CAS 2021/A/8018 Cape Town City Football Club v. Christofer David & FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Alexander McLin, Attorney-at-law in Lausanne, Switzerland

in the arbitration between

Cape Town City Football Club, Cape Town, South Africa

Represented by Mr Lyrique du Plessis and Mr Charl May, Attorneys-at Law, Cape Town, South Africa

- Appellant -

and

Mr Christofer David, Enschede, the Netherlands

Represented by Ms B.A.M. Dubois van Kleef, Attorney-at-Law, Amsterdam, The Netherlands

- First Respondent -

and

Fédération Internationale de Football Association, Zurich, Switzerland

Represented by Mr Alexander Jacobs and Mr Miguel Liétard, FIFA Litigation Department, Zurich

- Second Respondent -

I. PARTIES

1. Cape Town City Football Club (the "**Appellant**" or the "**Club**") is a professional football club affiliated with the South African Football Association ("**SAFA**"), with its registered office at Greenmarket Place, 54 Shortmarket Street, Cape Town, South Africa.

2. Mr Christofer David (the "**First Respondent**" or the "**Player**") is an adult male professional football player of Dutch nationality.

3. The Fédération Internationale de Football Association (the "**Second Respondent**" or "**FIFA**") is the world governing body of international football, located at FIFA-Strasse 20, 8044 Zürich, Switzerland.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions and pleadings at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to explain its reasoning.

5. Under an employment contract signed on 18 February 2019 and valid as from 20 February 2019 (the "**Employment Contract**") between the Player and the Club, the following was provided:

> "***Date of Termination without Option:***
> *30th June 2019*
>
> ***Date of Termination with Option:***
> *30th June 2021*
>
> ***Remuneration:***
> ***2018/19 Season (20th February 2019 to 30th June 2019)***
> *Gross remuneration for this Period : R640 000 (six hundred and forty thousand rand)*
>
> *Payable as follows :*
>
> *R 240 000 on signature of contract and successful player registration with the PSL.*
> *R133 333 - End March 2019*
> *R 133 333 - End April 2019*
> *R 133 334 - End May 2019*
> *The Player will receive match bonuses as per all other Players.*

Option Years :
2019/2020 Season (1st July 2019 to 30th June 2020)
Gross monthly remuneration: R 160 000 […]

2020/2021 Season (1st July 2020 to 30th June 2021)

Gross monthly remuneration: R 186 667 […]." (emphasis in original)

6. On 18 March 2019, the Club communicated to the Player the following:

"*We hereby wish to confirm that we are exercising our option to extend your employment with Cape Town City FC as stipulated in the signed contract (...) The termination date will thus be the 30th June 2021*".

7. On 23 April 2020, the Club sent a "Mutual Termination Proposal" to the Player, providing as follows:

"*The current dire economic situation due to Covid-19 and the volatile nature of the club's business have compelled management to review its organizational structure and employee requirements.*
(...)

1. During a meeting with the Head Coach and the technical staff, concerns about your performance have been raised.
(...)
2. The club does not intend to register you as a foreign player for the 2020/ 2021 season;

(...)

On a without prejudice basis, the club is prepared to release you from your duties with immediate effect and pay you an amount equivalent to 3 months' salary, the details of which will be elaborated in a mutual termination agreement.
This without prejudice this offer remains open for acceptance until 12h00 on Friday, 24 April 2020, failing which, the club has no option but to reduce your salary by 70% effective immediately for the foreseeable future due to COVID 19."

8. Also on 23 April 2020, the Club notified its employees that, in light of the COVID-19 pandemic:

"*the Club has already embarked upon several cost cutting measures, but there is simply no manner in which salary reductions can be avoided, and with it, the issue of possible retrenchments is regrettably contemplated.*"

9. On 24 April 2020, the Player's counsel provided the following response to the Club:

"*(...) I refer to your letter dated 23 April 2020.*
(...)

> *For the sake of clarity, my client does not agree with anything that has been stated in your letter and what has been presented as a proposal.*
> *(...)*
> *I look forward to discuss with you on behalf of my client and to find an amicable solution to this issue. We understand that the club is under some difficulties but these difficulties should not be to the absolute detriment of my client*".

10. Also on 24 April 2020, the Club responded to the Player as follows:

> "*It has come to our attention that you have not been acting within the best interest of the club. Accordingly, the club has decided to convene a Disciplinary Hearing to deal with certain issues raised and give you an opportunity to respond to these allegations.*"

11. On 27 April 2020, the Player responded and rejected the disciplinary procedure.

12. On 4 May 2020, the Club notified all its players that it would be requiring a 30% salary cut in light of the pandemic.

13. On 5 May 2020, the Club notified the Player that it was imposing the following disciplinary sanctions:

> "*1) A final written warning for the offences found guilty as per the Employee Handbook pursuant to Art 125 and 133.3 and*
>
> *2) The imposing of a monetary fine equal to the amount of 15% of your total gross monthly salary in pursuance to Art 129.*"

14. On 7 May 2020, the Club made a settlement offer to the Player, valid until 11 May 2020. Settlement negotiations continued throughout the month of May 2020 without resulting in agreement.

15. On 1 June 2020, the Club sent the Player a letter of termination, providing inter alia the following:

> "*We confirm that, after having consulted you on the proposed retrenchment, having taken into consideration your representations herein, the company has decided that you be retrenched, and that payment of severance pay and all other statutory monies due to you be paid lo you. We further confirm that you have received your monthly salary coupled with your full benefits for April 2020 and now included with this payment for May 2020, despite not working. You will further receive one 1 month's notice pay as prescribed by the company's employee handbook which is in excess of the statutory amount you are entitled to. The amount which will be paid to you is R 227 248 (two hundred and twenty seven thousand two hundred and forty eight rand only), which is for May 2020 including the vehicle allowance and one month's notice pay for June 2020 including accommodation and vehicle allowances. As mentioned this is in excess of the severance pay pursuant to*

> *statutory requirements of one week's pay for each completed year of ongoing service.*
>
> *We therefore hereby give notice of the termination of your employment with effect from **1st June 2020**. As stipulated above, you will be paid one month's notice in lieu of the termination and your contract will officially terminate on **30th June 2020**.*
>
> […]
>
> *Please note that this offer is made in full and final settlement of all claims related to your employment with the company and in full and final settlement of any and all claims arising between the parties on whatsoever cause and whatsoever nature. Acceptance of the payment referred to herein, constitutes acceptance of our offer.*" (emphasis in original)

16. The Player subsequently signed a contract with the German football club FC Wurzburger Kickers, valid as from 13 October 2020 until 30 June 2021, according to which he was entitled to a monthly salary in the amount of EUR 11,000 if the club played in the 2. Bundesliga, and of EUR 7,000 if it played in the 3. Liga.

17. On 22 June 2020, the Player lodged a claim before FIFA and requested payment of:

- ZAR 2,400,004 gross as compensation for breach of contract corresponding to the residual value of the Employment Contract;
- ZAR 257,000 as additional remuneration for accommodation and car due as from June 2020 until June 2021;
- Costs of one flight ticket amounting to ZAR 24,818.30;
- 5% interest p.a. as from the moment the aforementioned amounts become due;
- Procedural and legal costs;
- Sporting sanctions on the Club.

18. During the proceedings before FIFA, the Club argued that the Dispute Resolution Chamber of the South African National Soccer League (the "**NSL DRC**") was the rightful jurisdiction for the present dispute, with the decisions of the NSL DRC being appealable to the SAFA Arbitration Tribunal. The Player argued that the SAFA Arbitration Tribunal did not meet the requisite standards of independent and impartial tribunals, meaning that the NSL DRC could not be considered an appropriate hearing body by virtue of its decisions being subject to appeal proceedings before the SAFA Arbitration Tribunal.

19. The dispositive part of the FIFA Dispute Resolution Chamber issued on 6 May 2021 (the "Appealed Decision") reads as follows:

> "*1. The claim of the Claimant, Christofer David, is admissible.*
>
> *2. The claim of the Claimant is partially accepted.*
>
> *3. The Respondent, Cape Town SC, has to pay to the Claimant, the following amounts:*

- *ZAR 160,000 as outstanding remuneration (salary of June 2020), plus 5% interest* p.a. *as from 1 July 2020 until the date of effective payment;*

- *ZAR 257,000, as outstanding remuneration (accommodation and vehicle allowance), plus 5% interest* p.a. *as from 2 July 2020;*

- *ZAR 540,004 as compensation for breach of contract without just cause, plus 5% interest* p.a. *as from 22 June 2020.*

4. Any further claims of the Claimant are rejected

[…]

7. In the event that the amount due, plus interest as established above is not paid by the Respondent ***within 45 days****, as from the notification by the Claimant of the relevant bank details to the Respondent, the following consequences shall arise:.*

1. *The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods. The aforementioned ban mentioned will be lifted immediately and prior to its complete serving, once the due amount is paid. (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

2. *In the event that the payable amount as per in this decision is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee*." (emphasis in original)

20. The grounds of the Appealed Decision were communicated on 10 May 2021. In brief, its reasoning was that: (i) the FIFA DRC had jurisdiction because the Club had been unable to demonstrate that the local dispute resolution mechanism was compliant with minimum FIFA standards; (ii) the Club had not established that it had terminated the Employment Contract with just cause at it had seemingly given notice of termination in the midst of negotiations following its earlier expression of intent to retain the Player while seeking to reduce his salary in the context of the COVID-19 pandemic; and that, in light of the foregoing (iii) the Club had to compensate the Player for outstanding compensation at the time of termination as well as expected compensation for remainder of the Employment Contract term, as extended to 30 June 2021.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 28 May 2021, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2020 edition) (the "**CAS Code**"), the Appellant filed a Statement of Appeal against the Appealed Decision (the "**Appeal**") with the Court of Arbitration for Sport ("**CAS**"). In the Statement of Appeal, the Appellant requested that the dispute be referred to a sole arbitrator and requested that Mr Rauf Soulio, Judge in Adelaide, Australia, be appointed as Sole Arbitrator.

22. On 31 May 2021, the CAS Court Office acknowledged receipt of the Appeal and invited the Appellant to complete its Appeal by providing the name and full address of the Respondents(s), which it did by letter dated 1 June 2021.

23. On 8 June 2021, the CAS Court Office notified the Parties of the Appeal and the fact that the Appellant proposed that the matter be submitted to a Sole Arbitrator.

24. On 9 June 2021, the CAS Court Office sent the Parties a copy of the Application to Intervene as a Party dated 6 June 2021 filed by the National Soccer League ("**NSL**"), and invited them to comment on the request by 18 June 2021. On the same day, the CAS Court Office informed the NSL that its request had been submitted to the Parties for comment.

25. On 16 June 2021, the CAS Court Office acknowledged receipt of the Appellant's letter of 15 June 2021 and the Second Respondent's letter of 11 June 2021. The Appellant did not object to the NSL's intervention, while the Second Respondent did. The Second Respondent also objected to the Appellant's suggested nominee for Sole Arbitrator, requesting rather that the Sole Arbitrator be appointed by the President of the CAS Appeals Division from the Football List of CAS Arbitrators.

26. On 16 June 2021, the Appellant filed its Appeal Brief, further to Article R51 of the CAS Code.

27. On 21 June 2021, the CAS Court Office acknowledged the Parties' positions regarding the NSL's request to intervene, noting that Article R41.4 of the CAS Code provides that "[a] *third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing*", that both Respondents did not agree with the request, and that the NSL's Application to Intervene would be transmitted to the Sole Arbitrator, once constituted.

28. On 29 June 2021, the CAS Court Office informed the Respondents that the Appellant had paid the totality of the advance of costs and therefore invited them to file their Answers, since both Respondents had invoked Article R55 of the CAS Code, which provides that the Answer deadlines will be reset after the Appellant pays its share of the advance of costs.

29. On 27 July 2021, the CAS Court Office informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division and further to Article R54 of the CAS Code, that the arbitral tribunal for the present matter was constituted as follows:

Sole Arbitrator: Mr Alexander McLin, Attorney-at-law in Lausanne, Switzerland

30. On 28 July 2021, both Respondents filed their respective Answers, further to Article R55 of the CAS Code.

31. On 4 August 2021, the CAS Court Office wrote to the Parties and announced, considering the lack of unanimous agreement concerning the participation of the NSL as a party and in application of Article R41.4 paragraph 1 of the CAS Code, the Sole Arbitrator had decided that the NSL would not be permitted to participate in the instant

proceedings. It also invited the Parties to comment on whether the NSL might be permitted to file an *amicus curiae* brief pursuant to Article R41.4 of the CAS Code.

32. On 6 August 2021, the CAS Court Office wrote to the Parties acknowledging their positions regarding the holding of a hearing, noting that while the Appellant requested that a hearing be held, the First and Second Respondents preferred for the matter to be decided on the written submissions.

33. On 18 August 2021, the CAS Court Office acknowledged receipt of the Parties' respective positions on the participation of the NSL as *amicus curiae*, namely that while the Appellant did not object to it, both Respondents believed the NSL should not be permitted to do so.

34. On 3 September 2021, the CAS Court Office informed the Parties of its letter to the NSL of the same day, by which it provided an opportunity to the NSL to state whether it requested to participate in these proceedings as *amicus curiae*, and, if so, to state the reasons for which it should be permitted to do so.

35. On 10 September 2021, the CAS Court Office acknowledged receipt of the NSL's correspondence requesting to be permitted to participate as *amicus curiae* in this proceeding further to Article R41.4 of the CAS Code, and invited the Parties to provide their comments thereto.

36. On 24 September 2021, the CAS Court Office acknowledged receipt of the Parties' comments on the potential participation of the NSL as *amicus curiae*, namely that the Appellant was in favour of the NSL's participation while the Respondents were not.

37. On 30 September 2021, the CAS Court Office wrote to the Parties to inform them that the Sole Arbitrator had decided not to invite the NSL to provide submissions as *amicus curiae* on the basis of the applicable criteria, namely: (i) a vital interest in the subject matter of the dispute of the entity seeking to have submissions admitted; (ii) the balance of interest between the parties; and (iii) whether and the extent to which the dispute affects the interests of third parties and entities aside from the disputing parties. The CAS Court Office indicated that the reasons for the Sole Arbitrator's decision would be provided in the final Award. By the same letter, the Parties were informed of the Sole Arbitrator's decision to hold a hearing by videoconference in this proceeding, further to Articles R44.2 and R57 of the CAS Code.

38. On 25 October 2021, following a series of exchanges with the Parties aimed at securing a hearing date and after the Appellant's counsel indicated a lack of availability until the latter half of January 2022, the CAS Court Office invited the Parties to provide their positions concerning the holding of a hearing at that time.

39. On 3 November 2021, with all Parties having indicated their availability, the CAS Court Office called them to appear for a hearing on 19 January 2022 by video-conference.

40. On 25 November 2021, the CAS Court Office informed the Parties, further to a letter received from the Appellant on the same day, that the latter intended only to advance arguments on the "jurisdictional issue" (i.e. whether FIFA had jurisdiction to issue the

Appealed Decision), and was no longer pursuing its appeal on the merits of the Appealed Decision. The Respondents were invited to comment.

41. On 3 December 2021, the CAS Court Office acknowledged receipt of the First Respondent's comments submitted on 20 November 2021and noted that no comments had been received from the Second Respondent within the deadline provided.

42. On 17 December 2021, the CAS Court Office acknowledged receipt of the Appellant's submission of a document identified as the Expert Witness Statement of Mr Farai Razano, copies of which were provided to the Respondents for comment.

43. On 23 December 2021, the CAS Court Office acknowledged receipt of the Respondents' objections concerning the Appellant's Expert Witness Statement and Mr Razano's status as a witness. It also provided the Parties with an Order of Procedure for signature.

44. On 30 December 2021, the Appellant submitted an unsolicited letter making the case for exceptional circumstances justifying the admission of Mr Razano's testimony and Expert Witness Statement.

45. On 3 January 2022, the CAS Court Office acknowledged receipt of the Appellant's 30 December 2021 letter and invited the Respondents to provide their comments thereto.

46. On 7 January 2022, the CAS Court Office acknowledged receipt of the Respondents' respective comments to the Appellant's letter of 30 December 2021, and to the First Respondents' comments on the Order of Procedure.

47. On 11 January 2022, the CAS Court Office communicated to the Parties the Sole Arbitrator's decision to dismiss the Appellant's request that the Expert Witness Statement of Mr Farai Razano be admitted into the case file, indicating that the reason therefor would be provided in the final Award. It also provided the Parties with a draft hearing schedule, inviting them to collaborate or propose any modifications thereto prior to the hearing.

48. On 11 January 2022, the CAS Court Office wrote to the Parties acknowledging receipt of the Second Respondent's letter of 24 December 2021 enclosing a signed copy of the Order of Procedure, and granting the remaining Parties a new deadline to submit theirs.

49. On 14 January 2022, the CAS Court Office acknowledged receipt of the copies of the Order of Procedure signed by the Appellant and the First Respondent respectively.

50. On 17 January 2022, the CAS Court Office acknowledged receipt of the First Respondent's request to postpone the hearing scheduled on 19 January 2022 due to a COVID-19 infection and quarantine measures affecting his counsel's availability, and invited the other Parties to comment.

51. Also on 17 January 2022, the CAS Court Office acknowledged receipt of the Parties' positions (namely the Appellant's position that a hearing postponement would be prejudicial and the Second Respondent's agreement to postpone the hearing under the circumstances).

52. Still on 17 January 2022, the CAS Court Office communicated the Sole Arbitrator's decision to postpone the hearing previously scheduled on 19 January 2022 in light of the circumstances and provided alternative dates later in the month as well as in February 2022, when he as well as both Respondents were available to reschedule a hearing, inviting the Appellant to indicate its availability on those dates.

53. On 19 January 2022, the CAS Court Office acknowledged receipt of the Appellant's request dated 18 January 2022 proposing that, in lieu of rescheduling a hearing, the Parties instead be permitted to submit "heads of arguments" expanding on previous written submissions, inviting the Respondents to comment.

54. On 24 January 2022, the CAS Court Office acknowledged receipt of the Respondents' respective comments on Appellant's proposal, to which neither objected but only noted that no new evidence should be allowed.

55. On 2 February 2022, the CAS Court Office wrote to the Parties communicating the Sole Arbitrator's decision to order an additional round of written submissions and not to hold a hearing further to Article R57 of the CAS Code, as well as providing instructions and relevant deadlines therefor.

56. On 17 February 2022, SAFA requested to intervene in the instant proceedings, regarding which the Parties were invited to comment.

57. On 18 February 2022, the Appellant transmitted its Reply to CAS only via email.

58. On 25 February 2022, the CAS Court Office wrote to the Parties acknowledging receipt of the First Respondent's email of the same day inquiring whether the Appellant's Reply had been received by the deadline. The CAS Court Office noted that the Reply had been transmitted to the CAS by email and not on the CAS E-filing Platform or by courier, and therefore invited the Appellant to provide proof of filing by courier within the deadline.

59. Also on 25 February 2022, the Appellant responded by providing arguments as to which its Reply should be considered timely filed and admitted to the record. It also uploaded its Reply to the CAS E-filing Platform.

60. Still on 25 February 2022, the CAS Court Office acknowledged the Appellant's letter of response and provided a deadline for the Respondents to comment.

61. On 1 March 2022, the CAS Court Office wrote to the Parties to address the request for intervention of SAFA, as well as the issue of the admissibility of the Appellant's Reply. It noted that while the Appellant did not object to SAFA's request for intervention, both Respondents did. With respect to the admissibility of the Appellant's Reply, it noted that the First Respondent's position was that the Reply was inadmissible because it was not properly filed within the deadline.

62. Also on 1 March 2022, the CAS Court Office wrote separately to the Parties to acknowledge the Second Respondent's position that the Appellant's Reply is inadmissible, and that it would not be filing a Rejoinder if it was considered as such.

63. On 8 March 2022, the CAS Court Office wrote to the Parties to communicate that: (i) the Sole Arbitrator had deemed the Appellant's Reply inadmissible as it was not filed in accordance with Article R31 of the CAS Code and that more reasons would be provided in the final Award; (ii) the Sole Arbitrator's decision to decide the case based solely on the Parties' written submissions was maintained; and (iii) in light of the Respondents' objections to permitting SAFA to intervene as a party, that the Sole Arbitrator had decided that SAFA would not be allowed to do so, but that he had invited SAFA to indicate whether it requested to be permitted to file an *amicus curiae* brief further to Article R41.4 of the CAS Code, after which he would decide on this issue.

64. On 9 March 2022, the CAS acknowledged a letter from the Appellant requesting a hearing on the basis that it had withdrawn its previous request for a hearing conditionally on being able to file additional submissions but that these had now been deemed inadmissible, upon which the Respondents were invited to comment.

65. On 11 March 2022, the CAS Court Office wrote to the Parties acknowledging the Respondents' positions that the decision to decide the case on the basis of the written submissions should not be revisited, and that the Respondents would not be filing Rejoinders.

66. On 15 March 2022, the CAS Court Office wrote to the Parties informing them of and providing them with SAFA's application to be permitted to file an *amicus curiae* brief, giving the Parties an opportunity to comment.

67. On 29 March 2022, the CAS Court Office acknowledged receipt of the Parties' comments on SAFA's application to file an *amicus curiae* brief, noting the Appellant's support thereof and both Respondents' objections thereto.

68. On 6 April 2022, the Parties were informed that the Sole Arbitrator had decided to deny SAFA's request to file an *amicus curiae* brief according to Article R41.4 of the CAS Code, and that the reasons for the Sole Arbitrator's decision would be provided in the final Award.

69. On 6 April 2022, the CAS Court Office wrote to SAFA informing it of the Sole Arbitrator's decision to deny its request to file an *amicus curiae* brief on the basis of the applicable criteria, namely: (i) a vital interest in the subject matter of the dispute of the entity seeking to have submissions admitted; (ii) the balance of interest between the parties; and (iii) whether and the extent to which the dispute affects the interests of third parties and entities aside from the disputing parties.

70. On 4 May 2022, the CAS Court Office acknowledged receipt of the Appellant's unsolicited letter of the same date reiterating its request for a hearing to be held, and providing the Respondents with an opportunity to comment.

71. On 12 May 2022, the CAS Court Office acknowledged receipt of the Respondents' comments to the Appellant's letter of 4 May 2022, recalled the previous correspondence on the matter of a hearing and the second round of submissions that had been ordered in lieu thereof, and of the Sole Arbitrator's decision notified on 8 March 2022 that the Award would be rendered on the basis of the Parties' written submissions.

72. On 18 May 2022, the CAS Court Office sent the Parties an revised Order of Procedure.

73. On 20 May 2022, the Appellant returned the revised Order of Procedure with comments on Item 9 therefore regarding its absence of agreement to a decision on the basis of the Parties' written submissions.

74. On 24 May 2022, the Second Respondent returned the signed revised Order of Procedure to the CAS Court Office.

75. On 25 May 2022, the First Respondent returned the signed revised Order of Procedure to the CAS Court Office.

IV. SUBMISSIONS OF THE PARTIES

76. The Sole Arbitrator confirms that he has carefully taken into account all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present Award.

77. The Parties' respective requests for relief are as follows:

- Appellant's Appeal Brief:

> *"[…] Cape Town City Football Club respectfully requests CAS to:*
>
> *a) Admit the present appeal;*
>
> *b) Uphold the present appeal and set aside the Appealed Decision, replacing it by an Arbitral Award, stipulating that:*
>
> i. *The Dispute Resolution Chamber of the National Soccer League in South Africa is an independent arbitration tribunal guaranteeing fair proceedings, respects principles of equal representation of players and clubs and complies with the principles of FIFA Circular 11010 and the principles contained in the FIFA National Dispute Resolution Chamber (NDRC) Standard Regulations; and*
>
> ii. *The First Respondent should have referred his claim to the Dispute Resolution Chamber of the National Soccer League in South Africa as expressly agreed in the employment agreement between the Appellant and the First Respondent and undertaken by the Appellant and the First Respondent in terms of the Constitution, Collective Bargaining Agreement and Rules of the National Soccer League.*

iii. *The Dispute Resolution Chamber of the Second Respondent did not have jurisdiction to deal with the First Respondent's claim.*

Alternative Relief:

iv. *Find that the First Respondent's Contract was terminated with just cause;*

v. *Order the Respondents jointly to bear any and all costs and fees of the present appeal; and*

vi. *Order the Respondents jointly to pay Cape Town City Football Club a contribution towards legal fees and other expenses incurred in connection with the proceedings, pursuant to article R64.5 of the CAS Code, in an amount to be fixed by the Panel at its own discretion."*

- Appellant's letter to CAS of 25 November 2021

"***RE: CAS 2021/A/8018 CAPE TOWN CITY FOOTBALL CLUB V. CHRISTOFER DAVID & FIFA***

1. *Reference is made to the above and the hearing scheduled on 19 January 2022.*
2. *We write to you in order to limit the issues in this matter and curtail unnecessary expenditure of time and effort.*
3. *Our client, the appellant, has decided to pursue only the **jurisdictional issue** raised in this appeal (i.e., whether the FIFA DRC had jurisdiction to adjudicate on this matter). It will not pursue the issue of the merits of the dismissal in this appeal, that is, the appeal before the CAS.*
4. *If our client succeeds on this jurisdictional point, it will, if required, pursue the merits of the termination of the player's contract before the domestic tribunals in South Africa (the PSL and, if appropriate, the SAFA tribunal). If it fails on this jurisdictional point, it understands and appreciates that the FIFA award will be determinative of the case and, subject to issues of costs before this Tribunal, dispose of the matter finally and definitively."*

- Player's Answer:

"*[… T]he First Respondent respectfully requests the Sole Arbitrator to:*

a) Dismiss the appeal filed by Cape Town City;

b) Uphold the Appealed Decision and consequently condemn Cape Town City to pay Mr Christofer David:

a. ZAR 160,000 as outstanding remuneration (salary of June 2020), plus 5% interest p.a. as from 1 July 2020 until the date of effective payment;

b. ZAR 257,000, as outstanding remuneration (accommodation and vehicle allowance), plus 5% interest p.a. as from 1 July 2020;

c. ZAR 540,004 as compensation for breach of contract without just cause, plus 5% interest p.a. as from 22 June 2020.

c) Order Cape Town City to pay any legal expenses or costs faced by Mr Christofer David in an amount prudently estimated in the excess of EUR 30,000 (thirty thousand Euros);

d) Order Cape Town City to bear any and all administrative and procedural costs, which have already been incurred or may eventually be incurred in connection with these proceedings."

- FIFA's Answer:

"*[…] FIFA respectfully requests CAS to:*

(a) *Reject the Appellant's appeal in its entirety;*

(b) *Confirm the Appealed Decision and, in particular, that the FIFA DRC was competent to deal with the dispute between the Appellant and the Player;*

(c) *Order the Appellant to bear all costs incurred with the present procedure; and*

(d) *Order the Appellant to make a contribution to FIFA's legal costs.*"

78. In light of the fact that the Appellant narrowed its claim to only the issue of jurisdiction before the FIFA DRC thus abandoning all other claims filed in the Appeal, the Parties' submissions on FIFA's jurisdiction may be summarized as follows:

79. The Appellant argues that the FIFA DRC lacked jurisdiction to adjudicate and decide on the proceedings leading to the Appealed Decision, and that the NSL DRC is competent to deal with employment-related disputes. The NSL regulatory framework, including the Collective Bargaining Agreement (the "**CBA**"), provides for appeal proceedings to be submitted to the SAFA Arbitration Tribunal, which complies with all necessary FIFA prescripts for appeals to be heard with the professional football framework. The employment relationship between the Appellant and the Player was terminated with legal justification, i.e. operational requirements premised upon the fact that such measures were provided for in the NSL Employee Handbook as well as South African Law. Section 189 of the South African Labour Relations Act No. 66 of 1995 (the "**LRA**") provides for dismissal for operational requirements, and the procedures followed to dismiss the Player were premised upon the framework contained in Section 189 LRA. Finally, there is a substantive basis for fixed-term contracts to be terminated based on operational requirements in South Africa grounded in legal precedent, and the FIFA DRC is bound by the doctrine of *stare decisis*.

80. The Player argues that the FIFA DRC rightfully decided that it was competent to hear the dispute, as it cannot be established that the Employment Contract includes any clause that contains a clear, explicit, and exclusive reference relating to the competence of a national arbitration tribunal, nor were any of the documents relied upon by the Appellant as conferring mandatory jurisdiction thereupon signed or received by the

Player or applicable to the parties. The Appellant has not met its burden of proving that the NSL DEC and the SAFA Arbitration Tribunal constitute, within the framework of the association and/or a collective bargaining agreement, an independent national-level arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs pursuant to Article 22(b) of the FIFA Regulations on the Status and Transfer of Players (the "**RSTP**"). As a result, the FIFA DRC rightfully exercised its jurisdiction. Further, the Player considers that the Employment Contract was terminated by the Club without just cause as it did not have a clear legal basis, nor were there objective criteria that did not reasonably permit the continuation of the employment relationship between the parties.

81. For FIFA, the competence of the FIFA DRC derives from Article 22(b) of the FIFA RSTP, in light of the international dimension of the employment-related dispute between the (South African) Club and the (Dutch) Player. While exceptions to the general rule of the FIFA DRC's competence exist in the FIFA RSTP, in the absence of an independent arbitration tribunal established at the national level within the framework of the association and/or a collective bargaining agreement that guarantees fair proceedings and respects the principle of equal representation of players and clubs in accordance with the principles contained in Circular No. 1010 of 20 December 2005 , the FIFA DRC's competence is to be confirmed unequivocally. The Appellant has failed to discharge its burden of proving that the relevant national arbitration tribunal guarantees fair proceedings and respects the principle of equal representation of players and clubs in accordance with the principles contained in FIFA Circular 1010. In particular, the Appellant has not proven that the SAFA Arbitration Tribunal, which functions as the relevant appeals body to decisions of the NSL DRC, complies with these principles.

V. JURISDICTION

82. The Player filed his claim against the Appellant with FIFA on 28 May 2021. Consequently, the FIFA Statutes and Regulations as in force at that time will be applicable in this case for the examination of the Appellant's appeal.

83. Article R47 of the CAS Code states as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body."*

84. The jurisdiction of the CAS is derived from Article 58 para. 1 of the FIFA Statutes (2020 edition), which states that "[a]*ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question*". Paragraph 2 of the same Article provides: "*Recourse may only be made to CAS after all other internal channels have been exhausted*".

85. Article 24, para. 2 of the FIFA RSTP further provides that "[d]*ecisions reached by the DRC or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)*".

86. The Appellant submits that, pursuant to the above provisions, CAS has jurisdiction in the present case.

87. It is not contested by the Parties that the appealed decision is a decision rendered by the FIFA DRC, nor that the legal remedies within FIFA have been exhausted. In addition, all Parties have signed the Order of Procedure, expressly consenting thereby to CAS jurisdiction.

88. It follows from the above that CAS has jurisdiction.

VI. ADMISSIBILITY

89. The Appealed Decision was notified to the Parties on 6 May 2021 and the grounds of the Appealed Decision on 10 May 2021.

90. The Appellant lodged its Statement of Appeal and Appeal Brief with the CAS on 28 May 2021 and 16 June 2021 respectively, in accordance with Article 57(2) of the FIFA Statutes and Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

91. It therefore follows that the Appeal is admissible.

VII. APPLICABLE LAW

92. Article 187 paragraph 1 of the Swiss Private International Law Act (the "**PILA**") provides as follows.

> *"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the dispute has the closest connection."*

93. Article R58 of the CAS Code provides more specifically as follows:

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

94. Article 57 paragraph 2 of the FIFA Statutes states as follows:

> *"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law."*

95. The Appellant argues that South African law is applicable to this matter by virtue of its governing the Employment Contract as agreed by the Club and the Player by incorporation of the Club's Employee Handbook.

96. The Appellant considers that FIFA Rules for Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "**Procedural Rules**"), which at their Article 2 provide as follows, also provide for the application of South African law:

> "*In their application and adjudication of law, the… DRC shall apply the FIFA Statutes and regulations whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport.*"

97. Moreover, the Appellant highlights that, Article 13 of the CBA states:

> "*This agreement will be governed by and construed in accordance with the laws of South Africa*".

98. As a result, the Appellant concludes that the instant case "*shall be construed and adjudicated in accordance with the laws of the Republic of South Africa, specifically considering and in accordance with the rules of the National Soccer League. Additionally, the FIFA Statutes and Regulations and Swiss law shall also apply."*

99. The Player considers that according to the so-called "Haas doctrine", Article R58 of the CAS Code "*serves to restrict the autonomy of the parties, since event where a choice of law has been made, the 'applicable regulations' are primarily applied, irrespective of the will of the parties. […] Hence any choice of law made by the parties does not prevail over Art. R58 of the CAS Code, but is to be considered only within the framework of Art. R58 of the CAS Code and consequently affects only the subsidiarily applicable law."* (HAAS, Applicable law in football-related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law –, Bulletin TAS / CAS Bulletin, 2015/2, p. 11-12).

100. Furthermore, the Player considers that also according to the Haas doctrine, "*in appeal arbitration proceedings* [Article R58 of the CAS Code] *assumes that the federation regulations take precedence. Consequently, the rules and regulations of a federation also take precedence over any legal framework chosen by the parties* [...]. *If, therefore, the federation rules provide that Swiss law is to be applied additionally (to the rules and regulations of FIFA) then this must be complied with by the Panel.* [...] *Where* [Article 57(2) of the FIFA Statutes] *"additionally" refers to Swiss law, such a reference only serves the purpose of making the RSTP more specific. In no way is the reference to Swiss law intended to mean that in the event of a conflict between the RSTP and Swiss law, priority must be given to the latter.* [...] *Consequently the purpose of the reference to Swiss law in* [Article 57(2) of the FIFA Statutes] *is to ensure the uniform interpretation*

of the standards of the industry. Under [Article 57(2) of the FIFA Statutes], *however, issues that are not governed by the RSTP should not be subject to Swiss law.*" (HAAS, Applicable law in football- related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law –, Bulletin TAS / CAS Bulletin, 2015/2, p. 14-15). As a result, for the Player, South African law is only applicable to issues not addressed at all in the FIFA regulations.

101. The application of this logic to the specific South African context was examined in CAS 2016/A/4846, exhaustively analyzed in CAS 2017/A/5111, and applied in CAS 2008/A/1517.

102. The case at hand deals specifically with the termination of the Employment Contract, falling squarely within the FIFA RSTP's Articles 13 to 18 dedicated to the maintenance of contractual stability between professionals and clubs. In other words, FIFA has deemed, by virtue of regulating this issue, that it is in the interest of football for termination of employment contracts to be based on uniform criteria rather than national provisions which could vary considerably (see CAS 2019/A/6312 and CAS 2017/A/5465).

103. It is undisputed that the issues for determination on the merits concern: (i) the FIFA DRC's jurisdiction to adjudicate the matter in accordance with Article 22 of the FIFA RSTP; (ii) the lawfulness of the early and unilateral termination of the Employment Contract in accordance with Articles 13 and 14 of the FIFA RSTP; and (iii) the consequences of such termination, addressed by Article 17 of the FIFA RSTP. Moreover, while the Club's Employee Handbook contains certain references to the LRA, the Employment Contract does not contain a clear, explicit choice of law.

104. In view of the above, the Sole Arbitrator sees no reason to depart from CAS precedent and thus applies primarily the various rules and regulations of FIFA and, additionally, Swiss law where further interpretation of FIFA regulations may be necessary.

VIII. PROCEDURAL MATTERS

105. The following procedural questions are addressed below: (A) the status of the NSL following its request to intervene as a party and later to submit submissions as *amicus curiae*; (B) the nature and admissibility of an "expert witness statement" filed by the Appellant; (C) the admissibility of the Appellant's Reply submission and the matter of the hearing; and (D) SAFA's request to file an *amicus curiae* brief.

A. The status of the NSL in these proceedings

106. Article R41.4 of the CAS Code provides inter alia that:

> "*A third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing.*
>
> […]

After consideration of submissions by all parties concerned, the Panel may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix."

107. Following the NSL's initial request to intervene as a third party, the Appellant consented whereas the Respondents did not. Likewise, while the Appellant consented to the NSL's participation as *amicus curiae*, the Respondents did not.

108. Given the absence of agreement of all the Parties (and absence of any arbitration agreement to this effect) to the intervention of the NSL, the Sole Arbitrator determined that the NSL could not intervene in the proceeding.

109. Next, the determination as to the NSL's request to provide submissions as *amicus curiae* is made based on applicable criteria. These are: (i) a vital interest in the subject matter of the dispute of the entity seeking to have submissions admitted; (ii) the balance of interest between the parties; and (iii) whether and the extent to which the dispute affects the interests of third parties and entities aside from the disputing parties. (MAVROMATI D./REEB M.; *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Article R41, paras. 100-101.)

110. The NSL itself considers the following questions are raised by the present dispute, which it considers "important", "for the NSL and all participants in professional football in South Africa, in particular professional clubs and players):

- interpretation and approach to the FIFA RSTP in the context of South African law, in including the fundamental rights guarantees in the Bill of Rights;[1] South African immigration law; and dedicated, specialist, employment laws and mechanisms;

- appropriateness of the impartial, independent, agreed dispute resolution mechanism currently in place in respect of professional football in South Africa, and the effects and impacts of South African law on the development of these mechanisms;

- relevance of the approval by FIFA of the South African dispute resolution mechanism generally and the work, in particular, of professional clubs and players in bringing into being an effective, compliant, process which accords with the FIFA RSTP and South African law, and properly respects the rights of all of those entitled to access it;

- impact that the failure to respect the principle of subsidiarity would have on the conduct of clubs and players in South Africa in their attempts to comply with the law (and confidence in legal certainty – in particular as regards South African employment law) in the future;

- risk of the creation of a two track, unequal, and unfairly discriminatory approach to the implementation of employment law as between certain professional footballers and others despite the existence of clear legal principles governing employment law in South Africa and the existence of

appropriate and effective dispute resolution mechanisms able to ensure equal application of the law in the country; and

- general risk to any reasonable concept of the rule of law in professional football in South Africa if the matter is decided without the relevant facts and principles being placed before CAS to ensure that the decision arrived at will provide guidance for the future having regard to the relevant facts, circumstances, law, and principles of relevance in South Africa.

111. The Appellant considers that the NSL has an interest as the outcome of these proceedings "*bears materially on the jurisdiction of the NSL DRC and could cause the subversion thereof in its entirety*", the NSL is best-placed to provide views as to the application of its statutes "*within the greater FIFA framework*", and specifically the NSL will be able to make informed submissions on the role of the CBA, its compliance with Article 22 of the FIFA RSTP and the applicability of the NSL Statutes on member clubs with respect to the referral of disputes to the NSL DRC as a first instance tribunal further to the CBA. More broadly, "*all members of the NSL and the clubs playing and campaigning under its auspices*" could be affected if the NSL's powers are "*undermined*".

112. The Player considers that the dispute revolves around two issues: (i) whether the FIFA DRC was competent to decide and adjudicate the dispute between the Player and the Club; and (ii) whether the Club was entitled to terminate the Employment Contract unilaterally and prematurely, and in the affirmative, establishing the consequences therefor. The NSL is not concerned with question (ii). As for question (i), he considers that the necessary elements to establish whether the NSL DRC and the SAFA Arbitration Tribunal meet the requirements laid down in Article 22(b) of the FIFA RSTP and FIFA Circular 1010 were already submitted by the Appellant, and that the NSL did not demonstrate that it could provide any additional information of significant relevance to the Sole Arbitrator. Moreover, the fact that the Appellant's chairman is a member of the NSL's Executive Committee would (should the NSL be permitted to file an *amicus* brief) cause an imbalance between the Parties, and the NSL cannot be considered objective.

113. FIFA considers that the NSL has not justified and demonstrated its "*vital interest in the subject matter*", nor has it demonstrated how the dispute at stake would "*affect persons and entities beyond the parties*". The FIFA DRC did not question the NSL's compliance with the minimum standards of Article 22(b) of the FIFA RSTP, but rather the SAFA Arbitration Tribunal's. The NSL is not positioned to clarify the functioning of an arbitration tribunal pertaining to another entity.

114. The Sole Arbitrator, having considered all the arguments raised by the Parties and the NSL, while he understands that the NSL may consider it has an interest in the dispute resolution mechanism being recognized as compliant with the minimum standards in the FIFA RSTP, concludes that this interest is indirect at best, and certainly not vital. Indeed, he finds most of the arguments raised both by the Appellant and the NSL to be largely beside the point, given that the Appealed Decision does not appear to question the NSL's compliance with the minimum standards, but rather SAFA's at the appellate level. Moreover, for the same reasons, he finds that the interest of third parties are

unlikely to be affected materially one way or the other by the stance taken by the NSL. Finally, the Sole Arbitrator considers that the balance of interests between the Parties is best preserved without the admitting an *amicus* submission from the NSL considering the identified overlap in governance of the Club and the NSL.

115. As a result of the foregoing, the NSL's request to file an *amicus curiae* brief is dismissed.

B. The Appellant's "Expert Witness Statement"

116. Article R51 of the CAS Code provides as follows:

"*Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which it intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit.*

In its written submissions, the Appellant shall specify the name(s) of any witnesses, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, it intends to call and state any other evidentiary measure which it requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise."

117. Article R56 of the CAS Code provides inter alia as follows:

"*Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.*"

118. The Appellant initially filed the "Expert Statement of Mr Farai Razano" without providing an explanation as to why it was being submitted late (Mr Razano's name was not included with the Appeal Brief). Mr Razano's name first appeared on 18 November 2021 on the list of participants due to attend the hearing initially scheduled on 19 January 2022. The Expert Statement itself was sent to the CAS Court Office on 17 December 2022.

119. The Respondents disputed the admissibility of the Expert Statement: the First Respondent on the basis that it was not produced in accordance with the CAS Code, that Mr Razano cannot be considered an independent and objective expert by virtue of undisclosed links with the Appellant's counsel, and that the Expert Statement is in any event insufficient as proof of the SAFA's Arbitration Tribunal's compliance with the requirements of Article 22 of the FIFA RSTP. The Second Respondent considers that the Expert Statement, submitted six months later than the Appeal Brief, constitutes an

attempt to expand on its substantive position in response to the Second Respondent's Answer.

120. The Appellant later sought to justify its submission through an unsolicited letter, claiming exceptional circumstances. More specifically, its stated that the reason for the belated filing of the Witness Statement was principally due to fact that the Appellant anticipated that the NSL would be permitted to participate in the proceedings and would be defending its jurisdiction. As a result, at the moment of filing its Appeal Brief and having been informed of the NSL's intent to seek to intervene, the Appellant anticipated that it would need to "*prove its case on the merits*" and essentially would leave it to the NSL to address the issues associated with FIFA DRC and NSL jurisdiction. It argued that the Respondents would suffer no prejudice if the Expert Statement were to be admitted given the time available prior to the scheduled hearing to prepare.

121. The Sole Arbitrator, having considered the positions of the Parties, concludes that the Expert Statement is inadmissible. In his view, the reasons proffered by the Appellant do not constitute exceptional circumstances as such. Rather, they appear to be the result of assumptions made concerning the presence of a third party in the proceedings, the admissibility of which was uncertain and the nature of which had yet to be determined. The fact that these procedural determinations were ultimately incompatible with the Appellant's initial assumptions hardly constitutes exceptional circumstances, particularly when they were foreseeable at the time the Appeal Brief was filed.

C. The admissibility of the Appellant's Reply, and the matter of the hearing

122. At the Appellant's initial request and prior to its amendment of the scope of its appeal, a hearing was originally scheduled for 19 January 2022, which was postponed due to a COVID-19 infection affecting the Player's counsel's availability. The Appellant then proposed, in lieu of rescheduling the hearing, to submit "*heads of arguments*" expanding on previous written submissions.

123. Given the considerable time taken due to the manifold procedural issues raised prior to the originally scheduled hearing, and given that the availability of the Appellant's counsel looked to be uncertain for some time once it became apparent that the 19 January 2022 hearing date could not be maintained, the Sole Arbitrator decided to grant the Parties an opportunity to file another round of submissions in lieu of holding a hearing, as permitted by Article R57 of the CAS Code and in light of the Appellant's specific proposal that a second round of submissions be permitted in lieu of rescheduling the hearing.

124. The 2 February 2022 CAS letter to the Parties, which set the deadline for the Appellant to file its Reply as 22 February 2022, provided inter alia as follows:

> "*The Parties are also reminded that, pursuant to Article R31 of the Code, their pleadings shall be filed **by courier** in at least **six (6) copies** or **uploaded on the CAS E-filing Platform**. Exhibits can be filed on USB or CD-Rom by courier in at least six (6) copies, via the CAS E-filing Platform or by email to procedures@tas-cas.org. Notwithstanding whether the*

> *Parties chose to file their pleadings by courier or via the CAS E-filing Platform, the Parties are kindly requested to also transmit their pleadings **by email** to the CAS Court Office (while noting that sending the pleadings only by email is not sufficient by itself per the terms of Article R31 of the Code).*" (emphasis in original)

125. The Appellant transmitted its Reply to the CAS Court Office by email only on 18 February 2022. The deadline to file the Reply was 22 February 2022. On 25 February 2022, the CAS Court Office informed the Parties on that the Reply had not been filed via the CAS E-filing Platform and invited the Appellant to provide the CAS Court Office with proof of the Reply having been filed within the deadline by courier. When asked whether it could produce a courier receipt by the applicable deadline, the Appellant explained that it had, in its view, reasonably assumed that its email was sufficient as the CAS Court Office had not alerted it to the fact that it had not received the Appellant's Reply in tandem on the CAS E-filing Platform. It also argued that SAFA's application to intervene, and the CAS Court Office's invitation to provide comments thereon, had led it to reasonably assume that its time limits to file its Reply on the CAS E-filing Platform was suspended.

126. The Respondents considered that the filing of the Reply was manifestly late and therefore inadmissible. So too does the Sole Arbitrator. Indeed, while the Appellant considers that this may be overly formal, it was reminded of the filing requirements by the CAS Court Office in CAS' 2 February 2022 letter in terms that could hardly have been clearer. As this Sole Arbitrator noted in a previous case (CAS 2019/A/6087):

> "[T]*he Swiss Federal Supreme Court has ruled that that it is not excessively formalistic for the CAS to rule that a submission sent by email only is inadmissible (see 4A_556/2018). It determined that the requirement that the appeal brief must also be filed by courier is not a mere administrative formality, but a necessary condition for the appeal to be valid. Finally, it recalled that strict adherence to procedural requirements (especially regarding deadlines) is necessary to ensure that Parties' equal treatment and the proper application of substantive law*."

127. While CAS 2019/A/6087 dealt with the admissibility of an Appeal Brief rather than a Reply, Article R31(3) of the CAS Code is clear that the formal requirements apply to all written submissions, and that there is no obligation on the CAS Court Office to remind the parties or check whether parties have correctly filed their submissions prior to the applicable deadline. Article R31 of the CAS Code provides in this regard that:

> "*The request for arbitration, the statement of appeal a**nd any other written submissions**, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, **failing which the CAS shall not proceed**. If they are transmitted in advance by facsimile or by electronic mail at the official CAS email address (procedures@tas-cas.org), **the filing is valid upon receipt** of the facsimile or of the electronic mail by the CAS Court Office **provided that the written submission and its copies are also filed by courier or uploaded to***

***the CAS e-filing platform within the first subsequent business day of the relevant time limit**, as mentioned above.*" (emphasis added).

128. Following the Sole Arbitrator's determination concerning the inadmissibility of the Appellant's Reply, deeming himself sufficiently well-informed to decide the matter without a hearing further to Article R57 of the CAS Code, the Sole Arbitrator indicated to the Parties that he would be doing so, also considering the length of proceedings and costs incurred by the Parties at that point.

129. The Appellant then expressed its disagreement with this approach, reiterating that its proposal to forego its request for a hearing was conditional on its ability to make a further written submission, and that if its Reply was deemed inadmissible, it once again requested a hearing.

130. The Sole Arbitrator is not surprised by the Appellant's disappointment, given the fact that it had drafted a Reply and naturally was seeking to have it admitted. Nevertheless, for the reasons stated above, he considers that the Appellant was provided with the opportunity to file a Reply in compliance with the CAS Code, and that the Appellant's inability to comply with its requirements means that the Appellant must bear the responsibility for its assumptions and omissions and the associated consequences thereof, having authored its own misfortune.

131. The Sole Arbitrator considers that it is not for the Appellant to impose conditions on the holding of a hearing, despite its having indicated in the revised Order of Procedure that it does not consider its right to be heard to have been respected without one. The Sole Arbitrator's determination that he considers himself sufficiently well-informed to decide the matter without a hearing is made with full knowledge of the significant submissions already made and admitted to the file, and the various opportunities provided to parties throughout the procedure. This approach is compatible with the Swiss Federal Tribunal's adoption of a "[…] *a narrow approach of the parties' right to be heard in that the non-holding of a hearing does not constitute, as such, a violation of the parties' right to be heard.*" (MAVROMATI D./REEB M.; *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, p. 329, paras. 100-101.

D. The status of SAFA in these proceedings

132. As outlined *supra* with respect to the NSL's request to intervene, Article R41.4 of the CAS Code requires the consent of all Parties for a third party to participate in the arbitration.

133. Following SAFA's request to intervene as a third party, the Appellant consented, whereas the Respondents did not. Likewise, while the Appellant consented to SAFA's participation as *amicus curiae*, the Respondents did not.

134. Given that the lack of written consent of all existing Parties determines *ipso facto* that SAFA cannot be admitted as an additional party, the same criteria as were applied *supra* with respect to the NSL's request to provide submissions as *amicus curiae* must therefore be applied to SAFA's request to appear in this same capacity. Once again, these are: (i) a vital interest in the subject matter of the dispute of the entity seeking to

have submissions admitted; (ii) the balance of interests between the parties; and (iii) whether and the extent to which the dispute affects the interests of third parties and entities aside from the disputing parties.

135. SAFA argued principally that it acts in the public interest, in a similar manner to FIFA, as "*SAFA obtains its football power from FIFA*", and the South African courts have determined that not only is the "[t]*he fate of soccer players […] of public interest*" (*Coetzee v. Comitis and Others*, [2001] JOL 7818 (C)), but that private associations that regulate football exercise public functions. Citing CAS 2008/A/1639, under the rationale that *amicus* briefs tend to support a party to another's detriment and that an arbitral tribunal should therefore exercise its discretion with caution to accept them only where their positive effects offset their disadvantages, "[t]*his may be the case in proceedings demanding for greater transparency because of the public interest at stake…*".

136. The Appellant submitted "*no further observations save to concur with the points that SAFA has raised*".

137. The First Respondent noted that the purpose of an *amicus* brief is to assist the court and that it should serve a general interest, or the court's interest. *Amicus* briefs should therefore not be admitted where they aim explicitly to support the position of one of the parties, thereby creating an imbalance between them. SAFA's request suggests that it is meant to support the Appellant's position. Conversely, it does not appear "*that it would be able to provide special perspectives, arguments or expertise on the dispute at stake*".

138. The Second Respondent considers the timing of SAFA's request for intervention (and subsequent request to file an *amicus* brief) is indicative of an effort by the Appellant to introduce new evidence and/or arguments after the Sole Arbitrator's prior procedural decisions dismissing first the NSL's request to intervene and subsequently to file an *amicus* brief, and then the attempt to have the Expert Witness Statement admitted. FIFA highlights that SAFA has not substantiated how it became aware of the present proceedings, which it must do in order to demonstrate compliance with Article R41.3 of the CAS Code, which provides as follows:

> "*If a third party wishes to participate as a party to the arbitration, it shall file an application to this effect with the CAS Court Office, together with the reasons therefor* ***within 10 days*** *after the arbitration has* ***become known*** *to the intervenor, provided that such* ***application is filed prior to the hearing, or prior to the closing of the evidentiary proceedings*** *if no hearing is held*." (emphasis added)

139. FIFA goes on to point out that while SAFA claims it only became aware of the Appealed Decision on 11 February 2022, it received a copy thereof on 10 May 2021. While SAFA claims that the matter is of significant importance to it, this is incompatible with the fact that it did not seek to intervene at an earlier stage, as did the NSL (which, as a "special member" of SAFA, would have also likely made SAFA aware of the existence of the proceedings as of June 2021). Finally, the original hearing date for these proceedings were published on the CAS website (and in the South African press on 17 January 2022).

140. Finally, FIFA notes that the application for intervention arrived extremely late in the proceedings, after the evidentiary proceedings were closed on 2 February 2022, and that Article R56 of the CAS Code does not allow for further evidence to be submitted at this stage.

141. The Sole Arbitrator, having considered all the arguments raised by the Parties and SAF, concludes that while SAFA may have an interest in these proceedings, this interest cannot be considered vital. This is evidenced by the fact that SAFA did not seek to intervene sooner despite having been notified of the Appealed Decision. The Sole Arbitrator also considers that the public interest argument raised by SAFA regarding the national dispute resolution mechanism and those affected by it does not outweigh the interests of these proceedings to remain balanced and the need for equal treatment of the original and present Parties.

142. As a result of the foregoing, SAFA's request to file an *amicus curiae* brief is dismissed.

IX. MERITS

143. As the Appellant indicated in its letter of 25 November 2021 that it had decided to pursue "*only the jurisdictional issue (i.e. whether the FIFA DRC had jurisdiction to adjudicate on this matter)*", this is the sole matter requiring examination. The Sole Arbitrator will therefore examine the jurisdiction of the FIFA DRC under the FIFA RSTP, other applicable FIFA regulations and FIFA Circular 1010, the NSL regulations, and relevant SAFA statutes and regulations, where provided by the Parties.

144. According to Article 13 of the FIFA Statutes, all member associations have to comply fully with the FIFA Statutes, the regulations, directives and decisions of the FIFA bodies. It is not contested by the Parties that the FIFA Statutes and Regulations with the directives apply to the present case.

145. Further to Article 22 lit. b) and Article 24 (1) of the FIFA RSTP, the FIFA DRC is, as a rule, competent to deal with all employment-related disputes between a club and a player that have an international dimension. Article 22 lit. b) of the FIFA RSTP provides:

> "*Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:*
>
> *a) …*
>
> *b) employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable on the parties. The independent national arbitration tribunal must guarantee fair*

proceedings and respect the principle of equal representation of players and clubs;"

146. In its Circular 1010, FIFA articulated as minimum procedural standards the following conditions and principles:

> *"- **Principle of parity when constituting the arbitration tribunal***
> *The parties must have equal influence over the appointment of arbitrators. This means for example that every party shall have the right to appoint an arbitrator and the two appointed arbitrators appoint the chairman of the arbitration tribunal. The parties concerned may also agree to appoint jointly one single arbitrator. Where arbitrators are to be selected from a predetermined list, every interest group that is represented must be able to exercise equal influence over the compilation of the arbitrator list.*
>
> ***- Right to an independent and impartial tribunal***
> *To observe this right, arbitrators (or the arbitration tribunal) must be rejected if there is any legitimate doubt about their independence. The option to reject an arbitrator also requires that the ensuing rejection and replacement procedure be regulated by agreement, rules of arbitration or state rules of procedure.*
>
> ***- Principle of a fair hearing***
> *Each party must be granted the right to speak on all facts essential to the ruling, represent its legal points of view, file relevant motions to take evidence and participate in the proceedings. Every party has the right to be represented by a lawyer or other expert.*
>
> ***- Right to contentious proceedings***
> *Each party must be entitled to examine and comment on the allegations filed by the other party and attempt to rebut and disprove them with its own allegations and evidence.*
>
> ***- Principle of equal treatment***
> *The arbitration tribunal must ensure that the parties are treated equally. Equal treatment requires that identical issues are always dealt with in the same way vis-à-vis the parties."* (emphasis in original)

147. The Second Respondent explains further that it went on to draft the National Dispute Resolution Chamber Standard Regulations (the "**NDRC Standard Regulations**"), in force as of 1 January 2008, so that its Member Associations could establish a national dispute resolution system in compliance with the above principles, reflecting the FIFA DRC.

148. It is undisputed that the present dispute is of an international dimension. A specific employment-related dispute of an international dimension can thus only be settled by an authority other than the FIFA DRC if the following requirements are met: (i) there is an independent arbitral tribunal established at the national level; (ii) the jurisdiction of this independent arbitral tribunal derives from a clear reference in the employment contract; and (iii) this independent arbitral tribunal guarantees fair proceedings and

respects the principle of equal representation of players and clubs (see also CAS 2018/A/5659, CAS 2014/A/3684 & CAS 2014/A/3693).

149. Pursuant to FIFA Circular 1010, the terms "independent" and "duly constituted" require that an arbitral tribunal meets the minimum procedural standards which comprise the principle of parity in the constitution of the arbitral tribunal, the right to an independent and impartial tribunal, the principle of a fair hearing, the right to contentious proceedings and the principle of equal treatment.

150. The Player contends that the arbitration clause contained in the Employee Handbook referenced in the body of the Employment Contract, was insufficiently clear, explicit and exclusive, and that this is sufficient for the FIFA DRC to retain jurisdiction. He also argues that reliance on the CBA's provisions to grant jurisdiction to the NSL DRC is inappropriate, inter alia because the CBA came into force more than half a year after signature of the Employment Contract, and because the Player was not a member of the South African Football Players Union (the "**SAFPU**"), a necessary condition to be bound by the provisions of the CBA.

151. FIFA, on the other hand, supports the finding of the Appealed Decision whereby the Player was found to have "*accepted the binding nature of the Employee Handbook, and that consequently it shall be construed as part of the employment contract*". While the Sole Arbitrator considers that these issues are relevant to the competence of the FIFA DRC, he notes that the Appealed Decision nevertheless started from the premise that the NSL DRC was the dispute resolution mechanism chosen by the parties before it, and that, on a *prima facie* basis, this body appeared, in light of the NSL Handbook's applicable provisions, to meet the principle of equal representation of players and clubs.

152. Since the Appealed Decision ultimately turned not on the nature of the arbitration clause or even the composition of the NSL DRC, but rather the nature and adequacy of the SAFA Arbitration Tribunal as an appellate body, the Sole Arbitrator initially examines the latter.

153. The importance of the appellate mechanism stems from the need to ensure that the principles of FIFA Circular 1010 are respected throughout the national dispute resolution system, as the absence of associated structural and procedural guarantees on appeal would negate the legitimacy of the system, regardless of the compliance of the first instance (see CAS 2018/A/5659).

154. Considering the "default" nature of the FIFA DRC's competence, the Appellant bears the burden of proving the national dispute resolution mechanism's compliance with the minimum standards (see Article 8 of the Swiss Civil Code, as well as Swiss Federal Tribunal decisions ATF III 60 & ATF 130 III 417). For purposes of the present appeal, the Sole Arbitrator must determine whether the FIFA DRC rightfully asserted jurisdiction based on the information it had before it when making the determination. Indeed, the purpose of the Article 22 of the FIFA RSTP provisions are to ensure access to fair and equitable judicial process, regardless of whether it occurs before FIFA or before a national body. The Sole Arbitrator accepts that the road to compliance of a national dispute resolution system is not necessarily straightforward, as it depends on the rule making mechanics (and politics) of the relevant bodies. Given the ongoing

nature of the compliance process, aspects of the national first instance process that are deemed non-compliant by the FIFA DRC may well be the subject of modification prior to appeal before CAS. It would be unjust to the affected party (in the instant case, the Player) to delay its access to justice by remanding the matter to the national body should a CAS panel determine that the latter has met its burden of proving its compliance before CAS, but has not before FIFA. It follows that any evidence of increased compliance by the SAFA Arbitration Tribunal that arises after the Appealed Decision is considered in this light.

155. The Appealed Decision states that "[…] *no evidence was provided as to the composition of the SAFA Arbitration Tribunal*". Upon examination of the Club's Statement of Defence in the proceedings before the FIFA DRC, it does appear that such references are limited. What is addressed in Article 27.2, Chapter 1 of the NSL Handbook is that "*The Arbitrator will, in case of all disputes or difference relating to Member Clubs, registered Player or Officials of the League, be a Senior Counsel appointed by SAFA from its Arbitrators' Panel*". The Sole Arbitrator agrees that this raises issue of equal treatment, independence, and impartiality, especially given that the SAFA Statutes appear to provide for, at Article 71, "*special regulations regarding the composition, jurisdiction and procedural rules of this Arbitration Tribunal"*, which were neither provided before the FIFA DRC nor in these appeal proceedings. Similarly, evidence is and was lacking concerning the procedure for challenge and replacement of SAFA Arbitration "Senior Counsel", and the lack of the aforementioned special regulations means that the requirements of FIFA Circular 1010 cannot be adequately verified.

156. Considering the foregoing, the Sole Arbitrator concludes that FIFA DRC appropriately exercised its jurisdiction. As a result, there is no need to further examine the issue of the validity of the potential arbitration agreement between the Player and the Club in favour of the NSL DRC, nor the compliance of the NSL DRC itself (it being dependent on the appeal mechanism to which it is subject).

X. CONCLUSIONS

157. The Sole Arbitrator finds that the FIFA DRC correctly exercised its jurisdiction when determining that it could not verify the compliance of the SAFA Arbitration Tribunal with the requirements of Article 22 of the FIFA RSTP. The jurisdiction of the FIFA DRC must therefore be affirmed and the decision of the FIFA DRC of 6 May 2021 – i.e. the Appealed Decision – is confirmed.

158. The FIFA DRC's finding that the termination of the Player's Employment Contract by the Club was without just cause, and the associated consequences provided for in Appealed Decision therefore stand.

XI. COSTS

159. Article R64.5 of the CAS Code states that in the award shall decide which party shall bear the arbitration costs or in what proportion the Parties shall share them taking into account the outcome of the proceedings. The CAS panel also has discretion to grant the prevailing party a contribution towards its legal fees and other expenses. When granting

such contributions, the CAS panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.

160. Based on the circumstances of the case, in which the Respondents prevail with their requests for relief, the Sole Arbitrator decides that the costs of the arbitration, to be calculated by the CAS Court Office and communicated separately to the Parties, shall be borne by the Appellant.

161. As a matter of principle, except in special circumstances, only costs of the Parties which would have never been incurred if a given event had not occurred (i.e. "differential costs") will be recoverable.

162. The Sole Arbitrator finds it reasonable that the Appellant shall pay CHF 8,000 to the Player towards his expenses and costs incurred in connection with the proceedings, particularly in light of the fact that it reduced the scope of its appeal after the Respondents had already incurred the effort and associated costs of addressing the merits associated with the Appellant's original requests for relief. FIFA, having been represented by its in-house counsel and not having incurred differential costs, shall bear its own costs.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Cape Town City Football Club, filed with CAS on 28 May 2021 against the decision of the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* passed on 6 May 2021 is dismissed.

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

3. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne in their entirety by Cape Town City Football Club.

4. Cape Town City Football Club is ordered to pay CHF 8,000 (eight thousand Swiss francs) to Christofer David as contribution towards his costs and expenses incurred in connection with these appeal proceedings. FIFA is ordered to pay its own costs and expenses incurred in connection with these appeal proceedings.

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

Seat of arbitration: Lausanne, Switzerland
Date: 17 July 2023

THE COURT OF ARBITRATION FOR SPORT

Alexander McLin
Sole Arbitrator