CAS 2022/A/9004 Etoile Sportive du Sahel v. Souleymane Coulibaly

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Francesco Macrì, Attorney-at-Law, Piacenza, Italy

in the arbitration between

Etoile Sportive du Sahel, Tunisia

Represented by Mr Hamouda Bouazza, Attorney-at-Law, Sousse, Tunisia

Appellant

and

Souleymane Coulibaly, **United Kingdom**

Represented by Mr Paul-Alexandru Mincu and Mr Marius-Costantin Lazar, Attorneys-at-Law, Bucharest, Romania

Respondent

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I. PARTIES

1. Etoile Sportive du Sahel (the "Appellant" or the "Club") is a professional football club with its registered office in Sousse, Tunisia. The Club is registered with the Tunisian Football Association (the "FTF"), which in turn is affiliated to the *Fédération Internationale de Football Association* (the "FIFA")

2. Mr Souleymane Coulibaly (the "Respondent" or the "Player") is a professional football player of Ivorian and Italian nationality.

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

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties, 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.

A. Background Facts

The preceding decision of the FIFA Dispute Resolution Chamber

5. On 5 June 2017, the Egyptian Club, Al Ahly, filed a claim against the Player for breach of contract before the FIFA Dispute Resolution Chamber (the "DRC"), by means of which it was held the Player liable to pay Al Ahly the amount of USD 1,432,860 as compensation for breach of contract. Such a claim was registered under the reference "17-00961/ebo".

6. On 19 April 2018, the DRC issued a decision in the cited matter *inter alia (a)* ordering the Player to pay Al Ahly compensation for breach of contract in the amount of USD 1,432,680, and (b) ordering Al Ahly to pay the Player an outstanding remuneration of USD 26,400.

The employment relationship between the Parties

7. On 12 September 2019, the Player and the Tunisian Club, Etoile Sportive Du Sahel concluded an employment agreement (the "Contract"), valid from 10 September 2019 until 30 June 2024.

8. The Preamble of the Contract reads as follows:

> *"Whereas the FIFA Dispute Resolution Chamber issued its decision dated 18 April 2018 concerning the dispute between Al AHLY and the professional football player SOULEYMANE COULIBALY, (case ref 17-00961 / ebo).*

Whereas this decision orders the player to pay Al AHLY the sum of 1 432 860 $ as compensation for breach of contract,

Whereas this same decision orders Al AHLY to pay the player SOULEYMANE COULIBALY the sum of 26 400 US dollars as outstanding remuneration,

Whereas this decision became final and binding for both the player SOULEYMANE COULIBALY and Al ABLY.

Whereas the player wishes to continue his sports career

Whereas the player Souleymane Coulibaly is only responsible for his breach of contract with AL AHLY Sporting Club.

Whereas Etoile Sportive du Sahel has signed an agreement with AL AHLY Sporting Club to replace the player and pay in his place the financial compensation for breach of the contract subject of the FIFA decision cited above".

9. Article 2 and 3 of the Contract reads as follows:

"Article 2:

The player Souleymane Coulibaly acknowledges that Etoile Sportive du Sahel paid Al Ahly Sporting Club, Egypt in [its] stead the amount of the FIFA DRC decision case ref 17-00961/ebo for an amount of USD 1,400,000 to enable him to be registered.

[...]

Article 3:

However, the player Souleymane Coulibaly asks jurisdictional body authorised to take into account the amount reimbursed by the Etoile Sportive du Sahel to the club Al Ahly, Egypt in his place to count them in favour of Etoile Sportive du Sahel in all decisions relating to a contractual dispute between the player and the club".

10. By Article 7 of the Contract ("Remuneration"), the Parties agreed on the following remuneration:

a. *Season 2021/2022: Gross monthly salary of USD 10,000 plus performance bonus of USD 50,000*
b. *Season 2022/2023: Gross monthly salary of USD 10,000 plus performance bonus of USD 50,000*
c. *Season 2023/2024: Gross monthly salary of USD 10,000 plus performance bonus of USD 50,000*

Furthermore, the Contract provided the following regarding the performance bonus:

"The definitive financial value of the performance bonus (for each season) is calculated based on the number of official matches played by the player and the number of official matches played by the player and the number of official matches played by the club. (The definitive value = Performance bonus x number of official matches played by the player: number of official matches played by the club)".

11. On 15 October 2019, the Parties concluded a settlement agreement with Al Ahly (the "First Agreement"), where, in the recitals, they acknowledged that on 19 April 2018, the FIFA DRC had condemned the Player to the payment in favour of Al Ahly of the amount of USD 1,432,860 and, at the date of the agreement, the Player still did not make any payment. Furthermore, this was stipulated:

"E) ESS wishes to register the Player and has therefore proposed to Al Ahly that ESS will pay on behalf of the Player USD 1,400,000 to Al Ahly in settlement of the outstanding debt of the Player towards Al Ahly as provided for under the Decision;

F) The payment due by Al Ahly to the Player in accordance with point 5 of the Decision is deducted from the total outstanding amount of USD 1,432,860 and the Parties agree that the remaining open debt due by the Player to Al Ahly shall correspond to USD 1,400,000 in total;

[…]

NOW AND THEREFORE the Parties agree as follows:

1. *The Recitals are integrant and essential part of this Agreement*.

2. *The Player and/or ESS, acting on behalf of the Player, shall pay to Al Ahly the amount of USD 1,400,000 net, in accordance with the following payment schedule:*
   (a) USD 200,000 net within 15 days as from the signature of this Agreement,
   (b) USD 400,000 net by 31 July 2020,
   (c) USD 400,000 net by 31 January 2021,
   (d) USD 400,000 net by 31 July 2021. (hereinafter, 'the Settlement Payment')

3. *In the event that the Player and/or ESS fails to pay to Al Ahly any of the amounts due under the clause 3 above or makes only a partial payment, then the remainder shall become immediately due and payable and an interest rate of 15% p.a. shall apply starting from the date of the default.*

4. *ESS and the Player are jointly and severally liable for the entire payments of the Settlement Payment in favour of Al Ahly, until the Settlement Payment is covered in full, together with the interest (if applicable)."*

   […]

7. Al Ahli will not oppose to the registration and the qualification of the Player in favour of ESS".

12. On 23 January 2020 and 5 March 2020, Al Ahly filed two separate claims before the FIFA DRC against the Player and the Club due to the unpaid amounts provided in the First Agreement.

13. After the consolidation of the two proceedings, on 16 July 2020, the FIFA DRC condemned the Parties to pay in favour of Al Ahly the total amount of USD 1,400,000 plus interest as stated. In addition, a ban was imposed on the Club from registering new players nationally and internationally starting from the following transfer period. A restriction was imposed on the Player from playing any official match until the payment of the due amount or for a maximum duration of six months.

14. On 3 November 2020, the Parties filed two separate Statements of Appeal before the Court of Arbitration for Sport against the decision of the FIFA DRC. After consolidating the two arbitral proceedings, the CAS issued its decision in the case CAS 2020/A/7489 & CAS 2020/A/7490 dismissing both appeals and confirming the FIFA Decision.

15. On 2 August 2021, due to the failure to pay the amount determined by FIFA DRC, as confirmed by CAS, the bans determined under Article 24bis of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") were applied against the Parties.

16. On 24 January 2022, the Club and Al Ahly signed a second settlement agreement (the "Settlement Agreement") whereby the recitals acknowledged the findings of the proceedings before the FIFA DRC and the CAS, and the following was stipulated:

1. "The obligation to pay the Settlement Amount initially belongs to the Player, who shall immediately and without any condition automatically substituted by ESS to make such payment within the deadlines established in the present Settlement Agreement;

2. ESS undertakes to pay the Settlement Amount of USD 1,909,870.26 to Al Ahly, whom in turn hereby expressly and irrevocably agrees to receive, in accordance with the following payment schedule:

- *a. The net amount of USD 500,000 no later than 15 days after the below date of the present Settlement Agreement b. USD 500,000 by 31 August 2022;*
- *b. The net amount of USD 500,000 no later than 31 August 20222;*
- *c. The net amount of USD 500,000 no later than 28 February 2023;*
- *d. The net amount of USD 409,870.26 no later than 31 August 2023.*

[…]

5. ESS hereby confirms, without any limitation of any nature or degree, its legal obligation established in paragraphs 1 above, according to which it substitutes the Player in the payment of the Settlement Amount to Al Ahly."

The Player did not sign the settlement agreement.

17. On 31 January 2022, the Club paid the first agreed instalment to Al Ahly, i.e. USD 500,000, and, on the same day, it requested FIFA to lift the imposed bans, including the one against the Player. Consequently, given such a settlement, FIFA complied with such a request.

18. On 15 February 2022, the Player put the Club in default and granted it a fifteen-day deadline to proceed with the payment of USD 30,000 regarding outstanding remunerations for the season 2021/2022 and stating the following:

"*Until today, the Club did not pay to Mr. Souleymane Coulibaly the salaries due for November 2021, December 2021, January 22 in the total amount of 30,000.00 $ (thirty thousand dollars).*
Therefore, by the present, I send you this formal notice to ask you to pay to Mr. Souleymane Coulibaly in 15 days the above mentioned amount, in total net of 30.000/00 $ (thirty thousand dollars).
1. As the payments due is delayed for more than 30 days, this notice is made under article 14 bis of the FIFA Regulations on the Status and Transfer of Players." […]

19. On 3 March 2022, due to the non-payment of the claimed salaries, the Player terminated the Contract, stating the following:

"Taking into consideration the fact that the notifications sent by the player remained unanswered and without effect, regarding the outstanding payments, we understand to terminate with just cause the employment contract concluded on 12 September 2019."

20. On 6 March 2022, the Club replied to the Player, indicating that, despite the unilateral termination of the Contract, he remained jointly liable to comply with the financial obligations towards Al Ahly. Consequently, given that the first instalment of USD 500,000 had already been paid to Al Ahly according to the second settlement agreement, the Player owed the Club such amount to be reimbursed within ten days.

21. On 1 July 2022, the Player concluded a new employment contract with the Cypriot Club, FC Karmiotissa by Punin LTD, valid as of the signature until 30 June 2023. The new club was granted the right to unilaterally extend the validity of the employment contract until 30 June 2024 by informing the Player within the 15 May 2023. According to that contract, the Player was entitled to a net salary of EUR 18,000 net/20,021 gross to be paid in twelve instalments on the 20th of each month from August 2022.

B. Proceedings before the FIFA Dispute Resolution Chamber

22. On 10 March 2022, the Player filed a claim against the Club before the FIFA Dispute Resolution Chamber, claiming the payment of USD 40,000 as outstanding remunerations from November 2021 to February 2022, USD 240,000 as compensation for breach of contract according to Article 17 of the FIFA RSTP, and

interest of 5% per annum on the requested amounts as of the termination until the date of effective payment.

23. On 9 April 2022, the Club replied that, following the default notice of 15 February 2022, an agreement was found with the Player to pay the due amounts between 6 and 13 March 2022. Consequently, the Club argued that the Player did not act in good faith and terminated the Contract without just cause. In this regard, the Club noted that the Player was familiar with such abusive conduct, having previously acted in the same manner when he breached his contract with Al Ahly without just cause. In any case, the Club held that the DRC should consider the amounts already paid to Al Ahly in the final decision.

24. Besides, the Club filed a counterclaim towards the Player, asking for the payment of USD 260,000, corresponding to the residual value of the Contract, as compensation for the unlawful Player's breach of contract, USD 1,400,000, plus interest of 15%, as the amount to be paid to Al Ahly in accordance with the first settlement agreement or, subsidiarily, USD 500,000 as the amount paid to Al Ahly under the second settlement agreement.

25. On 2 May 2022, the Player replied to the Club's counterclaim, objecting to its admissibility and stating that the matter was *res judicata* in light of the award issued in the case CAS 2020/A/7489 & CAS 2020/A/7490. As to the merits, the Player reaffirmed his prayers for relief; alternatively, should it be found that he did not have just cause to terminate the Contract, he argued that no compensation was due to the Club insofar as the latter did not prove to suffer any damages in connection with the termination of the Contract.

26. On 9 June 2022, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

> "1. *The claim of the Claimant/Counter-Respondent, Souleymane Coulibaly, is partially accepted.*
>
> *2. The counterclaim of the Respondent/Counter-Claimant, Etoile Sportive Du Sahel, is admissible.*
>
> *3. The counterclaim of the Respondent/Counter-Claimant is rejected.*
>
> *4. The Respondent/Counter-Claimant has to pay to the Claimant/Counter-Respondent the following amount(s):*
>
> *a. USD 10,000 as outstanding remuneration plus 5% interest p.a. as from 1 December 2021 until the date of effective payment;*
>
> *b. USD 10,000 as outstanding remuneration plus 5% interest p.a. as from 1 January 2022 until the date of effective payment;*
>
> *c. USD 10,000 as outstanding remuneration plus 5% interest p.a. as from 1 February 2022 until the date of effective payment;*

d. USD 10,000 as outstanding remuneration plus 5% interest p.a. as from 1 March 2022 until the date of effective payment;

e. EUR 240,000 as compensation for breach of contract without just cause plus 5% interest p.a. as from 10 March 2022 until the date of effective payment.

5. Any further claims of the Claimant/Counter-Respondent are rejected.

[…]

7. Pursuant to art. 24 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/Counter-Claimant shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to 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.

8. The consequences shall only be enforced at the request of the Claimant/Counter- Respondent in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.

27. On 16 June 2022, the grounds of the Appealed Decision were communicated to the Parties, providing, *inter alia*, as follows:

- "[…] *the Dispute Resolution Chamber (hereinafter also referred to as Chamber or DRC) […] took note that the present matter was presented to FIFA on 10 March 2022 and submitted for decision on 9 June 2022. Taking into account the wording of art. 34 of the October 2021 edition of the Procedural Rules Governing the Football Tribunal (hereinafter: the Procedural Rules), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.*

- *Subsequently, the members of the Chamber referred to art. 2 par. 1 of the Procedural Rules and observed that in accordance with art. 23 par. 1 in combination with art. 22, par. 1 lit. b) of the Regulations on the Status and Transfer of Players (March 2022 edition), the Dispute Resolution Chamber is in principle competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between an*

Ivorian/Italian player and a club affiliated to the Tunisian Football Association.

- *The Chamber however noted that the player objected to the admissibility of the club's counterclaim on the grounds that the CAS Award was res judicata on the matters raised by the club.*

- *[…] the Chamber wished to recall that the plea of res judicata is founded to safeguard the certainty of rights which have already been adjudicated upon and defined by a judgement. The principle of res judicata ensures that whenever a dispute has been defined and decided upon, it becomes irrevocable, confirmed, and deemed to be just - res judicata pro veritate habetur.*

- *To this end, the Chamber recalled that the principle of res judicata is applicable if cumulatively and necessarily the parties to the disputes, the object of the matter in dispute, and the cause of action are identical (respectively, eadem personae, eadem res, and eadem causa petendi).*

- *By examining the cited criteria, the Chamber was comfortable to establish that no res judicata existed in the matter at hand for the triple identity test was not met at all. Firstly, the object of the counterclaim is not the same as that examined by the CAS Award (i.e. execution of payments under the first settlement agreement vs. compensation termination of the contract, respectively). Secondly, the causa petendi is not the same failure to pay amounts under the first settlement agreement, as reviewed in the CAS Award, since the counterclaim pertains to the breach of the contract allegedly committed by the player. Lastly, the DRC confirmed that the identity of parties is not met for in the matter examined by the CAS Award, Al Ahly was a party (claimant), whereas it is not a party to these proceedings which oppose solely the player and the club.*

- *On the basis of the foregoing, the Chamber confirmed that the counterclaim is admissible.*

- *[…] The foregoing having been established, the Chamber moved to the substance of the matter, and took note of the fact that the parties strongly dispute whether the player had just cause to terminate the contract and the consequences that follow, based on the alleged non- payment of certain financial obligations by the club as per the contract, in accordance with art. 14bis of the Regulations.*

- *In this context, the Chamber acknowledged that its task was to determine, based on the evidence presented by the parties, whether the claimed amounts had in fact remained unpaid by the club and, if so, whether the formal pre-requisites of art. 14bis of the Regulations had in fact been fulfilled.*

- *The Chamber also noted that in the case at hand the club bore the burden of proving that it indeed complied with the financial terms of the contract concluded between the parties. Nonetheless, the club limited its defense to state that a verbal agreement had been reached with the player to settle the financial obligations, yet it filed no evidence whatsoever in support of this allegation. As such, the club failed to justify that it indeed had complied with the contract in light of the amounts claimed as outstanding by the player.*

- *Thus, the Chamber concluded that the player had a just cause to unilaterally terminate the contract, based on art. 14bis of the Regulations.*

- *[…] The Chamber observed that the outstanding remuneration at the time of termination, coupled with the specific requests for relief of the player, is equivalent to 4 salaries under the contract, amounting to USD 40,000 (i.e. between November 2021 and February 2022.*

- *The Chamber equally noted that the player requested payment of the bonuses under the contract. These bonuses however were conditional as per the clear contractual wording, taking into particular consideration the number of matches played by both the player and the club.*

- *However, because no evidence of the number of matches played was filed by the player, he therefore failed to meet the required burden of proof. As such, the Chamber had no alternative but to reject this part of the claim.*

- *As a consequence, and in accordance with the general legal principle of pacta sunt servanda, the Chamber decided that the club is liable to pay to the player the amounts which were outstanding under the contract at the moment of the termination, i.e. USD 40,000.*

- *In addition, taking into consideration the player's request as well as the constant practice of the Chamber in this regard, the latter decided to award the player interest at the rate of 5% p.a. on the outstanding amounts as from their respective due dates until the date of effective payment.*

- *Having stated the above, the Chamber turned to the calculation of the amount of compensation payable to the player by the club in the case at stake […].*

- *[…] the Chamber held that it 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 Chamber established that no such compensation clause was included in the employment contract at the basis of the matter at stake.*

- *As a consequence, the Chamber 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 Regulations. The Chamber 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 Chamber 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, the Chamber concluded that the amount of USD 280,000 (i.e. the residual value of the contract for 28 months, from March 2022 to June 204) serves as the basis for the determination of the amount of compensation for breach of contract.*

- *The DRC […] noted that the Turkish league was suspended for two months only while the club reduced the player's salary for the entire 2019/2020 season and in a retroactive manner, which could not be deemed neither reasonable nor proportionate.*

- *In continuation, the Chamber 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 […] Indeed, the player did not find new employment, and therefore no mitigation shall apply to the matter at hand.*

- *Subsequently, the Chamber referred to art. 17 par. 1 lit. ii) of the Regulations, according to which a player is entitled to an amount corresponding to three monthly salaries as additional compensation should the termination of the employment contract at stake be due to overdue payables. In the case at hand, the Chamber confirmed that the contract termination took place due to said reason i.e. overdue payables by the club, but decided that the player shall not receive any additional compensation since there was no mitigation to be accounted for.*

- *Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the club should pay in principle the amount of USD 280,000 to the player, which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter. However, the Chamber noted that the player had requested EUR 240,000 as compensation for breach of contract.*

- *Considering the principle of non ultra petita according to which the Chamber is bound by the limits of a party's request for relief, the Chamber*

determined that it should award the amount of EUR 240,000 as claimed by the player.

- *Lastly, taking into consideration the player's request as well as the constant practice of the Chamber in this regard, the latter decided to award the player interest on said compensation at the rate of 5% p.a. as of the date of claim until the date of effective payment.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 1 July 2022, the Club filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the 2019 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In its submission, the Club asked to appoint a Sole Arbitrator according to Article R50 of the CAS Code and requested French be the language of the procedure.

29. On 6 July 2022, the CAS Court Office informed FIFA and the Respondent of the appeal filed by the Club, granting the Respondent with two separate deadlines to state whether or not he agreed with the appointment of a Sole Arbitrator and French be the language of the procedure.

30. On 7 July 2022, the Respondent informed the CAS Court Office that he requested English be the language of the procedure since it was the one chosen by the Parties in the employment contract.

31. On 11 July 2022, the CAS Court Office acknowledged the Appellant's request to order the Respondent to provide a full copy of the employment contract with his new club, F.C. Karmiotissa. Furthermore, given the Parties' disagreement, they were informed that the President of the Appeals Arbitration Division, or her Deputy, would issue an Order on Language in due course.

32. On 13 July 2022, the Club filed its Appeal Brief in accordance with Article R51 CAS Code.

33. On 14 July 2022, the CAS Court Office provided the Parties with a copy of the Order on Language issued on the same date by the President of the Appeals Arbitration Division, whereby English was selected as the language of the arbitral procedure, and the Appellant ordered to file an English translation of its Appeal Brief and the attached exhibits.

34. On 9 August 2022, the CAS Court Office informed the Parties that the Deputy Division President decided to refer the matter to a Sole Arbitrator.

35. On 5 September 2022, the Respondent requested that the time limit to file his Answer be fixed after the payment by the Appellant of its share of the advance of costs, pursuant to Article R55 (3) of the CAS Code.

36. On 18 September 2022, the Club informed CAS about the payment of the amount of USD 500,000 in favour of Al Ahly as the second instalment as per the settlement agreement of 24 January 2022 between the two clubs.

37. On 1 October 2022, Counsel for the Respondent's provided the CAS Court Office with a copy of their power of attorney, undersigned by the Player on 12 September 2022

38. On 7 October 2022, the CAS Court Office acknowledged receipt of the Player's Answer, filed on 6 October 2022, in accordance with Article R55 CAS Code. On the same day, in accordance with Article R54 CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Arbitral Tribunal appointed to decide the present matter was constituted as follows:

- Sole Arbitrator: Mr Francesco Macrì, Attorney-at-Law in Piacenza, Italy.

39. On 14 October 2022, the CAS Court Office provided the Parties with a copy of the relevant, complete FIFA case file.

40. On 2 December 2022, the CAS Court Office informed the Parties that the Sole Arbitrator, given the Parties' requests, decided to hold a hearing, inviting the Parties to indicate whether they prefer to hold the hearing in person or by videoconference. With the same communication, pursuant to Article 44.3 of the CAS Code, the Respondent was invited to provide the CAS Court Office with a copy of the "Standard Employment Contract" attached to the new employment contract with F.C. Karmiotissa as "Appendix A".

41. On 9 December 2022, the Respondent provided the CAS Court Office with a copy of the requested Appendix A, attached to the new employment contract.

42. On 13 December 2022, after consultation with the Parties, the CAS Court Office informed them that an in-person hearing would take place on 27 January 2023 at the CAS headquarters in Lausanne, Switzerland.

43. On 10 January 2023, the CAS Court Office provided the Parties with an Order of Procedure, duly signed and returned on the same day by the Club and on 16 January 2023 by the Player.

44. On 12 January 2023, the Club provided the CAS Court Office with a communication from the Executive Director of Al Ahly (the "Statement") concerning payments received by the Appellant, requesting the admission of that document to the file case.

45. On 17 January 2023, after having received the Player's considerations in that regard, the CAS Court Office informed the Parties that the Statement from Al Ahly provided by the Club was admitted to the file.

46. On 27 January 2023, a hearing was held in Lausanne, Switzerland. In addition to the Sole Arbitrator, Mr Fabien Cagneux, CAS Managing Counsel, and the following persons attended the hearing:

For the Appellant:

- Mr Hamouda Bouazza, Counsel;
- Mr Malek Rejiba, Counsel.

For the Respondent:

- Mr Paul Alexandru Mincu, Counsel;
- Mr Amelian Catalin, Counsel;

47. The Parties then had full opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

48. At the outset of the hearing, the Parties confirmed that they had no objection to the composition of the Arbitral Tribunal and with the procedure adopted by the Sole Arbitrator, and that their right to be heard had been respected.

49. Before their closing statements, the Parties informed the Sole Arbitrator that they would start negotiations to settle the dispute and jointly asked to suspend the arbitral proceedings until their final decision.

50. On 27 January 2023, the CAS Court Office informed the Parties that the proceedings were suspended until 10 February 2023 to allow them to continue their negotiations.

51. On 22 February 2023, the CAS Court Office informed the Parties that they were granted an ultimate deadline until 28 February 2023 to inform on the status of their negotiations; otherwise, such negotiations would have been deemed to have failed, and the Sole Arbitrator would have been able to begin drafting the arbitral award.

52. On 28 February 2023, the CAS Court Office acknowledged receipt of the Appellant's communication regarding the failure of the Parties' negotiations to reach a settlement agreement.

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

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

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

- In April 2018, before signing the Contract with the Club, the FIFA DRC condemned the Player to pay his previous club, Al Ahly Sporting Club, the total amount of USD 1,432,860 for contract termination without just cause.

- In May 2019, the Player arrived in Sousse, where he underwent a surgical operation, whose costs were entirely paid by the Club. At that time, Al Ahly's representatives informed the Club that the Player was at risk of being banned for life due to his failure to pay the amount determined by the FIFA DRC. Therefore, the Club and Al Ahly entered into negotiations to find an amicable solution to settle the debt of the Player.

- In September 2019, by signing the Contract, the Player, *inter alia*, acknowledged under Article 2 that the Club had paid the amount he owed to Al Ahly to allow him to continue his career and that he obliged himself to respect the duration of the Contract. Furthermore, as per Article 3 of the Contract, in the event of a unilateral termination of the Contract, it was agreed that the sums advanced by the Club would be taken into account by the judicial authority in case of a possible dispute with the Player.

- On 15 October 2019, the Club and the Player signed an agreement with Al Ahly, whereby the first two undertook to pay, jointly and severally, the total amount of USD 1,400,000 at the given deadlines.

- Since this agreement remained unfulfilled, the DRC, under the request of Al Ahly, condemned the Parties to the relevant payment together with imposing a ban on recruiting new players on the Club and a restriction against the Player from any official matches until the debt had been paid. The appeal filed by the Parties before CAS against the FIFA Decision was rejected.

- Since the FIFA decision was put in force according to the provision of Article 24 bis of the FIFA RSTP, the Club reached a new amicable settlement with Al Ahly, whereby the first undertook to pay the total amount of USD 1,909,870.26 to the second in four instalments as of the dates stipulated therein.

- The Player was informed of such a new agreement but did not sign it without any explanation. Notwithstanding, as a consequence of the agreement between the Club and Al Ahly, the restriction imposed on the Player was lifted.

- Even though only two weeks earlier the Club paid the first instalment of the amount due to Al Ahly by the Player, the latter, on 15 February 2022, sent a formal notice to the Club for the payment of the monthly salaries of November and December 2021 and January 2022

- The Club's representatives contacted the Player to explain that the delays were due to temporary financial difficulties. Hence, the Player agreed to receive the due payment between 6 and 13 March 2022. However, the Player disregarded this agreement and, on 3 March 2022, notified the Club of his unilateral termination of the Contract.

- The Club replied to such notice, demanding the reimbursement of the amount advanced to Al Ahly on the Player's behalf, i.e., USD 500,000, without receiving any response.

- Upon the Player's claim, the FIFA DRC declared the Contract between the Parties terminated due to the Club's misconduct and ordered it to pay the Player the unpaid outstanding salaries and compensation for breach of contract, as detailed in the Appealed Decision. Unpredictably, the FIFA DRC did not grant the Club's request to order the Player to reimburse the amount of USD 1,400,000 plus interest at 15% without explaining its decision.

- Considering the above circumstances, the Club submits that the Player signed the employment contract in bad faith to avoid paying what he owed to Al Ahly and convincing the Club to do so on his behalf.

- However, concerning the Player's unilateral termination, the Appealed Decision is correct insofar as the Club failed to provide adequate evidence of the Player's bad faith. Therefore, the outstanding salaries remained due by the Club.

- Instead, considering the new employment contract signed by the Player with F.C. Karmiotissa, the due compensation shall be conveniently reduced, according to the provision of Article 17 (1) of the FIFA RSTP.

- Furthermore, according to Article 2 of the Contract, the Player shall bear any amount due to Al Ahly.

- Therefore, taken into account that the Player did not inform the Club of the dispute with Al Ahly and the early unilateral termination of the Contract does not exempt the Player from his contractual obligations, the Player shall be ordered to reimburse the entire amount paid by the Club to Al Ahly, i.e., USD 1,909,870.26 (USD 1,500,000 plus 15% interest) notice and then filed a claim before the FIFA DRC.

- On this basis, the Club submitted the following prayers for relief in its Appeal Brief:

  "To consider the appeal of "Etoile Sportive du Sahel" lodged against the decision issued on June 09, 2022 by the Dispute Resolution Chamber (CRL) of FIFA, and whose reasons for this decision were notified to the appellant on June 16 June 2022 having reference N° FPSD-5420, admissible.

  Reduce the amount of compensation due to the respondent by taking into consideration the specific provisions mentioned in article 3 of the employment contract and the value of the new employment contract signed by the respondent with the Club Karniotissa (Protshlima Cyta) for the

period corresponding to the remaining duration of the prematurely terminated contract.

Order the player "Souleymane Coulibaly" mainly, to pay an amount equal to 1,400,000 USD + 15% interest for the club "Etoile Sportive du Sahel" until the effective payment and subsidiary his portion equivalent to the half of the amount requested, and very subsidiary an amount equal to USD 500000 (the first installment that has actually been paid to "Al-Ahly SC" to date), while reserving the right to request later the other installments which will be paid by Etoile Sportive du Sahel".

Order the player to pay the costs of this arbitration procedure as well as the lawyer's fees."

B. The Respondent

55. The submissions of the Player may be summarised as follows:

- The Player decided to sign with the Club since it was clear from the Contract's provision that the latter had already concluded an agreement with the Al Ahly and paid the compensation on his behalf.

- Regrettably, the Player, after the signing of the Contract, discovered that the Club did not pay the relevant debt to Al-Ahly; instead, to cure its breach, on 15 October 2019, the Club asked the Player to conclude a settlement agreement whereby the Parties undertook to pay jointly and severally all any due amount to Al Ahly.

- The Agreement was drafted in English, which was not the native language of the Player, and he took part in the negotiations without any legal assistance. Notwithstanding, the Club again guaranteed the Player that it would pay any due amount to Al Ahly on his behalf, without asking for reimbursement.

- As a consequence of the Club's failure to fulfil its obligations, the Parties were condemned by FIFA DRC to pay USD 1,400,000 plus interest to Al Ahly. Such a decision was confirmed also by CAS.

- Hence, the Club was forced to reach a new settlement with Al Ahly to lift the sanctions imposed by FIFA. On 24 January 2022, the two clubs found an agreement (that the Player did not sign) where the Club undertook to pay the total amount of USD 1,909,870.26, also declaring that it substituted the Player in such payment. In this regard, Articles 1 and 5 of the Agreement between the two clubs confirm the Club's substitution in favour of the Player without additional conditions or limitations.

- Since the Club acknowledged the validity of the Appealed Decision on the contract termination for just cause, solely the calculation of the

compensation due to the Player in the light of Article 17 (1) of the FIFA RSTP and the restitution in favour of the Club of the amount paid to Al Ahly should be at stake in the present proceedings.

- In this regard, when the Player signed the Contract, the Club was aware of his financial obligations towards Al Ahly and that he could not pay such an enormous amount. Therefore, to convince the Player to sign the Contract, the Club guaranteed to settle all the matters with the creditor without seeking any restitution of the amount paid.

- The payment in favour of Al Ahly was not an act of generosity by the Club, which was well aware of the opportunity to register the Player without paying any transfer fee, stipulating a remarkable contract duration of five seasons and agreeing on a below-average salary for the first year of the Contract. The Club was aiming to obtain a later return on this initial outlay from the potential future transfer of the player.

- The Player signed the Contract (and agreed to the clauses therein) believing that his debts to Al Ahly had been settled. On the contrary, he then found himself forced to sign the first agreement in October 2019 because the Club induced him the assumption that such a signing was necessary to complete the transfer and be able to play.

- On the contrary, the Player found out that not only had the debt with his creditor not been settled, as promised by the Club, but he had to undergo subsequent proceedings before the FIFA bodies and the additional threat of disciplinary proceedings. Not alone, due to the Club's breach, the interest on the sum owed to Al Ahly had increased from 5% to 15%.

- The Player signed the contract trusting that he was released from his debts, and the provision of Article 3 of the Contract cannot be applied because he terminated the Contract with just cause. Furthermore, such clause is unlawful and disproportionate because *de facto* the Player would have to pay the Club an amount of USD 1,400,000 in the event of early termination of the Contract, whereas, hypothetically and according to the current FIFA regulations, given the value of the Contract for five seasons (i.e., approximately USD 450,000 without bonuses), the maximum liquidated compensation in favour of the Club could be hypothetically USD 650,000.

- The clause in Article 3 of the contract constitutes, *de facto*, a pre-emptive waiver of any compensation by the Player in the event of termination of the contract for just cause since, in that case he would have to return a far more significant sum to the Club, i.e., USD 1,400,000. FIFA regulations prohibit such a waiver, making the provision unlawful and invalid.

- Regarding the due compensation according to Article 17 (1) of the FIFA RSTP, considering the content of such provision, the amount granted

shall be confirmed since the new contract with FC Karmiotissa was signed on 22 of August 2022, after the issuing of Appealed Decision on 1 July 2022.

- As a closing remark, Article 17 (2) FIFA RSTP cannot be applied in the case at stake since such a provision aims to sanction the unlawful conduct of a player who, together with his new club, has intentionally broken the contract with the former club without just cause.

- In addition, the first settlement between the Parties and Al Ahly did not modify the fact that the Club obliged itself to pay the compensation on behalf of the Player without demanding any reimbursement; moreover, by the second Agreement in 2022, the Club confirmed its intention to substitute the Player in the due payment to Al Ahly.

56. On this basis, the Player submitted the following prayers for relief in his Answer:

i. "*To dismiss the appeal filed by Etoile Sportive du Sahel;*

ii. *To confirm the Appealed Decision in totum;*

iii. *To order Etoile Sportive du Sahel to bear any and all costs and/or expenses of the arbitration.*

V. JURISDICTION

57. The jurisdiction of CAS, which is not disputed, derives from Article 57 (1) FIFA Statutes (2022 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 CAS Code which reads: *"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 […]"*. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by both Parties.

58. Furthermore, Article 23 of the Employment Agreement between the Parties provides "*[…] The parties agree to amicably settle disputes that may arise during the execution of this contract. Failing that, it is made attribution to the jurisdiction of FIFA".* Therefore, since this is an appeal proceeding against a FIFA decision, the CAS jurisdiction is confirmed by the Parties' contractual agreement.

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

VI. ADMISSIBILITY

60. The Appeal was filed within the deadline set by Article 58 (1) FIFA Statutes on 1 July 2022. The Appeal complied with all other Article R48 CAS Code requirements, including the CAS Court Office fee payment.

61. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

62. The present proceedings concern an appeal against a decision issued by the FIFA DRC.

63. The Club merely recognises the CAS jurisdiction on appeals against FIFA DRC decisions (allegedly referring to the provisions of the CAS CODE applicable to the appeal proceedings) while the Player submits that the Panel shall decide in accordance with the FIFA regulations and, additionally, Swiss Law, since the Contract does not make any reference to other law chosen by the Parties.

64. In this regard, 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. Article 23 of the Employment Contract refers any dispute to the FIFA jurisdiction if an amicable settlement between the Parties cannot be found.

67. In view of the choice of the Parties to refer their dispute to the FIFA DRC, the Sole Arbitrator finds that the Parties accepted the applicability of Article 56 (2) FIFA Statutes. In accordance with this provision, the regulations of FIFA are primarily applicable (as to the date when the claim was lodged, FIFA RSTP March 2022 edition applies); if necessary, additionally, Swiss Law.

VIII. MERITS

68. The Sole Arbitrator acknowledges that the Club does not object to the Appealed Decision because the Player terminated the Contract with just cause due to the outstanding salaries at the date he issued the termination letter, i.e., 3 March 2022.

69. Consequently, the Sole Arbitrator leaves as undisputed the fact that the Player had just cause to terminate the Contract according to Article 14bis (1) FIFA RSTP, and, at the date of the termination letter, the Club still had to pay the Player USD 40,000, corresponding to four monthly salaries from November 2021 to February 2022, plus interest as determined in the Appealed Decision.

70. That being stated, in brief, the Club objects that, since the Player signed a new employment contract with the Cypriot club F.C. Karmiotissa, the compensation under Article 17 (1) of the FIFA RSTP must be conveniently reduced as illustrated above. Furthermore, the Club holds that, as a result of the early unilateral termination requested by the Player, he is obliged to return to the Club all sums paid by the latter to the Player's creditor, i.e., Al Ahly. Conversely, the Player asked the Appealed Decision to be entirely confirmed.

71. Regarding the issues at hand, the Sole Arbitrator observes that, at the date of the Appealed Decision, the Player had not signed his new employment contract with FC Karmiotissa: therefore, this element could not be taken into consideration by the DRC. On the other hand, while the Club filed a prompt counterclaim requesting the Player be condemned for the same grounds outlined in its appeal before the CAS, the DRC did not examine this request, and no decision was issued to that effect.

72. According to Article R57 (1) of the Code of Arbitration for Sport (the "Code"), the Sole Arbitrator has "*full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*". As stated in CAS jurisprudence, the CAS appeals arbitration procedure thus entails a *de novo* review of the merits of the case and is not confined to merely ruling whether the appealed decision is to be upheld. The Sole Arbitrator's role is to independently establish the merits of the case discussed before the first instance judicial body.

73. The Sole Arbitrator observes that the full power to review the facts and the law granted under the provisions of Article R57 of the CAS Code has a dual meaning: not only that procedural flaws of the proceedings of the previous instance can be cured during the proceedings before the CAS, but also that the Panel is authorised to admit new prayers for relief and new evidence and hear new legal arguments (see Mavromati/Reeb, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Edition 2015, comment under Article R57, para 12, p. 508) with some limited restrictions which are not applicable in the present case. Therefore, the Sole Arbitrator notes that "*there is no limitation to the scope of the panel's review with respect to legal arguments and submissions*" (CAS 2015/A/4346 Gaziantepspor v. Darvydas).

74. Therefore, in view of the so-called "*de novo* review" principle, the Sole Arbitrator deems himself entrusted to address the above-mentioned issues at stake in these proceedings.

i. What is the compensation due to the Player according to Article 17.1 FIFA RSTP?

75. Concerning the consequences of the relevant breach, the Sole Arbitrator concurs with the FIFA DRC that the Player is entitled to compensation according to Article 17 (1) of the FIFA RSTP, which provides financial compensation in favour of the injured party. Moreover, the Sole Arbitrator abides by CAS case law according to which, in light of the principle of "positive interest", *"the harmed party should be restored to the position in which the same party would have been had the contract been properly fulfilled*" (CAS 2005/A/801; CAS 2006/A/1061; CAS 2006/A/1062; CAS 2008/A/1447; CAS 2012/A/2698; CAS 2014/A/3706).

76. Article 17 (1) of the FIFA RSTP, states the following:

"*[…] 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".*

77. The purpose of Article 17 of the FIFA RSTP consists in reinforcing contractual stability, i.e., to strengthen the principle of *pacta sunt servanda* in the world of international football by acting as a deterrent against unilateral contractual breaches (CAS 2017/A/5180, 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 RSTP is to support and foster contractual stability […]";* confirmed in CAS 2008/A/1568, para. 6.37).

78. Therefore, the FIFA DRC correctly referred to the remaining value of the Employment Contract up to the original date of termination (i.e., 3 March 2022), with respect to the salaries that the Player failed to receive due to early termination, to determine the basis of the amount of compensation for breach of the Contract.

79. Regarding the residual value of the Employment Contract, the Sole Arbitrator notes that the Contract would have ended on 30 June 2024. Therefore, such amount shall be calculated in relation to the remaining four monthly salaries from March 2022 (concerning season 2021/2022) and the expected yearly salary for the season 2022/2023 and 2023/2024, which totally amounts to EUR 280,000 gross, which is the residual value of the Employment Contract.

80. Nevertheless, the Sole Arbitrator acknowledges that the Player, before FIFA DRC, requested EUR 240,000 as compensation for breach of contract. Only this amount was granted in the Appealed Decision on this basis: *"70. Considering the principle of non ultra petita according to which the Chamber is bound by the limits of the party's request for relief, the Chamber determined that it should award the amount of EUR 240,000 as claimed by the player".*

81. Consequently, according to the provision mentioned, the residual value of the Employment Contract as granted must be set off in the current proceedings with the amounts earned by the Player with the new club during the overlapping period, i.e., F.C. Karmiotissa (1 July 2022 to 30 June 2023 = EUR 20,021 gross). As a result, the "*Mitigated Compensation*" shall amount to EUR 219,979 gross.

82. The Sole Arbitrator notes that the Player objected that the remuneration agreed with F.C. Karmiotissa be taken into account for the calculation of the so-called "Mitigated Compensation" since Article 17 (1) FIFA RSTP provides that a deduction from the due compensation is allowed *"in case the player signed a new contract by the time of the decision"*. Therefore, since the Player signed the new employment contract on 22 August 2022, after issuing the Appealed Decision on 9 June 2022, and outside the relevant period, no "Mitigated Compensation" can occur.

83. The Sole Arbitrator acknowledges the wording of the provision at stake but, oppositely, holds that the deduction is always allowed when the Player, before a final decision, enters into a new contract.

84. A final decision must be understood to be that concluding the proceedings between the parties, i.e., where an appeal is brought, as in the case at stake, the one rendered by the CAS in the relevant proceedings pursuant to the power of *de novo* review under Article R57 of the Code that is granted to the panels.

85. Otherwise reasoning, a panel's decision would inevitably be affected by the procedural and substantive issues that occurred before first instance bodies (FIFA DRC in this case) and thus limited in its power to assess the dispute *"de novo"*.

86. Furthermore, the wording of Article 17 FIFA RSTP does not provide for any procedural estoppel. Conversely, it appears indisputable that such provision can be applied only to the proceedings before FIFA since, at the time of the relevant decision, the DRC will be bound to the employment situation of the parties at that moment, as it happened in this case.

87. From a factual point of view, in light of the duty of mitigation that relies upon the Player, this interpretation appears preferable. At the time the appeal was lodged, the Player signed a new contract whose duration overlapped with part of the expired one and thus he had mitigated the economic loss suffered as a result of the termination of the Contract with the Club.

88. According to Article 337c (2) of the Swiss Code of Obligations (the "SCO"), the duty of mitigation is related to the rule that the employee must permit a set-off against

the amount of compensation for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn: *"(2) The employee must permit a set-off against this amount for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn"*.

89. Such a rule implies that, per the general principle of fairness, the injured player must act in good faith after the breach by the club and seek other employment, showing diligence and seriousness. This principle aims to limit the damages deriving from a breach and avoid it could turn into an unjust enrichment for the injured party (CAS 2015/A/4346 Gaziantepspor Kulübü Derneği v. Darvydas Sernas, award of 5 July 2016).

90. In this context, the Appealed Decision did not take into account any deduction since, at the time it was issued, the Player had not signed any new contract (on this basis, also the "Additional Compensation" was not granted to the Player). Still, this circumstance cannot exempt the Sole Arbitrator from considering all events that occurred within the contractual relationship between the Parties in deciding their dispute: "*The power of CAS Panels to go beyond the establishment of the legality of the previous decision and to issue an independent and free standing decision has been confirmed in numerous CAS cases. Accordingly, the CAS must be able to not only examine the formal aspects of the appealed decision but also, above all, to evaluate all facts and legal issues involved in the dispute*" (The Code of the Court of Arbitration for Spot, Mavromati – Reeb, p. 508)

91. The Sole Arbitrator points out that the Player was diligent and managed to find a new contract soon after the termination of the Contract but, according to the quoted provision of Article 337c (2) SCO, the relevant remuneration shall be taken into account to determine the due compensation in order not to allow the Player to achieve an unjust enrichment.

92. On this basis, the Sole Arbitrator believes that the amount granted by the FIFA DRC with the Appealed Decision, shall be reduced as above, which is fair and reasonable under the applicable criteria for the general duty of mitigation of damages.

93. In addition to the Mitigated Compensation, the Player would be also entitled to an amount corresponding to three monthly salaries in accordance with Article 17 (1) (ii) of the FIFA RSTP (the "*Additional Compensation*"). This amount was not granted by the FIFA DRC since, at the time of the Appealed Decision, the Player was unemployed and, therefore, the awarded compensation was not mitigated: *"[The Chamber] decided that the player shall not receive any additional compensation since there was no mitigation to be accounted for".*

94. In this regard, however, the Sole Arbitrator points out that the Player only requested the confirmation of the Appealed Decision without filing any appeal to obtain such Additional Compensation. Consequently, being unable to decide *ultra petita*, the Sole Arbitrator finds that he is not in a position to award the Player such additional amount.

95. The total amount of the awarded compensation, i.e. EUR 219,979 gross, shall be accrued with 5% interests p.a. as from 10 March 2022 until the date of effective payment.

ii. Does the Player have to return, totally or partially, to the Club the amount paid to Al Ahly according to the Parties' contractual agreements?

95. At the outset, the Sole Arbitrator notes that the Club had already submitted a request to the FIFA DRC to order the Player to pay the total amount of USD 1,400,000 (equal to the amount owed by the Player to Al Ahly under a previous FIFA DRC decision) or the lesser amount of USD 500,000 corresponding to the first instalment already paid up to that time by the Club in favour of the mentioned Player's creditor. The FIFA DRC did not address this point in the Appealed Decision and, according to the illustrated power of the *de novo* review, the Sole Arbitrator will thereinafter adjudicate about it.

96. The Sole Arbitrator observes that, when signing the Contract, the Parties mutually acknowledged that, on 18 April 2018, the FIFA DRC passed a decision whereas the Player was ordered to pay in favour of the Egyptian Club, Al Ahly (i.e. the Player's previous club), the total amount of USD 1,432,860 as compensation for a previous breach of contract and, in turn, Al Ahly was condemned to pay USD 26,400 to the Player as outstanding remunerations. In this regard, the "Preamble" of the Contract reads as follows:

> *"Whereas the FIFA Dispute Resolution Chamber issued its decision dated 18 April 2018 concerning the dispute between AL AHLY and the professional football player SOULEYMANE COULIBALY, (case ref 17-00961/ebo).*
>
> *Whereas this decision orders the player to pay AL AHLY the sum of 1 432 860 $ as compensation for breach of contract,*
>
> *Whereas this same decision orders AL AHLY to pay the player SOULEYMANE COULIBALY the sum of 26 400 US dollars as outstanding remunerations".*

97. Furthermore, in the following contractual clauses, given the Player's intention to continue his professional career, the Club declared itself to be available to pay the amount established by FIFA in place of the Player, as it actually declared that it made such payment before the signing of the Contract, according to the provision of the Article 2: "*Whereas Etoile Sportive du Sahel has signed an agreement with AL AHLY Sporting Club to replace the player and pay in his place the financial compensation […] Article 2.1: The Player SOULEYMANE COULIBALY acknowledges that Etoile Sportive du Sahel paid Al Ahly Sporting Club, Egypt in its stead the amount of the FIFA DRC decision case ref. 17-00961/ebo for an amount of US $ 1 400 000 to enable him to be registered*".

98. In addition, it emerges from the Contract that, by virtue of such an alleged Club's payment, the Parties committed themselves to abide by the terms and clauses of the Contract and particularly to respect the duration of their mutual agreement thus reached, save in the event of a potential and future transfer of the Player by mutual consent: "*Article 2.2: Consequently, both parties undertake to respect the terms and contractual*

clauses of their engagement and especially to respect the duration of their engagement in its entirety except in the case of a possible future transfer of the player to another club".

99. With the above in mind, it should be noted that the Parties did not establish in the Contract, or even in their subsequent agreements, any term and timetable for reimbursing the amount the Club stated it had paid to the creditor instead of the Player. Therefore, from these agreements, it follows that, if the contract had been concluded on the scheduled expiry date, nothing would have been reimbursed to the Club by the Player.

100. In addition, it appears from the wording of Article 3 (2) of the Contract that, in case of an "*anticipated unilateral termination*" of the Contract, the Player authorised any Court called upon to decide any disputes between the Parties to consider such credit of the Club against him: "*However, the player Souleymane Coulibaly asks jurisdictional body authorised to take into account the amount reimbursed by the Etoile Sportive du Sahel to the club Al Ahly, Egypt in his place to count them in favour of Etoile Sportive du Sahel in all decisions relating to a contractual dispute between the player and the club".*

101. In this regard, the Club argued that the above should be the understanding of such provision (see para. 91 of the Appeal Brief); conversely, the Player disputed that such a recognition of debt was effective subject to the Club's entire fulfilment of its obligations, including the expected payment of the debt to Al Ahly, being acknowledged between the Parties that the Club had already had a significant benefit in engaging a valuable player without paying any transfer fee (see para. 54 of the Answer).

102. Regarding these contractual agreements, it is undisputed that, after the signing of the Contract, given the non-payment of the debt to Al Ahly, the Club and the Player reached an agreement with the creditor on 15 October 2019 for the payment of the total sum of USD 1,400,000 in four instalments therein provided. Furthermore, in the event of non-fulfilment of such undertaken obligations, it was provided that an interest rate of 15% would be applied to that amount.

103. By Article 4 of this latter agreement, the Club and the Player declared themselves jointly and severally liable towards Al Ahly: "*ESS and the Player are jointly and severally liable for the entire payments of the Settlement Payment in favour of Al Ahly, until the Settlement Payment is covered in full, together with the interest*".

104. It is important to note that this tripartite settlement at issue (Club, Player and Al Ahly) did not mention the Contract between the Parties and did not provide for any modification of the provisions therein. Only the Parties acknowledged at point E) of the settlement's premises the reasons why they resolved to pay the debt in dispute, that was the possibility of registering the Player for the Club and fielding him on the pitch.

105. Since even this agreement was not fulfilled, the Parties, upon complaint by Al Ahly, were ordered by FIFA to pay it the amount of USD 1,400,000 plus 15% interest. CAS

confirmed the decision and, by communication dated 2 August 2021, FIFA applied the consequent sanctions against the Parties according to Article 24 of the FIFA RSTP due to the non-payment of the ordered amount. Consequently, on 24 January 2022, the Club reached a new agreement with Al Ahly whereby it undertook to pay the total amount of USD 1,909,870.26 (as accrued by the agreed interest rate of 15%) in four instalments. The Player did not sign such agreement.

106. With the above in mind, the Sole Arbitrator holds that the Club actually assumed the obligation to pay the debt of the Player towards Al Ahly and, what is more, that the Contract provides that such payment should have been executed before the signature of the Parties ("*The Player SOULEYMANE COULIBALY acknowledges that Etoile Sportive du Sahel paid Al Ahly Sporting Club*). Therefore, it cannot be assumed that the Club, by consent of the Parties, could have made the payment even after signing the Contract, just as it is evident that the later agreements with Al Ahly were required to remedy the Club's previous breach. In parallel, the Player was entitled to assume that his debt had been settled even before the Contract was finalised and no longer had any obligation to anyone unless the Contract would have been unilaterally terminated as provided in Article 3.

107. In this regard, the Sole Arbitrator deems it worthwhile to comment on the following SCO provisions to highlight better the obligations undertaken by the Parties through the Contract:

i) Article 17. An acknowledgment of debt is valid even if it does not state the cause of the obligation:

i.e., the Club agreed to pay the outstanding amount on behalf of the Player, and the Contract does not provide any deadline or time of reimbursement upon the Player. The Player is only required to return the amounts paid by the Club (or set-off any credit towards the Club) in the event of unilateral termination of the Contract. However, this provision must be appropriately understood as outlined below, and it cannot be addressed as presented by the Club, i.e., as an automatic result of any unilateral termination of the Contract for whatever reason.

ii) Article 18 (1) When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement. (2) A debtor may not plead simulation as a defence against a third party who has become his creditor in reliance on a written acknowledgment of debt:

i.e, the Preamble of the Contract states that the Club already paid the debt. This statement was reiterated in Articles 1 and 2.1 of the Contract, confirming that the Player was released from any obligation due to the Club's intervention. Moreover, the Club cannot argue that it has not finally accepted its debt to Al Ahly, since it has declared this willingness on two separate moments, earlier in the Contract and later in the Agreement in October 2019. A different understanding would not explain why the Club agreed to pay such a considerable sum instead of the Player (the only debtor of Al Ahly) without being obliged beforehand.

108. Moreover, it seems that, from a systematic interpretation of the agreements at issue, the Parties intended to conclude an agreement whereby both of them were satisfied: the Club because it engaged the Player without paying any transfer fee; the Player because he could continue his career without suffering further sanctions from FIFA due to his failure to comply with his obligations to Al Ahly. Not only did the Parties mention these *desiderata* in the Preamble and Articles 1 and 2.1 of the Contract, but they also envisaged in Article 20 that they would not modify the Contract without their explicit and express determination to that effect and the approval of the relevant Tunisian Football Federation.

109. Hence, notwithstanding the agreements that followed the Contract, the Sole Arbitrator finds that the Club fully assumed the obligation to pay the debt on an exclusive basis and remained on the Club regardless of what the Player signed in October 2019.

110. Contrary to the Club's position, the agreement of 15 October 2019 cannot be considered as a new obligation assumed by the Player towards the Club, but only as an acknowledgment of the prior existing debt to the third-party creditor, Al Ahly, without any effect on the internal obligations between the Parties. It is clear that the Parties could be nothing more than jointly and severally obliged towards the creditor since Al Ahly never declared that it was waiving its credit in favour of one of them. The Club, as bound by the obligation assumed in the Contract, was forced to reach an agreement with the creditor of the Player to fulfill its contractual obligations, but this did not entail a modification to its exclusive responsibility and a following Player's obligation to return any sum to the Club.

111. In this regard, the SCO provides as follows:

> *"Article 143 (1): Debtors become jointly and severally liable for a debt by stating that each of them wishes to be individually liable for performance of the entire obligation".*
>
> *"Article 148 (1)Unless the legal relationship between the joint and several debtors indicates otherwise, each of them assumes an equal share of the payment made to the creditor".*

112. In accordance with these provisions, the Agreement of October 2019 provided for the Parties to be jointly and severally obligated to Al Ahly as a third-party creditor. Indeed, it follows from that Agreement that Al Ahly could benefit from the pledge of payment of the claimed amount by a new debtor, the Club. However, the Sole Arbitrator finds that this trilateral agreement did not change the legal, internal relationship between the Parties, under which they agreed that Al Ahly's credit would be assumed only by the Club without ever amending expressly or implicitly the terms of their employment relationship and obligations.

113. Nor can the final agreement signed by the Club and Al Ahly on 24 January 2022 have provided new or additional obligations for the Player, since he did not sign it. Consequently, the Sole Arbitrator finds that this agreement cannot be considered for the purpose of this decision.

114. Therefore, the Sole Arbitrator finds that the Club exclusively assumed the obligation of the Player, and the Player, in turn, was not required to return the amount paid in case of respect of the entire duration of the Contract.

115. The Sole Arbitrator now turns his attention to examining the content of Article 3 of the Contract to understand what could have been the consequences in case of whatsoever unilateral termination of the employment relationship and whether, in this case, the such provision contains a binding obligation for the Player to reimburse the amounts paid by the Club or to authorize the offsetting of such sums against his receivables.

116. The Sole Arbitrator notes that the content of Article 3 is broad and refers merely to a *"unilateral termination*" of the Contract without mentioning if this provision shall be applied to the same extent in case of termination with or without just cause by one of the Parties: " *In the event of an anticipated unilateral termination of this contract, each party should bear the financial sanctions resulting from a final and binding decision of the authorized judicial body (CRL FIFA and/or TAS)".*

117. Therefore, the way this provision has been drafted implies that the above paragraph of Article 3 indicates that the Parties first agree that the judicial bodies before the case is brought will determine the financial sanctions resulting from the unilateral termination of the Contract. In particular, it follows that the CAS is given the power to impose a financial penalty on either party (at first glance, as a liquidated damages clause), depending on the finding of their liability.

118. Furthermore, the wording of Article 3.2 seems to provide that, in the event of unilateral termination of the contract, whether for just cause or not, the Player authorises the "jurisdictional body" to take into account the sums paid in favour of Al Ahly as set-off of any debt of the Club that would be determined in a dispute between the Parties in favour of the Player himself.

119. As a consequence, suppose this would be the possible interpretation of the provision at issue, the Sole Arbitrator observes how such an assumption would lead to a contractual situation completely unbalanced in favour of the Club, which could get rid of the Player at any time without having to bear the financial consequences, as it could offset a considerable credit against the Player, in any event, higher than the value of the entire Contract.

120. In this regard, it seems clear that the obligation to return USD 1,400,000 upon the Player against the total value of the Contract for USD 420,000 (USD 650,000 with bonuses), which corresponds to the salaries owed by the Club, would represent an evident disproportion between the Parties' obligations. "[...] *"according to CAS jurisprudence, parties to a contract of employment are free to stipulate a liquidated damages clause to be referred to in case of termination of said contract without any just cause. However, it is also a longstanding CAS practice, that if the reciprocal obligations set forth actually disproportionately favour one of the parties and give it an undue control over the other party, such clause is incompatible with the general principles of contractual stability and therefore null and void"* (CAS 2020/A/7011 Al Hilal Khartoum Club v. Mohamed El Hadi Boulaouidat, award of 23 March 2021).

121. In the Sole Arbitrator's view this consequence contravenes the applicable regulations and even Swiss Law, as respectively providing:

Article 14 (1) of the FIFA RSTP (Terminating a contract with just cause): "*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*".

Accordingly, the Swiss Civil Code*:*

Article 2:

1 Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.

2 The manifest abuse of a right is not protected by law.

Article 27:

1 No person may, wholly or in part, renounce his or her legal capacity or his or her capacity to act.

2 No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.

In addition, also the SCO rules the following:

Article 19.

1 The terms of a contract may be freely determined within the limits of the law.

2 Clauses that deviate from those prescribed by law are admissible only where the law does not prescribe mandatory forms of wording or where deviation from the legally prescribed terms would contravene public policy, morality or rights of personal privacy.

122. In this regard, CAS jurisprudence stated that an agreement that entails apparent disproportionality between the parties cannot be enforced: *"[…] the Panel fins that the reciprocal obligations deriving from Article 10(3) of the Contract are so unbalanced and clearly contrary to the general principles of contractual stability that said article is null and void"* (CAS 2016/A/4605, Al-Arabi Sports Club Co. For Football v. Matthew Spiranovic).

123. Having said this, the Sole Arbitrator notes that, according to Article 3 (2) of the Contract, the Player only "asks" the adjudicatory bodies (FIFA and now CAS) to take into consideration the amounts reimbursed by the Club to Al Ahly on behalf of the Player; but this is a unique power left to the Sole Arbitrator within the discretion given to him by the Parties themselves in accordance with Article 3 (1) (there is no "must" or "shall" in the wording) and generally provided according to Article R57 of the Code.

124. On this basis, the Sole Arbitrator holds that the Club's request cannot be validly granted since the Player is the fulfilling party and, therefore, he cannot be punished for having exercised its rights. Applying the requested set-off (as claimed by the Club) to the Parties' employment relationship would lead to the illogical consequences of punishing the party for fulfilling its obligations in good faith.

125. It is true that the Parties explicitly agreed to apply such contractual provision to their employment relationship. However, the unequal power of bargain in negotiating the terms of an employment contract (the agreement is drafted on the Club's letterhead) and the circumstances (the Player was eager to get rid of his previous considerable debt) must be considered in this context. Article 3, if considered a provision contrary to the rights of the Player even if he has a just cause to terminate the Contract, represents a typical situation where there is unbalanced power of bargain.

126. Therefore, considering the Player as the aggrieved party and the provision under Article 3 null and void (and therefore not enforceable) as detailed above, the Club's request for relief cannot be upheld since any amount granted to the Club would be an unjust punishment towards the Player.

IX Conclusion

127. Based on the foregoing, the Sole Arbitrator holds that:

i. The Player unilaterally terminated the Employment Contract with just cause;
ii. The Club shall pay an amount of USD 40,000 to the Player as outstanding salary, plus interest at a rate of 5% *per annum* as indicated in the Appealed Decision and with regard to the starting date of the interest not objected by the Parties before CAS;
iii. The Club shall pay an amount of EUR 219,979 gross to the Player as compensation for breach of contract, plus interest at a rate of 5% *per annum* as from 10 March 2022 (the date of the claim before the DRC) until the date of effective payment
iv. All other and further motions or prayers for relief are dismissed.

X. COSTS

(…).

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 1 July 2020 by Etoile Sportive du Sahel against the decision issued on 9 June 2022 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is partially upheld.

2. The decision rendered by the Dispute Resolution Chamber of the Fédération *Internationale de Football Association* on 9 June 2022 is confirmed, save for point n. 4 of the operative part, which shall read as follows:

   Etoile Sportive du Sahel has to pay to Mr Souleymane Coulibaly the following amounts:

   a. *USD 10,000 as outstanding remuneration plus 5% interest p.a. as from 1 December 2021 until the date of effective payment;*
   b. *USD 10,000 as outstanding remuneration plus 5% interest p.a. as from 1 January 2022 until the date of effective payment;*
   c. *USD 10,000 as outstanding remuneration plus 5% interest p.a. as from 1 February 2022 until the date of effective payment;*
   d. *USD 10,000 as outstanding remuneration plus 5% interest p.a. as from 1 March 2022 until the date of effective payment;*
   e. *EUR 219,979 gross as compensation for breach of contract without just cause plus 5% interest p.a. as from 10 March 2022 until the date of effective payment.*

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 28 November 2023

THE COURT OF ARBITRATION FOR SPORT

Francesco Macrì
Sole Arbitrator