

Decision of the Players' Status Chamber

passed on 3 July 2023

regarding a contractual dispute concerning
the player Lameck Banda FC Arsenal Tula

BY:

Castellar Guimaraes Neto (Brazil)

CLAIMANT:

FC Arsenal Tula, Russia

Represented by Sila International Lawyers

RESPONDENT:

Maccabi Petah Tikva Football Club, Israel

Represented by Nir Inbar

I. Facts of the case

1. On 4 August 2021, FC Arsenal Tula from Russia (hereinafter: *Claimant*) and Maccabi Petah Tikva Football Club from Israel (hereinafter: *Respondent*) concluded an agreement (hereinafter: *transfer agreement*) regarding the loan transfer of the player Lameck Banda (hereinafter: *the player*) from the Claimant to the Respondent.
2. According to the transfer agreement, it was agreed *Inter alia* as follows:
 - “4. *Optional Transfer fee:*
 - a) *Until 15 May 2022, Maccabi Petah Tikva will have an exclusive option to buy 100% of the player’s economic and federative rights for amount of €250,000 (two hundred fifty thousand EUR) NET as transfer fee (This transfer fee shall be paid as follows:*
 - i) €125,000 to be paid until 15 June 2022 and upon receipt of an invoice;
 - ii) €125,000 to be paid until 15 September 2022 and upon receipt of an invoice.
 - b) *In addition to the fees written above, in the event that the Maccabi Petah Tikva transfers the Player, to the third club (national or international) during the course of any employment contract between the Maccabi Petah Tikva and the Player, on a definitive or temporary basis. Arsenal Tula shall have the right to receive from Maccabi Petah Tikva the amount equivalent to 20% (twenty percent) NET, therefore no deduction is allowed from the transfer fee) of any amount of transfer fee(s) (including transfer fees, compensation for early termination, buy-out fees etc.) or loan fee(s).*
 - c) *“All the amounts specified in lit. “b” should be paid to Arsenal Tula within 10 days after Maccabi Petah Tikva receives 100% of the respective amount(s). In case Maccabi Petah Tikva receives the said sum in installments, Arsenal Tula should get 20% of each installment (partial part of each amount) within 10 days after each installment is received by Maccabi Petah Tikva. Maccabi Petah Tikva will reveal, with full disclosure, each and every document concerning the transfer/loan to a third party.”*
 - d) *In case late payment by Maccabi Petah Tikva of one or more of the amounts established above, Maccabi Petah Tikva will pay to Arsenal Tula as agreed fine in the amount of €500 per every day of such delay.”*
3. According to the information displayed in the Transfer Matching System (TMS), the player’s loan was converted to permanent, and the player was registered with the Respondent on a permanent basis on 12 July 2022.
4. Still according to TMS, the player was subsequently transferred from the Respondent to the Italian Club, US Lecce (hereinafter: *Lecce*), on 12 August 2022 (hereinafter: *the subsequent transfer*).

5. In accordance with the transfer agreement signed between the Respondent and Lecce (hereinafter: *the Lecce-Maccabi Agreement*), the latter undertook to pay to the former a fixed transfer fee of EUR 2,085,000, plus a sell-on fee of 15% exceeding EUR 1,845,000, as follows:
- a. EUR 1,240,000 upon the signing on a transfer agreement and no later than 11 August 2022;
 - b. EUR 445,000 by 15 January 2023;
 - c. EUR 400,000 by 15 June 2023.

6. The Lecce-Maccabi Agreement further established as follows as to the cited payments:

(a) *A sell-on fee shall be paid by LECCE to MACCABI out of any future transfer (definitive and/or or permanent) that will be calculated as 15% (fifteen percentages) out of any amount exceeding accumulated € 1,845,000 paid to LECCE by any third-party in relation with the transfer of the Player and/or legal decision/settlement related to the transfer of the Player and/or other form of remuneration (in particular percentages of future transfer and/or player's exchange which will be valued by a CAS sole arbitrator that will be appointed by the CAS. The procedure shall be conducted in English and on an expedited manner (i.e. the operative part of the decision shall be notified to the parties within three (3) months from the filing of the request for arbitration) and/or other remuneration concerning the transfer of the Player. (hereinafter "Sell-on Fee").*

(b) *In case of early termination of the employment contract between the Player and LECCE, if no remuneration is due to LECCE due to it taut and/or negli,9ence and/or bad faith (for example, failing to pay the Player's salaries or mutual consent with the Player stipulating other value to LECCE) then LECCE shall compensate MACCABI in the amount equivalent to the Sell-on Fee that was potentially due to MACCABI according to the value of the Player on the date of Termination (which will be valued by a CAS sole arbitrator that will be appointed by the CAS. The procedure shall be conducted in English and on an expedited manner (i.e. the operative part of the decision shall be notified to the parties within three (3) months from the filing of the request for arbitration).*

(c) *For the purposes of clause 3, the following definition shall apply:*

"Net Transfer Fee" is defined as being the net income LECCE receives or is entitled to in connection with the Future Transfer after the deduction of the Fixed Transfer Fee stipulated in clause 2.1 above. For the avoidance of doubt, transactions that will create income to LECCE will accumulate over the previous ones to define the total remuneration LECCE should pay to MACCABI.

For example, in season 2023/24, LECCE has loaned the player to a third club for EUR 1,000,000. MACCABI are entitled to 0. Then, in season 2024/25, LECCE has loaned/sold the player to a third/fourth club, for EUR 1,000,000. Those amounts will accumulate over the EUR 1,845,000, basing the Net Transfer Fee calculation according to the sum of EUR 155,000 (15% x 1,000,000).

(d) *LECCE shall make payment of the Sell-on Fee due to the MACCABI within 7 days after any payment is actually made to LECCE in respect of the Future Transfer. For the avoidance of doubt, if such payments are actually made in instalments, the applicable proportion of the Sell-on Fee shall be payable within 7 days of receipt of each instalment.*

(...)

2.4

(a) *MACCABI hereby waives, in respect of this transfer only, any rights (if any) to training compensation under Article 70 and Annexe 4 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA Regulations") and Solidarity Contribution under Article 21 and Annex 5 of the FIFA Regulations in respect of the player*

(b) *Maccabi represents and warrants that the Player has a professional contract in force with Maccabi and has not been loaned to any other club during the time the Player has been under contract with Maccabi and that, Maccabi is therefore the only club possibly entitled to training compensation in accord with Article 20 and Annexe 4 of the FIFA Regulations on the Status and Transfer of Players. Maccabi also warrants and guarantees that no other club has a right to claim training compensation from US Lecce and will indemnify and hold US Lecce harmless of any claims of third parties for training compensation for the Player.*

II. Proceedings before FIFA

7. On 27 February 2023, the Claimant filed the claim at hand before FIFA. A brief summary of the position of the parties is detailed in continuation.

a. Position of the Claimant

8. The Claimant argues that the Respondent has failed to comply with its financial obligations towards the Claimant, as per the terms of the transfer agreement. The Claimant states that the Respondent has failed to pay the sell-on fee amounting to 20% of any transfer compensation in case of the Player's transfer to a third club, as stipulated in the transfer agreement – and as it happened due to the subsequent transfer.

9. The Claimant also argues that it has put the Respondent in default and granted it a deadline of 10 days to comply with its financial obligations, but the Respondent has failed to do so. As a result, the Claimant is seeking redress before FIFA claiming the recovery of overdue payables and imposition of corresponding sanctions on the Respondent.

10. The Claimant further put forward two main arguments:

- The Respondent justified in its default notices that it was not willing to pay any amounts to the Claimant because its bank allegedly did not allow such payment on account of sanctions imposed on Russian clubs because of the war in Ukraine. The Claimant references the jurisprudence of the FIFA Players' Status Chamber (PSC), which states that (a) the burden is high to prove that it was legally and in practice impossible to perform the payment, and (b) the mere existence of sanctions has no effect on the maturity of the debt. The Claimant quoted the decisions by the PSC in matters FPSD-6307 and FPSD-7845 in support of the above. In essence, the Claimant argues that banking sanctions cannot justify the Respondent's failure to pay the amounts due.
- The Claimant challenges the Respondent's assertion that it did not yet receive the amounts due by Lecce. The Claimant argues that this fact is not relevant for deciding upon the present matter in that the FIFA PSC's jurisprudence supports this stance, as shown in the decision

Ref. 20-01377, where the Single Judge of the PSC concluded that the Respondent had an obligation to comply with the terms of the settlement agreement, irrespective of whether or not it received payment from specific amounts from a third party. The Claimant highlighted that the Respondent confirmed that by the beginning of February 2023, Lecce fully paid two instalments of transfer compensation the Respondent.

11. The Claimant requested the following relief:

"1. The claim of the Claimant, Football club Arsenal Tula, Russia, is accepted.

2. The Respondent, Football club Maccabi Petah Tikva, Israel, has to pay to the Claimant the following amounts:

- EUR 248,000 as outstanding sell-on fee plus 5% p.a. as from 23 August 2022 until the date of effective payment;*
- EUR 89,000 as outstanding sell-on fee plus 5% p.a. as from 26 January 2023 until the date of effective payment; and*
- EUR 500 for every day of delay as from 23 August 2022 until the date of effective payment as contractual penalty.*

3. A sanction according to article 12bis of the FIFA Regulations on the Status and Transfer of Players is imposed on the Respondent."

b. Position of the Respondent

12. In its reply, the Respondent argues that due to the war between Russia and Ukraine, all Israeli banks and other regulatory authorities unanimously decline any bank transfers and/or any kind of banking services related to any of the Russian sanctioned banks/entities.
13. The Respondent further argues that the requirements developed by the Swiss Federal Tribunal in relation with the *clausula rebus sic stantibus* principle and/or *force majeure* principle are both met in this case. Consequently, as further explained below, the Respondent must be temporarily exempted from fulfilling its contractual obligations until all sanctions are lifted. The Respondent also argues that no interest nor delay penalty are due in this matter. The Respondent argued it raised the burden of proof and provided evidence and documentation exempting the Respondent from honouring its current financial obligations arising from the Loan Agreement. The Respondent stated finally that it was acting in a long-term contractual relationship in good faith, fully complying with previous payments, in due time.
14. The Respondent provided the following pieces of evidence to support their arguments:
- a. The official Bank Statement of the Respondent's bank, which previously authorized payments from the Respondent to the Claimant, but due to the international sanctions and related authorities' instructions, it objectively forbids and prevents from the Respondent to transfer any amount to the Claimant, which is owned by, and for the very least "linked" to, a sanctioned Russian governmental body.

- b. The United States Office of Foreign Assets Control (OFAC) Sanction List, showing “State Corporation Rostec” as a sanctioned party, together with a further Directive by the OFAC, listing the following entities as sanctioned:
- i. Redit Bank of Moscow Public Joint Stock Company
 - ii. Gazprombank Joint Stock Company
 - iii. Joint Stock Company Alfa-Bank
 - iv. Joint Stock Company Russian Agricultural Bank
 - v. Joint Stock Company Sovcomflot
 - vi. Open Joint Stock Company Russian Railways
 - vii. Public Joint Stock Company Alrosa
 - viii. Public Joint Stock Company Gazprom
 - ix. Public Joint Stock Company Gazprom Neft
 - x. Public Joint Stock Company Rostelecom
 - xi. Public Joint Stock Company Rushydro
 - xii. Public Joint Stock Company Sberbank of Russia
 - xiii. Public Joint Stock Company Transneft.
- c. Email correspondence between the Claimant and the Respondent showing that they were communicating directly on several matters, during any of which the Claimant did not mention the Sell-On payments stipulated in Clause 4(b), as it was perfectly aware of the Respondent bank’s restrictions due to the sanctions and of the tremendous efforts taken by the Respondent to comply with its obligations.
- d. The Respondent’s Letter dated 14 February 2023, in which they replied to the Claimant that due to the war between Russia and Ukraine, all Israeli banks and other regulatory authorities unanimously decline any bank transfers and/or any kind of banking services related to any of the Russian sanctioned banks/entities.
- e. The Bank Statement dated 30 March 2023 in which the bank officially clarified that it denied the Respondent’s request to transfer funds to the Claimant.

15. The Respondent’s prayers for relief are as follows:

- a. Reject the requests for relief sought by the Claimant.*
- b. In the alternative, Suspend the Claimant’s claim in its entirety.*
- c. Order the Claimant to bear the full costs (if any) of these proceedings.”*

III. Considerations of the Players’ Status Chamber

a. Competence and applicable legal framework

16. First of all, the Single Judge of the Players’ Status Chamber (hereinafter also referred to as Single Judge) analysed if he was competent to deal with the case at hand. In this respect, he took note that the present matter was presented to FIFA on 27 February 2023 and submitted for decision on 3 July 2023. Considering the wording of art. 34 of the March 2023 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.

17. Subsequently, the Single Judge referred to art. 2 par. 1 and art. 24 par. 2 of the Procedural Rules and observed that in accordance with art. 23 par. 2 in combination with art. 22 par. 1 lit. g) of the Regulations on the Status and Transfer of Players (May 2023 edition), he is competent to deal with the matter at stake, which concerns a contractual dispute between clubs belonging to different associations.
18. Subsequently, the Single Judge analysed which regulations should be applicable as to the substance of the matter. In this respect, he confirmed that, in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (May 2023 edition), and considering that the present claim was lodged on 27 February 2023, the October 2022 edition of said regulations (hereinafter: the Regulations) is applicable to the matter at hand as to the substance.

b. Burden of proof

19. The Single Judge recalled the basic principle of burden of proof, as stipulated in art. 13 par. 5 of the Procedural Rules, according to which a party claiming a right based on an alleged fact shall carry the respective burden of proof. Likewise, he stressed the wording of art. 13 par. 4 of the Procedural Rules, pursuant to which he may consider evidence not filed by the parties, including without limitation the evidence generated by or within TMS.

c. Merits of the dispute

20. The competence and the applicable regulations having been established, the Single Judge entered into the merits of the dispute. In this respect, he started by acknowledging all the above-mentioned facts as well as the arguments and the documentation on file. However, he emphasised that in the following considerations he will refer only to the facts, arguments, and documentary evidence, which he considered pertinent for the assessment of the matter at hand.

i. Main legal discussion and considerations

21. The foregoing having been established, the Single Judge moved to the substance of the matter, and took note of the fact that this is a claim for outstanding remuneration, where the dissent of the parties lies in the Respondent's ability to pay the amounts due because of international sanctions imposed on the Claimant. In this respect, the Single Judge underlined that the amount claimed is not disputed.
22. With the above scenario in mind, the Single Judge determined that it was the Respondent's burden to demonstrate that a situation or *force majeure* or *clausula rebus sic stantibus* took place, in line with the principle of the burden of proof outlined before. Therefore, the Single Judge concluded that the crux of the matter in essence lies with weighing the evidence on file. He accordingly proceeded to examine such evidence.

23. In doing so, the Single Judge noted that that the following pieces of evidence advanced by the Respondent are relevant to the assessment of the matter:
- A letter by the Respondent's bank, Hapoalim, stating as follows:

"Following your request to transfer funds from your account to Arsenal Tula Football Club in Russia - we would like to inform you that your request was unfortunately denied.

In accordance with the regulations applicable to Bank Hapoalim B.M, it is obliged to manage its risks and comply with various international sanctions. The sanctions are updated from time to time.

Executing transfers to Arsenal Tula Football, which is connected according to public sources to STATE CORPORATION ROSTEC, which is designated by the U.S. (OFAC), may expose the Bank to compliance risks, including money laundering and terrorist financing risks which the Bank does not wish to be expose to."
 - Documentation from the OFAC office of the United States of America which show that "State Corporation Rostec" is currently sanctioned.
24. Considering the above, the Single Judge was not persuaded that a situation of *force majeure* or *clausula rebus sic stantibus* existed. In fact, the Single Judge found that the Respondent failed to discharge its burden of proof regarding its alleged undertaking of "best efforts" since, based on the evidence on file, it could be observed that the Respondent continuously refused (and still refuses) to pay the amount in dispute solely referring to the existence of international sanctions.
25. To this effect, the Single Judge observed that before the claim was filed, the Claimant had provided the details of different bank accounts for payment to be remitted, without any further action by the Respondent. The Single Judge further noted that the Respondent has neither provided any evidence of trying to make the payment in these accounts, nor that its own banking partner had attempted, or refused, to transact with the said banks.
26. What is more, the Single Judge found that the letter from the Respondent's bank seem to protect the bank's own interest and compliance regulations, and further that the Respondent has not demonstrated neither that there is the alleged correlation between said "State Corporation Rostec" and the Claimant, let alone that these restrictions or sanctions applied to the Claimant itself, and furthermore the impossibility of making payments to the Claimant via other banking partners.
27. Consequently, given that the Respondent failed to discharge its burden of proof and in accordance with the general legal principle of *pacta sunt servanda*, the Single Judge decided that the Respondent is liable to pay to the Claimant the amounts which were outstanding under the transfer agreement with relation to the sell-on fee and the subsequent transfer of the player, namely EUR 248,000 plus EUR 89,000.

28. In addition, taking into consideration the Claimant's request as well as the constant practice of the Football Tribunal in this regard, the Single Judge decided to award the Claimant interest at the rate of 5% p.a. on the outstanding amounts as from their respective due dates until the date of effective payment.
29. The Single Judge then turned to the contractual penalty sought by the Claimant. In this respect, he found that the daily EUR 500 penalty is proportional of *vis-à-vis* the amounts due, but this amount must be limited in time to avoid that it becomes excessive and thus illegal. In other words, the penalty cannot be unlimited in time, otherwise it would become akin to interest (which has already been awarded and cannot in any event exceed the annual rate of 18% in line with the jurisprudence of the football Tribunal) and could potentially exceed the original amount due. As such, the Single Judge decided that the daily penalty must be limited from the date of default until the date of decision on 3 July 2023, for a total of EUR 63,000.
30. Lastly, the Single Judge turned to article 12bis of the Regulations and established that there was a *prima facie* justification for the defaulted payment by the Respondent. Consequently, he decided that the requisites established by said article are not met in this matter.

ii. Compliance with monetary decisions

31. Finally, considering the applicable Regulations, the Single Judge referred to art. 24 par. 1 and 2 of the Regulations, which stipulate that, with its decision, the pertinent FIFA deciding body shall also rule on the consequences deriving from the failure of the concerned party to pay the relevant amounts of outstanding remuneration and/or compensation in due time.
32. In this regard, the Single Judge highlighted that, against clubs, the consequence of the failure to pay the relevant amounts in due time shall consist of a ban from registering any new players, either nationally or internationally, up until the due amounts are paid. The overall maximum duration of the registration ban shall be of up to three entire and consecutive registration periods.
33. Therefore, bearing in mind the above, the Single Judge decided that the Respondent must pay the full amount due (including all applicable interest) to the Claimant within 45 days of notification of the decision, failing which, at the request of the Claimant, a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods shall become immediately effective on the Respondent in accordance with art. 24 par. 2, 4, and 7 of the Regulations.
34. The Respondent shall make full payment (including all applicable interest) to the bank account provided by the Claimant in the Bank Account Registration Form, which is attached to the present decision.
35. The Single Judge recalled that the above-mentioned ban will be lifted immediately and prior to its complete serving upon payment of the due amounts, in accordance with art. 24 par. 8 of the Regulations.

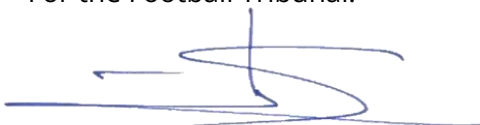
d. Costs

36. Finally, the Single Judge referred to art. 25 par. 1 and 2 of the Procedural Rules, according to which in disputes between clubs, costs in the maximum amount of USD 25,000 are levied. As per art. 25 par. 5 of the Procedural Rules, the Single Judge will decide the amount that each party is due to pay, in consideration of the parties' degree of success and their conduct during the procedure, as well as any advance of costs paid.
37. Considering that the claim of the Claimant has been accepted to a considerable extent the Single Judge concluded the Respondent shall bear the costs of the current proceedings before FIFA. According to Annexe 1 of the Procedural Rules, the costs of the proceedings are to be levied based on the amount in dispute. Consequently, the Single Judge concluded that the maximum amount of costs of the proceedings corresponds to USD 25,000.
38. In light of the above the Single Judge determined the costs of the current proceedings to the amount of USD 5,000 and concluded that said amount has to be paid by the Claimant Respondent in order to cover the costs of the present proceedings.
39. Likewise, and for the sake of completeness, the Single Judge recalled the contents of art. 25 par. 8 of the Procedural Rules and decided that no procedural compensation shall be awarded in these proceedings.
40. The Single Judge thus concluded the deliberations by rejecting any other requests for relief made by any of the parties.

IV. Decision of the Players' Status Chamber

1. The claim of the Claimant, FC Arsenal Tula, is partially accepted.
2. The Respondent, Maccabi Petah Tikva Football Club, must pay to the Claimant the following amount(s):
 - a. **EUR 248,000 as outstanding sell-on fee** plus 5% interest *p.a.* as from 23 August 2022 until the date of effective payment;
 - b. **EUR 89,000 as outstanding sell-on fee** plus 5% interest *p.a.* as from 26 January 2023 until the date of effective payment;
 - c. **EUR 63,000 as contractual penalty.**
3. Any further claims of the Claimant are rejected.
4. Full payment (including all applicable interest) shall be made to the bank account indicated in the **enclosed** Bank Account Registration Form.
5. Pursuant to art. 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 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.
6. The consequences **shall only be enforced at the request of the Claimant** in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.
7. The final costs of the proceedings in the amount of USD 5,000 are to be paid by the Respondent to FIFA. FIFA will reimburse to the Claimant the advance of costs paid at the start of the present proceedings (cf. note relating to the payment of the procedural costs below).

For the Football Tribunal:



Emilio García Silvero

Chief Legal & Compliance Officer

NOTE RELATED TO THE APPEAL PROCEDURE:

According to article 57 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision.

NOTE RELATED TO THE PUBLICATION:

FIFA may publish this decision. For reasons of confidentiality, FIFA may decide, at the request of a party within five days of the notification of the motivated decision, to publish an anonymised or a redacted version (cf. article 17 of the Procedural Rules Governing the Football Tribunal).

CONTACT INFORMATION

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