, and as confirmed by the CAS (CAS 2013/A/3091-93), that *"among a player´s fundamental rights under an employment contact, is not only his right to a timely payment of his remuneration, but also his right to access training and to be given the possibility to compete with his fellow teammates, in the team´s official matches"*.

115. As set out above, the Club failed to register the Player and even to allow him to train with the team despite the Default Letter of 2 September 2021, thus de facto preventing him from being eligible to play for the Club.

116. As such, the Sole Arbitrator finds that the fundamental terms and conditions which formed the basis of the employment relationship were no longer respected by the Club, and the Player could not be expected in good faith to continue the employment relationship with the Club.

117. Given these circumstances, the Sole Arbitrator concludes that the Contract was unilaterally terminated by the Player with just cause in accordance with Article 14 of the FIFA RSTP by the Termination Letter of 17 September 2021.

118. As the Player is found to have terminated the Contract with just cause in accordance with Article 14 of the FIFA RSTP, the question whether or not the Contract was/could also be terminated with just cause based on Article 14bis of the same regulations can be left unanswered in this case.

c) What are the financial consequences of the termination of the Contract, if any?

119. Initially, the Sole Arbitrator notes that while the Club does not dispute its obligation to pay the Player his outstanding salary, in case the Contract was not terminated in 2020 by mutual agreement, the Club submits that the FIFA DRF erred in its calculation of such an amount.

120. As it is not disputed that the Player was not in DR Congo between 1 July and 21 August 2021 and left again on 31 August 2021, the Player was not able to provide his services to the Club in these periods, and the Player should therefore in any case only be entitled to receive his salary for 10 days for the period between 22 August and 31 August 2021.

121. The Player, on his side, concurs with FIFA´s assessment of the overdue payables and notes that he reached out to the Club from the beginning of June 2021 asking to be reintegrated into the team.

122. The Sole Arbitrator initially notes that pursuant to the Contract, the Player was *"entitled to a fixed monthly salary of four thousand united state dollars (USD 4,000) for the duration of the football season"*. Furthermore, pursuant to the Loan Agreement, the loan to Nkana FC would in any case have expired by the end of June 2021, thus meaning that the Player would again be a member of the Club´s team from 1 July 2021.

123. It is undisputed that the Club never paid the Player any salaries after the termination of contractual relationship between the Player and Nkana FC.

124. As the Sole Arbitrator finds no reason to disregard the Player´s undisputed submission about reaching out to the Club in order to be reinstated into the team from July 2021, and in consideration of the fact that it was the Club which prevented the Player from joining the training of the team, the Sole Arbitrator sees no grounds for amending the Appealed Decision with regard to the outstanding salaries and the accrued interest in that regard.

125. For the sake of good order, the Sole Arbitrator notes that the fact that the Player was not in DR Congo in the said periods is not found to be decisive in this particular case since the Player cannot be expected to stay in DR Congo for the entire period when the Club is at the same time not allowing him to attend training and is not paying him his salaries.

126. With regard to the question of compensation for breach of contract, the Sole Arbitrator notes that since the Contract was terminated with just cause by the Player due to the Club´s breach of contract, the Sole Arbitrator has to address the Player´s claim for compensation.

127. The Player submits that he is entitled to compensation for breach of contract and that the amount of compensation payable in case of the Parties' breach of contract was validly agreed between the Parties in clause 10 of the Contract, which states as follows:

"10. INDEMNIFICATION
Player agrees to indemnify and hold the Club harmless from any loss, damage, expense, prosecution and action directly related to, caused by or arising out of Player's breach or breach of the obligations, terms and conditions included in this Agreement.

In accordance with the provisions of Article 17 of the FIFA Regulations for the Status and transfer of Players, the sum of $2 million is due as compensation in the event of a unilateral breach and/or termination of this contract".

128. The Club, on its side, agrees that clause 10 of the Contract is a penalty clause validly entered into by the Parties in accordance with Article 160 et seq. of the SCO. However, the Club finds that pursuant to the SCO, a decision-making body as the CAS in under an obligation to reduce a penalty amount if the amount is considered excessive, meaning *"unreasonably exceeding the amount admissible for a sense of justice and equity"*, even if such possible reduction must be executed with a certain restraint.

129. Article 17 (1) of the FIFA RSTP states, *inter alia*, as follows:

"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. […]*".*

130. In accordance with Swiss law, in accordance with the principles set out in Article 17 (1) of the FIFA RSTP and in accordance with the Parties´ submissions, the Sole Arbitrator finds that the freedom of the parties to a contract is to be given the utmost importance, and the Sole Arbitrator finds no sufficient grounds for not considering the agreed penalty clause validly agreed between the Parties.

131. The FIFA RSTP do not contain any provisions regarding penalty clauses, and Swiss law is therefore applicable to this issue, and the relevant provisions regarding such clauses are set out in Article 160 et seq. of the SCO, which state as follows:

"Art. 160

1 Where a penalty is promised for non-performance or defective performance of a contract, unless otherwise agreed, the creditor may only compel performance or claim the penalty.

2 Where the penalty is promised for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance provided he has not expressly waived such right or accepted performance without reservation.

Art. 161

1 The penalty is payable even if the creditor has not suffered any damage.

2 Where the damage suffered exceeds the penalty amount, the creditor may claim further compensation only if he can prove that the debtor was at fault.

[…]

Art. 163

1 The parties are free to determine the amount of the contractual penalty.

2 The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.

3 At its discretion, the court may reduce penalties that it considers excessive".

132. The Sole Arbitrator notes the following, which is in line with the Panel in CAS 2015/A/4139, para 50-54:

"[…] *Article 163(3) CO provides that the judge may reduce penalties which he finds excessive. However, the reduction of the penalty is reserved for exceptional cases only, when the penalty is considered as grossly unfair. This follows from Article 163 par. 1 of the SCO, which expressly provides that a penalty can be set at any amount by the parties. As a rule, the parties are therefore bound by their agreement, and the principle of freedom of contract commands that the tribunal abides by the parties' agreement. Since the possibility of a reduction affects the contractual freedom of the parties, it may only be applied with reservation (Decision of the Swiss Federal Tribunal, 11.03.2003, 4C.5/2003).*

According to the Swiss Federal Tribunal, a penalty is excessive when the stipulated amount is unreasonable and flagrantly exceeds the amount admissible with regard to the sense of justice and equity (ATF 133 III 43, para. 3.3.1). The doctrine prescribes that it is not sufficient that the penalty should be too important to be reduced: the penalty must flagrantly exceed any amount admissible with regard to the sense of justice and equity.

The excess must exceed what is reasonable. The quantum of the penalty must not be justifiable (COUCHEPIN G., La clause pénale – Etude générale de l'institution et de quelques applications pratiques en droit de la construction, 2008, para. A.2.1. p. 169).

When deciding whether a reduction of the penalty fee is admissible and, if so, to what extent, the Panel should take into account all the circumstances of the case, in particular a series of criteria, such as (i) the creditor's interest in the other's party compliance with the undertaking; (ii) the severity of the default or breach; (iii) the intentional failure to breach the main obligation; (iv) the business experience of the parties; and (v) the financial situation of the debtor (Decision of the Swiss Federal Tribunal, 16.01.2002, 4C.249/2001).

Higher amounts are appropriate for penalties that are not only intended as liquidated damages but, in addition, prevent the debtor from breaching its contractual obligation in the first place (punitive function of a penalty clause)".

133. In the case at hand, the Sole Arbitrator initially notes that, based on the size of the Player´s monthly salary, it appears that the penalty amount was not fixed in order to reflect and cover a party´s potential damage in case of a breach of contract by the other party, but mainly in order to motivate the Parties to respect the Contract.

134. The Sole Arbitrator further notes that the consequences of the Club´s breach of the Contract, which, at the time of the Player´s termination, was still to remain in force for almost four more years, were indeed very severe to the Player, who has not signed any new contract since then.

135. However, and even based on the above considerations, the Sole Arbitrator finds that the agreed penalty of USD 2,000,000 is to be considered excessive and disproportionate in the case at hand, not least based on the size of the Player´s monthly salary pursuant to the Contract, and that the amount to be paid to the Player therefore needs to be reduced. The fact that the Player is an employee of the Club does not change this.

136. Based on the circumstances of this particular case, not least the fact that the Contract was drafted by the Club, that the penalty amount seems to be fixed this high in order to prevent any breach of contract and the severe consequences for the Player, the Sole Arbitrator, after consideration the original contractual period, the residual value of the contract, the sign-on fee and the Player's remuneration, finds it proper to set the amount payable by the Club to the Player as a result of the termination of the Contract caused by the Club´s breach at the amount of USD 500,000.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 22 March 2022 by Tout Puissant Mazembe against the decision rendered by the Dispute Resolution Chamber of the FIFA Tribunal on 27 January 2022 is partially upheld.

2. The decision rendered by the Dispute Resolution Chamber of the FIFA Tribunal on 27 January 2022 is confirmed, except for paragraph 2 of the operative part, which is amended as follows:

   "2. The Respondent, TP Mazembe, has to pay to the Claimant the following amounts(s):

   - USD 4,000 as outstanding remuneration plus 5% interest p.a. as from 1 August 2021 until the date of effective payment;
   - USD 4,000 as outstanding remuneration plus 5% interest p.a. as from 1 September 2021 until the date of effective payment;
   - USD 2,266 as outstanding remuneration plus 5% interest p.a. as from 18 September 2021 until the date of effective payment;
   - USD 500,000 as compensation for breach of contract without just cause plus 5% interest p.a. as from 21 September 2021 until the date of effective payment".

3. (…).

4. (…).

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