CAS 2022/A/8972 Tout Puissant Mazembe v. Isaac Amoah and the Fédération Internationale de Football Association

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Patrick Stewart, Solicitor in Manchester, United Kingdom

Arbitrators: Mr Efraim Barak, Attorney-at-law in Tel Aviv, Israel
Mr Lars Hilliger, Attorney-at-law in Copenhagen, Denmark

in the arbitration between

Tout Puissant Mazembe,

Represented by Mr Grégory Ernes of Altius Lawyers, Brussels, Belgium

- Appellant -

and

Mr Isaac Amoah, Ghana

Represented by Mr Vicent Okantah of Vintels Sports Agency, Accra, Ghana

- First Respondent -

and

Fédération Internationale de Football Association, (FIFA), Zurich, Switzerland

Represented by Mr Miguel Liétard and Mr Saverio Paolo Spera of the FIFA Litigation Department, Switzerland

- Second Respondent -

I. PARTIES

1. Tout Puissant Mazembe (the "Appellant" or "TP Mazembe") is a professional football club based in Ghana and is a member of the Fédération Congolaise de Football Association which in turn is affiliated to the Fédération Internationale de Football Association.

2. Isaac Amoah (the "First Respondent" or the "Player") is a professional football player from Ghana.

3. The Fédération Internationale de Football Association (the "Second Respondent" or "FIFA") is an association incorporated under Swiss law with its registered office in Zurich, Switzerland. FIFA is the governing body for international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

4. Collectively, TP Mazembe, the Player and FIFA will be referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Background Facts

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced 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 Panel 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.

6. On 11 March 2019, TP Mazembe and the Player entered into an employment contract under which the Player was engaged to play football for TP Mazembe (the "Employment Contract"). The Employment Contract included, *inter alia*, the following terms:

   a) Its duration was from date of signature until 10 June 2024.

   b) Pursuant to clause 3.3, the Player was to be paid USD 5,000 per month, along with a signing fee of USD 25,000 and performance-related bonuses.

   c) Clause 5.5.10 (the "Compensation Clause") states as follows:

      "*In accordance with the provisions of art. 17 of the FIFA RSTP, the sum of USD 1,000,000 is due as compensation in case of violation and/or unilateral termination.*"

   d) Clause 5.5.11 states as follows:

      "*In the event that a dispute between the parties regarding the content of this contract and its obligations, the matter may be referred to the FIFA Status and Transfer Committee. In the event of an appeal, this dispute shall be settled in*

accordance with the Rules of the Sports Arbitration Tribunal (CAS) and the decision of the CAS shall be final and binding on the parties".

e) Clause 7 states as follows:

"*Changes to this agreement or any agreement created pursuant to this agreement require the written consent of all parties present. The modification refers to this agreement and/or the current contract and expressly states that it is an amendment to it.*"

7. On 10 September 2020, TP Mazembe and Nkana FC, a football club in Zambia, entered into a contract under which the Player was loaned to Nkana FC from 13 September 2020 until 30 June 2021 (the "Loan Contract").

8. TP Mazembe and the Player entered into an addendum to the Employment Contract, with TP Mazembe signing it on 11 September 2020 and the Player signing it on 12 September 2020. The addendum included the following provisions:

"*1. The clause relating to duration of contract is amended to five years from the date of this agreement, that is, 11th September 2020 to 10th September 2025, in lieu of the loan period of the football season 2020/21 to Nkana Football Club of Kitwe, Zambia. 2. The clause referred to above shall be automatically revised by an additional year for subsequent loan arrangements or extensions in order that the integrity of the duration of the contract is maintained. 3. The employee declares expressly and voluntarily that he renounces any claim to wages, subsidies of any kind and/or bonuses from Mazembe during the loan period.*"

9. On 13 September 2020, the Player and Nkana entered into an employment contract with a term from 13 September 2020 to 30 June 2021 (the "Nkana Employment Contract"), under which the Player was to be paid USD 1,600 per month.

10. On 3 February 2021, Nkana FC allegedly terminated the Nkana Employment Contract unilaterally without cause.

11. On 22 February 2021, the Player lodged a claim against Nkana FC with the FIFA Dispute Resolution Chamber (the "FIFA DRC") for breach of contract.

12. On 21 June 2021, the FIFA DRC decided in favour of the Player with respect to its claim against Nkana FC.

13. In July and August 2021, there was communication between TP Mazembe and the Player regarding the Player's return to TP Mazembe. Those communication and the intentions of TP Mazembe and the Player are in dispute.

B. Proceedings before the FIFA Dispute Resolution Chamber

14. On 25 October 2021, the Player filed a claim against TP Mazembe with the FIFA Dispute Resolution Chamber (the "FIFA DRC") with the following requests for relief:

"The Club is indebted to the Player in the amount of USD$ 35,000.00 (Thirty Five thousand United States Dollars) being the unpaid salary, owing and payable to the Player by the Club, plus interest from the date to be determined by the FIFA DRC;
The club have breached the employment without just a cause and is indebted to the player in the amount of USD$ 240,000.00 (Two hundred and forty thousand United States dollars).

The club be and is hereby ordered to pay the amounts set out in paragraph 25(1) and 25(2) above to the Player within thirty days of the order of the FIFA DRC and

Any or further compensation relief that the FIFA DRC deems appropriate".

15. The claim for USD 35,000 related to alleged unpaid salaries from April to October 2021 and the claim for USD 240,000 related to the residual value of the TP Mazembe Employment Contract.

16. On 9 December 2021, TP Mazembe filed its reply in which it rejected the Player's claims and made a counterclaim against the Player and his new club (if any) for breach of contract by reason of being absent without a valid justification from 16 August 2021 to 25 October 2021. TP Mazembe made the following requests for relief:

"*The payment by the player of USD 1,000,000 as compensation for breach of contract, in line with clause 5.5.11* [sic] *of the contract;*

That the player's new club is held joint and severally liable for the payment of the aforementioned amount;

The application of a sporting sanction on the player, for the unjustified breach of contract during the protected period."

17. In a rejoinder, the Player rejected TP Mazembe's counterclaim and amended his request for relief to USD 1,000,000 by reference to the Compensation Clause.

18. The FIFA DRC confirmed that, in line with Football Tribunal jurisprudence, the Player did not have the right for his employment with TP Mazembe to be automatically re-instated after the loan with Nkana ended early. Accordingly, the FIFA DRC refused to uphold any claim by the Player which was based on TP Mazembe and the Player having a valid contract during the period from 3 February 2021 (i.e. the date that Nkana terminated the Nkana Employment Contract unilaterally) and 30 June 2021 (i.e. the date on which the Nkana Employment Contract was due to expire).

19. However, the FIFA DRC determined as follows:

a) The Player was supposed to re-join TP Mazembe on 1 July 2021 but TP Mazembe's communication with the Player in July and August 2021 demonstrated a lack of interest in the Player returning to the club. Several messages from the Player to TP Mazembe's representatives went unanswered and it was only on 11 August 2021 that TP Mazembe demonstrated any interest in the Player returning when it sent the Player airline tickets. Even then TP Mazembe appeared indifferent to the Player

returning to the club, demonstrated by: (i) the unreasonably short time period between the flight tickets being issued and the flight departure which did not account for Covid-19 related pre-travel requirements and visa requirements; and (ii) TP Mazembe's failure to support the Player in obtaining a visa.

b) Accordingly, TP Mazembe breached the Employment Contract by failing to resume its duties as the employer following the expiry of the Loan Contract on 30 June 2021.

20. The FIFA DRC noted that: (i) the breach of contract had occurred during the "Protected Period" of the TP Mazembe Employment Contract; and (ii) accordingly, sporting sanctions under Article 17(4) of the FIFA Regulations on the Transfer and Registration of Players (the "FIFA RSTP") should apply.

21. On 5 May 2022, the FIFA DRC issued the following decision (the "Appealed Decision"):

"*1. The claim of the Claimant, Isaac Amoah, is partially accepted.*

2. The Respondent, TP Mazembe, has to pay to the Claimant USD 251,666 as compensation for breach of contract.

3. Any further claims of the Claimant are rejected.

4. The counterclaim of the Respondent is rejected.

5. Full payment (including all applicable interest) shall be made to the bank account indicated in the enclosed Bank Account Registration Form.

6. The Respondent shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision.

7. If full payment is not made within 45 days of notification of this decision, the present matter shall be submitted, upon request of the Claimant, to the FIFA Disciplinary Committee."

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 15 June 2022, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (2021 edition) (the "Code"), the Appellant filed a Statement of Appeal at the Court of Arbitration for Sport (the "CAS") in which it:

a) challenged the Appealed Decision;

b) requested that the case be submitted to a panel of three arbitrators;

c) nominated Mr Andrew de Lotbinière McDougall QC as an arbitrator;

d) requested a copy of the complete FIFA DRC case file for the Appealed Decision;

e) requested that CAS, as a provisional measure pending the final award, suspend the sanctions imposed on TP Mazembe by the FIFA DRC in the Appealed Decision (pursuant to Article R37 of the Code); and

f) requested a 30-day extension for submission of its Appeal Brief.

23. On 20 June 2022, the CAS Court Office:

a) acknowledged receipt of the Statement of Appeal;

b) invited the First Respondent and the Second Respondent (the "Respondents") to comment on the Appellant's extension request by 22 June 2022, pending which the deadline for the Appellant to submit the Appeal Brief was suspended;

c) invited the Respondents to file their positions on the Appellant's request for provisional measures within 10 days.

24. On 21 June 2021, the Player refused to consent to TP Mazembe's request for a 30-day extension to file its Appeal Brief.

25. On 22 June 2021, FIFA gave its consent to TP Mazembe's request for a 30-day extension to file its Appeal Brief.

26. On 23 June 2022, the CAS Court Office advised the Parties that, in the absence of consent from the Player, TP Mazembe's extension request would be forwarded to the Division President, or her Deputy, pursuant to Article 32(2) of the Code.

27. On 28 June 2022, the CAS Court Office advised the Parties that the Deputy Division President had granted TP Mazembe a 20-day extension to file its Appeal Brief and that the suspension on the submission deadline was lifted with immediate effect.

28. On 30 June 2022:

a) FIFA submitted its Answer to TP Mazembe's request for provisional measures, in which it objected to the request, and also nominated, jointly with the Player, Mr Lars Hilliger as an arbitrator for the case.

b) The Player submitted his Answer to TP Mazembe's request for provisional measures, in which he objected to the request.

29. On 5 July 2022, the CAS Court Office advised the Appellant that Mr Andrew de Lotbinière McDougall QC had declined his nomination as an arbitrator and requested the Appellant to nominate an alternative arbitrator within 10 days.

30. On 11 July 2022, the Appellant nominated Mr Efraim Barak as an arbitrator for the case.

31. On 13 July 2022, the Appellant submitted its Appeal Brief and the CAS Court Office invited the Respondents to submit their Answers within 20 days.

32. On 14 July 2022, FIFA requested that, pursuant to Article 55(3) of the Code, the deadline for submitting its Answer be suspended until the Appellant had paid its share of the advance of costs. On the same day, the CAS Court Office confirmed that the deadline had been suspended.

33. On 20 July 2022, the Player submitted his Answer.

34. On 21 July 2022, the suspension on the deadline for FIFA to submit its Answer was lifted.

35. On 4 August 2022, the Appellant's request for provisional measures was granted by the Deputy President of the CAS Appeals Arbitration Division.

36. On 9 August 2022, FIFA submitted its Answer and the CAS Court Office invited the Parties to confirm by 16 August 2022 whether they preferred for a hearing to be held or for the Panel to issue an award based solely on the Parties' written submissions.

37. On 10 August 2022, the Appellant requested a hearing, while the Player and FIFA advised that they did not require a hearing.

38. On 23 August, the CAS Court Office advised that the Panel for the case was constituted as follows:

President: Mr Patrick Stewart, Solicitor in Manchester, United Kingdom

Arbitrators: Mr Efraim Barak, Attorney-at-law in Tel Aviv, Israel
Mr Lars Hilliger, Attorney-at-law in Copenhagen, Denmark

39. On 8 September 2022, the CAS Court Office informed the Parties as follows:

a) The Panel had decided that, pursuant to Articles R44(2) and R57 of the Code, a hearing would be held by way of video-conference.

b) TP Mazembe was invited to confirm whether its request for production of the FIFA DRC file for the Appealed Decision still stood and, if so, to provide its reasons for the relevancy.

40. On 17 October 2022, TP Mazembe signed the Order of Procedure provided by the CAS Court Office.

41. On 25 October 2022, FIFA signed the Order of Procedure provided by the CAS Court Office.

42. On 26 October 2022, the Player signed the Order of Procedure provided by the CAS Court Office.

43. On 28 November 2022, a hearing was held by videoconference as provided for in Articles R44(2) and R57 of the Code. In addition to the Panel and Mr Fabien Cagneux, CAS Managing Counsel, the following persons attended the hearing:

For the Appellant:

- Mr Sven Demeulemeester - Counsel
- Ms Sheena Belmans - Counsel
- Mr Hadrien Flamant - Counsel

For the First Respondent:

- Mr Isaac Amoah – The First Respondent
- Mr Vincent Okantah – Counsel

For the Second Respondent:

- Mr Saverio Paolo Spera - Counsel
- Mr Alexander Jacobs - Counsel

44. At the opening of the hearing, the Parties confirmed that they had no objections to the constitution of the Arbitral Tribunal nor to the procedure adopted by the Panel so far. The Parties were given full opportunity to submit their arguments in opening and closing statements and to answer the questions posed by the Panel.

45. Before the hearing was concluded, the Parties confirmed that their right to be heard had been duly respected.

IV. SUBMISSIONS OF THE PARTIES

46. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in this Section IV of the award.

A. Submissions of the Appellant

47. The Appellant made the following requests for relief:

"*1. Declare this Appeal admissible and well-founded;*

2. In any case, annul the transfer ban imposed by FIFA on TP MAZEMBE;

3. Annul the Decision under Appeal rendered by the Dispute Resolution Chamber of the FIFA Football Tribunal in its entirety;

4. Consider that the Contract was terminated without just cause by the Player;

5. Order the Player to pay the sum of USD 192,499.90 as compensation, plus interest at 5% per annum from 26 October 2021;

6. Hold the Player's new club jointly and severally liable for payment under point 5, if applicable;

Or, in the alternative,

7. Subject to further mitigation in the event of new contract(s), limit the amount of the termination penalty to USD 25,000;

8. Order the Respondent to bear the costs of the present proceedings, including the reimbursement of the court fees of CHF 1,000;

9. To grant the Appellant a contribution established at its discretion to cover the costs and fees incurred as a result of the present proceedings."

48. The Appellant's submissions can be categorised as follows:

a) It was the Player who was in breach of the Employment Contract, not TP Mazembe. Accordingly, it was TP Mazembe which was entitled to terminate the Employment Contract for just cause, not the Player.

b) The Compensation Clause is the correct starting point for assessing the compensation due to TP Mazembe.

c) In the alternative, if TP Mazembe did breach the Employment Contract, the Player failed to validly terminate it for just cause.

d) In the alternative, if the Player did validly terminate the Employment Contract, the FIFA DRC's award was disproportionate as:

i. the compensation award was too high; and

ii. sporting sanctions should not have been imposed.

49. Each of the above will now be considered in further detail.

A. *The Player was in breach of contract, not TP Mazembe*

50. TP Mazembe submitted that it was the Player, not TP Mazembe, who breached the Employment Contract by being absent without just cause. As a consequence, TP Mazembe was entitled to terminate the Employment Contract with just cause pursuant to Article 14 of the FIFA RSTP.

51. TP Mazembe submitted that it had been in regular communication with the Player and provided evidence of WhatsApp exchanges which had taken place from 29 July 2021. It specifically addressed the following WhatsApp exchange between the Player and a Mr André Mtine of 7 July 2021, which the Player had cited in its claim:

Mr Mtine: "*Good evening! We're in good health, thanks. I trust that you are well too. What's on your mind with regards to your future. Perhaps this should be the starting point*".

Player: "*Thanks for the response; We like to join the team back to fight for my position. Thanks*".

Mr Mtine: "*Realistically, I do not see that happening. Contact Mr. Kitengie*".

52. TP Mazembe advised that Mr Mtine's role at the club is to manage player-loans. He is not authorised to speak on behalf of TP Mazembe regarding sporting matters. TP Mazembe was in fact interested in the Player's return and Mr Mtine was merely expressing his own personal view of the Player becoming a starting-player for TP Mazembe.

53. TP Mazembe argued that any misunderstanding as to its intentions with respect to the Player were corrected when it sent airline tickets to the Player on 11 August 2021. It did so to enable the Player to return from Accra (Ghana) to TP Mazembe's base in Lubumbashi for pre-season training which had commenced at the start of August.

54. The flight was scheduled for 15 August 2021, but the Player did not travel. TP Mazembe submitted that the Player provided a variety of reasons for this, none of which were valid. Specifically, the Player alleged as follows:

a) TP Mazembe had not given the Player sufficient notice to be in Accra for 15 August 2021. In response, TP Mazembe argued that four days' notice was sufficient to make a journey which should not have taken longer than a day.

b) The Player was unable to obtain a visa on time. In response, TP Mazembe argued that obtaining a visa was a straight forward process and that it had explained to the Player that he should attend "*the embassy*" to do so.

c) The Player was unable to secure the results of a Covid-19 PCR test in time to satisfy travel requirements. In response, TP Mazembe argued that such results could be "*obtained within hours*".

d) The Player was concerned that the flight tickets were invalid as he could not find any details of the flights online. In response, TP Mazembe refuted any suggestion that it may have forged the flight tickets.

55. TP Mazembe suspected that the real reasons for the Player not taking the scheduled flight were that: (i) he did not wish to return to TP Mazembe; and/or (ii) he did not have a valid passport (evidenced by the fact that the passport which the Player provided to the FIFA DRC in the context of the Appealed Decision had expired). In any event, TP Mazembe had no contractual obligation to arrange flights for the Player and it was the Player's responsibility to be in Lubumbashi in time for pre-season training

56. As TP Mazembe did not consider any of the reasons provided by the Player to constitute valid justification, TP Mazembe deemed the Player to be absent without leave from 16 August 2021 to 25 October 2021.

B. *The penalty clause is the correct starting point for assessing compensation due to TP Mazembe*

57. TP Mazembe made, *inter alia*, the following submissions:

a) In accordance with Article 17(1) of the FIFA RSTP, primacy should be given to any specific agreement between TP Mazembe and the Player with respect to compensation for breach of contract.

b) The Compensation Clause in the Employment Contract states as follows:

"*In accordance with the provisions of Article 17 of the FIFA Regulations on the Status and Transfer of Players, the sum of $ 1 million is due as compensation in case of violation and / or unilateral termination.*"

c) The penalty clause satisfies the requirements of Swiss law (and in particular Article 160 *et seq.*) to be valid and enforceable.

C. *Even if TP Mazembe was in breach, the Player did not validly terminate the Employment Contract*

58. In the alternative, TP Mazembe submitted that (if TP Mazembe had breached the Employment Contract):

a) There was no outstanding salary due to the Player at the date of termination of the Employment Contract by the Player and therefore Article 14bis of the FIFA RSTP is not relevant.

b) In any event, the Player failed to comply with the procedural steps for terminating a contract as set out in Article 14bis of the FIFA RSTP.

D.I. *Even if the Player terminated with just cause, the compensation award was excessive*

59. TP Mazembe submitted, *inter alia*, as follows:

a) Pursuant to Article 17(1) of the FIFA RSTP, if the parties have agreed a contractual remedy for breach of contract, then that shall primarily apply.

b) As already acknowledged by TP Mazembe, the Compensation Clause is valid under Swiss law. Nevertheless, pursuant to Article 163(3) of the Swiss Code of Obligations (which states that "*The court shall reduce penalties that it considers excessive*") the validity of a penalty clause does not preclude a court from deeming the resultant penalty to be excessive if it exceeds the "*the amount of admissible for a sense of justice and equity*". TP Mazembe cited case Swiss Federal Tribunal ("SFT") 133 III 43 as authority for this position.

c) Furthermore, the excessiveness must be assessed *ex post* and *in concreto*. In this regard, reference is made to the considerations developed by the SFT in 133 III 201, in which the court commented as follows:

"*A reduction of the penalty is justified when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain his entire claim, measured concretely at the moment that the contractual violation took place. To evaluate the excessive character of the contractual penalty, one must not decide in an abstract manner, but, on the contrary, take into consideration*

all the circumstances of the case at hand. In particular, the following elements must be taken into account, the nature and duration of the contract, the degree of fault and of the contractual violation, the economic situation of the parties, specifically the situation of the debtor. It is also important not to lose sight of possible dependencies resulting from the contract and the business experience of the parties."

d) Article 163(3) of the Swiss Code of Obligations does not provide criteria for determining whether a penalty is excessive, but the SFT has established criteria which have been adopted in CAS jurisprudence. For example, in CAS 2010/A/2317 and CAS 2011/A/2323, the panel commented as follows:

"*A balance of interests is required to decide whether a penalty is abusive or not in each case. For this purpose, the creditor's interest* [...], *the seriousness of the breach of the contract* [...] *and the debtor's fault (ibidem), along with financial situation (ibidem) of both parties, are determinant. The nature of the agreement* [...], *the debtor's professional background* [...] *and the aim of the penalty also have to be taken into consideration in the balance*".

e) The penalty set out in the Compensation Clause should be reduced on the following grounds:

i. USD 1,000,000 exceeds any damage suffered by the Player, even when taking into account the residual value of the Employment Contract, as he was not a starting player for TP Mazembe.

ii. CAS jurisprudence considers that "[...] *the severity of the violation should be taken into consideration.* [...] *If the violation of the primary obligation is objectively serious, the penalty fee will rarely be viewed as excessive*". See CAS 2015/A/4139. By implication, a non-material violation may result in the penalty fee being considered excessive.

iii. By lodging a groundless claim against the club, the Player has caused TP Mazembe serious damage.

f) The residual value of the Employment Contract is the correct starting point to assess the level of penalty. This should be calculated from 26 October 2021 to 10 September 2025 to take into account that TP Mazembe usually pays salary for 10 months of the year only. On this basis the penalty should be reduced to USD 192,499.90.

g) However, even that level of penalty is grossly excessive when assessed against the main criterion for analysing the reasonableness of a penalty. In CAS 2015/A/4139, the panel commented as follows:

"*The creditor's interest is the main criterion to be taken into consideration to evaluate the quantum of the penalty, as the latter is the expression of the creditor's will to strengthen the main obligation. The creditor's interest shall be widely construed. It is determined in the light of any legitimate inconvenience which the creditor would suffer in case of breach of the main obligation. The*

agreed penalty fee protects the creditor's interest: the greater the creditor's interest in the performance of the main obligation, the greater a heavy punishment is justified (function of preventive pressure of the penalty clause). When the penalty fee is related to a single breach, and therefore a single payment, the reasons which lead the creditor to insert a penalty clause in the contract is the main criterion to assess the creditor's interest."

h) TP Mazembe argued that the following factors should operate to reduce the Player's entitlement to damages from USD 192,499.90 to USD 25,000 (i.e. six months' salary): (i) damages of USD 192,499.90 would unjustly enrich the Player; (ii) the Player failed to return from holiday after his loan period without any justifiable reason, thereby demonstrating a lack of interest in the Employment Contract; (iii) the Player terminated the Employment Contract despite there being no salary arrears and did so without serving notice. This illustrates that the Player was impatient to leave the club; (iv) the excessiveness of the penalty is obvious when compared to the level of the Player's monthly salary (USD 5,000); and (ii) the Player contributed to the situation by failing to return to the club, even after having been sent airline tickets.

D.II. *Even if the Player terminated with just cause, sporting sanctions are not justified*

60. TP Mazembe submitted, *inter alia*, as follows:

a) A ban from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods shall cause it great harm.

b) When making the decision to impose sporting sanctions, the FIFA DRC took into account three prior FIFA DRC cases which were determined against TP Mazembe. However: (i) all three are subject to ongoing appeals before the CAS; (ii) in two, the respondents are facing ongoing criminal investigations regarding forgeries; and (iii) in the third, the respondent is facing an important procedural issue which increases the likelihood of TP Mazembe's appeal being successful.

c) Accordingly, TP Mazembe should not be considered a repeat offender and the transfer ban should be lifted.

B. Submissions of the First Respondent

61. The First Respondent made the following requests for relief:

"*Base on the foregoing, we respectfully request CAS to reject the appellant Request.*

Accept the decision of the FIFA DRC on 5 May 2022 No. FPSD-4098.

Declare that the employment contract was breached without just cause by the appellant.

Order the appellant to pay the sum of USD 1,000,000 as a compensation for breach of the contract stated in the employment contract or the appellant should pay the amount of USD 251,666 awarded to the player by the FIFA DRC as a compensation for the

breached of employment contract without just cause, plus interest at 5% per annum from 31 July 2021.

Order the appellant to pay 10% (ten percent) of the total compensation sum as legal and administrative charges to the respondent legal team.

Order the appellant to bear the cost of the present proceeding."

62. The Player's submissions can be categorised as follows:

a) Based on the facts, it was TP Mazembe who breached the Employment Contract, thereby entitling the Player to terminate with just cause.

b) The Compensation Clause is valid under Swiss law and compensation of USD 1,000,000 should not be considered excessive given the damage suffered by the Player.

63. Each of the above elements will now be considered in further detail.

A. *TP Mazembe breached the Employment Contract*

64. The Player argued that TP Mazembe showed no interest in maintaining its employment relationship with him and made, *inter alia*, the following submissions in this regard:

a) On 7 July 2021, the Player contacted Mr Andre Mtine to ask when he should return to Lubumbashi as TP Mazembe's season had finally ended (following a delay caused by the CV19 pandemic). When Mr Mtine replied, he asked the Player about his plans and the Player expressed his desire to re-join TP Mazembe and fight for a position in the team. Mr Mtine's responded "*Realistically, I do not see that happening. Contact Mr. Kitengie*". The Player sent Mr Kitengie (the team manager) a WhatsApp message that day but Mr Kitengie did not respond to the message after having read it.

b) On 29 July 2021, the Player sent Mr Kitengie another WhatsApp querying when he should return for pre-season training. Again, Mr Kitengie failed to respond.

c) On 6 August 2021, the Player contacted Mr Mtine to inform him that his attempts to engage Mr Kitengie in communications had been to no avail.

d) On 11 August 2021, Mr Eritee (a representative of TP Mazembe) contacted the Player to advise him that he would receive airline tickets that evening.

e) It was TP Mazembe's responsibility to ensure that the Player had a visa to enable him to live and work in the Democratic Republic of Congo pursuant to the Employment Contract. Accordingly, on 11 August 2021, the Player responded to Mr Eritee to advise him that he did not have a valid visa and that he required a letter of invitation from TP Mazembe so that he could apply for a visa in Ghana. Mr Eritee replied that he would call the player via WhatsApp.

f) On 12 August 2021, the Player contacted Mr Eritee again as he had not called the Player as promised. The Player suggested that, if TP Mazembe could not provide a letter of invitation, then the club could provide him with an electronic visa. Mr Eritee responded to advise that the Democratic Republic of Congo had ceased issuing electronic visas. Therefore, the Player should apply for a visa in Ghana. The Player reiterated the need for the club to send him a letter of invitation to facilitate that.

g) On 13 August 2021, the Player received flight reservations from Mr Eritee to fly from Accra (Ghana) to Lubumbashi (Democratic Republic of Congo) via Addis Ababa (Ethiopia). The Player responded within a few minutes to reiterate that he still did not have a valid visa and required a letter of invitation. On the same day, the Player also contacted Mr Mtine to update him as to the issues he was experiencing. Mr Mtine advised the Player to: (i) remind Mr Eritee the following day to provide the letter of invitation; and (ii) take a rapid Covid test. The player contacted Mr Eritee again but did not receive a response.

h) On 27 August 2021, the Player's counsel sent an official letter to TP Mazembe, asking the club to clarify the Player's position.

i) On 25 October 2021, the Player filed a claim against TP Mazembe with the FIFA DRC.

j) On 27 October 2021, Mr Mtine called the Player's counsel via WhatsApp to apologise about the Club's treatment of the Player and for ignoring the various messages from the Player.

k) On 5 November 2021, Mr Andre Mtine again called the Player's counsel to advise that TP Mazembe's president wished to meet with the Player in Lubumbashi to settle the dispute amicably. The Player rejected this request as he had already filed his complaint with the FIFA DRC.

l) On 4 February "*2021*" (it is assumed that the Player's submissions intended to refer to "2022"), Mr Andre Mtine again called the Player's counsel via WhatsApp offering 12 months' salary (USD 60,000 USD) to settle the dispute.

B. *The Player is entitled to USD 1,000,000 in damages*

65. The Player submitted, *inter alia*, that:

a) The Compensation Clause is a valid penalty clause under Swiss law and, pursuant to Article 17(1) of the FIFA RSTP, it should be the primary means of determining compensation to be awarded to the Player for TP Mazembe's breach of contract without cause.

b) TP Mazembe's contention that damages of USD 1,000,000 are excessive is baseless and contrary to the club's position in its claim against the Player.

c) The Player has been unemployed since July 2021 as a consequence of TP Mazembe's conduct and, in practice, no other club will employ the Player while TP Mazembe's appeal against the Appealed Decision is pending.

C. Submissions of the Second Respondent

66. The Second Respondent made the following requests for relief:

"*Based on the foregoing, FIFA respectfully requests the Panel:*

(a) to reject the reliefs on the merits sought by the Appellant and confirm the Appealed Decision in its entirety;

(b) to order the Appellant to bear the full costs of these arbitration proceedings;"

67. FIFA summarised the issues involved in this case as follows:

"[…] *the merits of the matter preliminarily require establishing whether the Player terminated the* [Employment] *Contract with the Appellant with just cause and, in the affirmative, determine the related financial and sporting consequences for the Appellant in accordance with Article 17 RSTP.*

[…] *the Player had just cause to prematurely terminate the* [Employment] *Contract with the Appellant in light of the behaviour the latter adopted after the Player's loan to Nkana expired.* […] *the Club demonstrated the clear will not to continue this employment relationship from the very moment in which the Player manifested his intention to re-join the team.*

As far as the amount of compensation awarded to the Player and the imposition of sporting sanctions by the [FIFA] *DRC are concerned* […] *considering the facts of the case and the significant disregard for the contractual obligations from the side of the Appellant – the Appealed Decision was correctly taken also in this respect.*"

68. FIFA's submissions can be categorised as follows:

a) TP Mazembe's objections to the Player's termination of the Employment Contract are flawed.

b) TP Mazembe is under-stating the level of compensation to which the Player is entitled for breach of contract.

c) The FIFA DRC was justified in imposing sporting sanctions.

69. Each of the above elements will now be considered in further detail.

A. *TP Mazembe's objections to the Player's contract termination are flawed*

70. FIFA made, *inter alia*, the following submissions:

a) FIFA contested TP Mazembe's claims that: (i) it was the Player who failed to take appropriate steps to return to TP Mazembe following the expiry of his loan to Nkana on 30 June 2021 (including, by not holding a valid passport); and (ii) it had demonstrated an interest in retaining the Player's services by providing him with flight tickets.

b) TP Mazembe's conduct did not indicate a desire for the Player to return. It was only on 13 August 2021, two weeks after the start of pre-season training, that TP Mazembe sent the Player flight reservations. FIFA noted that, while TP Mazembe claimed to have sent the flight reservations to the Player on 11 August 2021, that could not have been the case as the reservations indicated an issuance date of 13 August 2021. In providing the Player with flight tickets at such short notice, particularly in the context of ongoing Covid-testing, TP Mazembe's actions appeared to be an unsuccessful attempt to shield itself against possible legal action from the Player, rather than a genuine attempt to bring the Player back to the club.

c) TP Mazembe's arguments concerning the Player not having a valid passport are flawed. Firstly, the issue complained about by the Player was the lack of a valid visa, which (as stated in the Appealed Decision) is TP Mazembe's responsibility to provide to the Player. This is confirmed by CAS jurisprudence including CAS 2009/A/1838. Secondly, the Player submitted in evidence a copy of his passport which was issued on 20 January 2020 – i.e. it would have been valid in August 2021. If TP Mazembe is arguing that this passport is not valid, then the burden of proof sits with the club and it has failed to provide any evidence in this regard.

d) The circumstances of the case undoubtedly show that it was TP Mazembe which lacked interest in resuming the employment relationship with the Player, not the other way around. Hence, the premature termination of the contract has to be attributed to TP Mazembe's stance, including all the inevitable consequences in terms of paying compensation and suffering sporting sanctions.

e) For obvious reasons, TP Mazembe did not reference CAS jurisprudence which is relevant to the current case. For example, CAS 2017/A/5092 in which the Sole Arbitrator commented as follows:

"*The employer is obliged to undertake the necessary steps to provide his employees with visa and/or work permit. It is very natural and is a basic principle of any labour law that an employer must provide his employees with visa/work permit, if necessary. By not providing the employee with visa/work permit, not even after being reminded to do so, the employer in effect is forcing the employee to leave. If an employer does not undertake the necessary action to provide his employee with a visa/work permit and if this prevents him from entering the country in which he is employed and therefore to start work, this could be seen as an unjustified breach of contract by the employer*".

f) TP Mazembe's argument concerning the lack of notice provided by the Player in accordance with Article 14bis of the FIFA RSTP is also flawed. Article 14bis of the FIFA RSTP concerns termination of an employment contract for outstanding salaries, whereas this case involves termination with cause.

B. *Compensation for breach of contract*

71. FIFA made, *inter alia*, the following submissions:

a) TP Mazembe acknowledges that the Compensation Clause constitutes an excessive penalty.

b) On the one hand, TP Mazembe is seeking to argue that (when considering what damages it is entitled to) the correct starting point is the residual contract value. On the other hand, TP Mazembe is seeking to argue that the Player should only be awarded USD 25,000 should TP Mazembe be required to compensate the Player for breach of contract.

c) Notwithstanding FIFA's views on this matter, it is a "horizontal" dispute between the Player and FIFA, so FIFA is content to leaves the issue to the Panel to decide.

C. *The FIFA DRC was justified in imposing sporting sanctions*

72. FIFA made, *inter alia*, the following submissions:

a) Article 17 of the FIFA RSTP provides for two possible consequences of a breach of contract, namely the payment of compensation to the damaged club and/or the imposition of sporting sanctions. These measures are not inter-dependent and may be imposed separately.

b) Article 17(4) of the FIFA RSTP states as follows:

"*sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period.* [...] *The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods.*

c) TP Mazembe's breach of the Employment Contract took place during the protected period (i.e. the first two or three years of the contract, depending on the age of the player), meaning that the FIFA DRC had no discretion in determining the level of sanction as Article 17(4) does not provide a range of alternatives. As such, sporting sanctions cannot be reduced on grounds of proportionality. As confirmed by the CAS on several occasions, sporting sanctions either apply or they do not. See, for example, CAS 2017/A/5011, CAS 2014/A/3765, CAS 2011/A/2656, CAS 2011/A/2657 and CAS 2011/A/2666.

d) The FIFA RSTP provides for sporting sanctions that are sufficiently strong to serve a deterrent effect. Pursuant to CAS case law: (i) "*whenever the wording of a provision is clear, one needs clear and strong arguments to deviate from it*" (see CAS 2007/A/1359 and CAS 2009/A/1880, citing CAS 2009/A/1568 and XAS 2007/A/1429 and 1442); and (ii) sanctions imposed by FIFA can only be reviewed by the CAS if these are *"evidently and grossly disproportionate to the offence."* See *inter alia* CAS 2014/A/3754, CAS 2018/A/5588 and CAS 2009/A/1844.

e) The burden is on TP Mazembe to make a compelling case warranting the non-application of Article 17(4) of the FIFA RSTP. However, when considering the

facts of the case, FIFA can only conclude that the Player terminated the Employment Contract "*due to a blatant disrespect for the contractual obligations of his counterparty*"

f) With respect to TP Mazembe's argument that it should not be sanctioned as it has not been shown to be a "*repeat offender*", the imposition of sporting sanctions is determined on a case-by-case basis considering the circumstances of each matter brought before the FIFA DRC. "*As such, the fact that a club is a repeated offender is only one of the circumstances to take into account when assessing a specific case, however by no means does it entail that only repeated offender clubs can be sanctioned as per Article 17(4) RSTP.*" This was confirmed by the panel in CAS 2016/A/4550 which commented as follows:

"*The Panel agrees that 'repeated offenders' shall be treated with severity and be systematically sanctioned according to Article 17 par. 3 or 17 par. 4 RSTP. However, FIFA's position in the above-mentioned case cannot be interpreted that players or clubs that are not to be considered as 'repeated offenders' shall automatically be exempted of any sanction. On the contrary, the Panel considers that each case shall be analysed individually, according to the specific circumstances of the case, and that the burden lies on the offender to demonstrate that it does not deserve any sanction* [...]."

g) Furthermore, it is irrelevant whether any of the previous decisions involving TP Mazembe are currently pending before the CAS. The FIFA DRC simply referred to them to demonstrate a pattern worthy of consideration when imposing sanctions. In any event, this would only have been one factor taken into account by the FIFA DRC when deciding to impose sanctions. Indeed, the FIFA DRC could legitimately have imposed sanctions based on the facts of this case alone and the utter disrespect shown by TP Mazembe to its contractual obligations.

V. JURISDICTION

73. Article R47 of the Code provides as follows:

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

74. Article 58 (1) of the FIFA Statues (May 2021 Edition) provides as follows:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question."

75. The Parties do not dispute the jurisdiction of CAS and confirmed it by signing the Order of Procedure.

76. It follows that the CAS has jurisdiction to decide the present dispute.

VI. ADMISSIBILITY

77. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties."

78. Article 58 (1) of the FIFA Statues requires appeals to be lodged within 21 days of receipt of the decision in question.

79. The FIFA DRC rendered the Appealed Decision on 5 May 2022 and notified its grounds to the parties on 31 May 2022. The last day of the 21-day period by which the Appellant was required to have filed the Statement of Appeal was therefore 21 June 2022. The Appellant submitted its appeal on 14 June 2022 and it was therefore submitted in a timely manner.

80. Accordingly, the Appellant's appeal to CAS is admissible.

VII. APPLICABLE LAW

81. Article R58 of the Code provides as follows:

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

82. FIFA is the body which issued the Appealed Decision and it is domiciled in Switzerland. Furthermore Article 56(2) of the FIFA Statutes (May 2021 Edition) provides 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."

83. Accordingly, the Panel is satisfied that the various regulations of FIFA (and specifically the FIFA RSTP) shall apply and that Swiss law shall apply additionally to fill in any gaps or lacuna when appropriate.

VIII. PRELIMINARY ISSUE

84. The First Respondent's requests for relief included the following:

"*Order the appellant to pay the sum of USD 1,000,000 as a compensation for breach of the contract stated in the employment contract or the appellant should pay the amount of USD 251,666 awarded to the player by the FIFA DRC as a compensation for the breached of employment contract without just cause, plus interest at 5% per annum from 31 July 2021*" (emphasis added).

85. The Panel considers the emphasised element of the request to constitute a counterclaim as, in the Appealed Decision, the FIFA DRC awarded the First Respondent compensation of USD 251,666. Pursuant to established CAS jurisprudence (see, D. Mavromati / M. Reeb, "the Code of the Court of Arbitration for Sport", Volters Kluwer, 2015, pg. 488. See also for example, CAS 2020/A/7227), counterclaims are not permitted within an appeal arbitration procedure. Accordingly, the Panel considers this element of the First Respondent's request to be inadmissible.

IX. MERITS

86. According to Article R57 (1) of the Code, the Panel has "*full power to review the facts and the law*". As repeatedly stated in the CAS jurisprudence (e.g. CAS 2007/A/1394), by reference to this provision the CAS appeals arbitration procedure entails a *de novo* review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function of the Panel to make an independent determination as to merits.

87. In light of the facts and the circumstances of the case, as well as considering the Appellant's contentions in support of its claims, the Panel considers that the main issues to be resolved are the following:

a) Which FIFA regulations are applicable to this case?

b) Was the Player entitled to terminate the Employment Contract with just cause?

c) If the answer to c) is in the negative, was TP Mazembe entitled to terminate the Employment Contract with just cause?

d) What level of compensation should be awarded to the wronged party?

e) Should sporting sanctions be applied?

88. Before addressing the main issues, the Panel feels compelled to express its surprise that neither TP Mazembe nor the Player offered any witness evidence at the hearing. Given that the facts surrounding the relationship between TP Mazembe and the Player are material to determining this case, the Panel would have found witness evidence of great assistance. Furthermore, the Appellant did not find it necessary to invite any official of the Club to attend the hearing as a Party to provide oral evidence. The Player did attend part of the hearing and agreed, during the hearing, to provide oral evidence, but unfortunately this was not possible due to poor internet connectivity.

A. Which FIFA regulations are applicable?

89. The FIFA RSTP (August 2021 Edition) are applicable to this dispute and, in particular, the following articles:

> "*14 Terminating a contract with just cause*
>
> *1. A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.*
>
> *2. Any abusive conduct of a party aiming at forcing the counterparty to terminate or change the terms of the contract shall entitle the counterparty (a player or a club) to terminate the contract with just cause.*
>
> [...]
>
> *17. Consequences of terminating a contract with just cause*
>
> *1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.*
>
> *Bearing in mind the aforementioned principles, compensation due to a player shall be calculated as follows:*
>
> *i. in case the player did not sign any new contract following the termination of his previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated;*
>
> *[...]*
>
> *4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. The club shall be able to register new players, either nationally or internationally, only as of the next registration period following the complete serving of the relevant sporting sanction. In particular, it may not make use of*

the exception and the provisional measures stipulated in article 6 paragraph 1 of these regulations in order to register players at an earlier stage."

90. TP Mazembe referred to Article 14bis of the FIFA RSTP when alleging that the Player failed to comply with procedural requirements when terminating the Employment Contract. As the Player did not seek to terminate the Employment Contract on the grounds of outstanding salary, the Panel concurs with FIFA's position that Article 14bis of the FIFA RSTP is not applicable to these proceedings.

B. Was the Player entitled to terminate the Employment Contract with just cause?

91. The FIFA RSTP does not define "just cause". However, the Commentary on the Regulations on the Status and Transfer of Player (the "RSTP Commentary"), explains that, pursuant to CAS jurisprudence, the following principles should be applied when considering whether a party is entitled to terminate a contract for just cause:

"- *Only a sufficiently serious breach of contractual obligations by one party to the contract qualifies as just cause for the other party to terminate the contract.*

- *In principle, the breach is considered sufficiently serious when there are objective circumstances that would render it unreasonable to expect the employment relationship between the parties to continue, such as a serious breach of trust*

- *The termination of a contract should always be an action of last resort (an "ultima ratio" action).*"

92. The Panel also notes the following guidance from the RSTP Commentary:

"*Players who decide to terminate their contracts in the absence of a valid visa or work permit are also frequently involved in disputes. As per the established jurisprudence, it is the club's responsibility to obtain these documents (on time). As a result, a player will be considered to have a just cause to terminate their contract if the required permits are not available in good time. However, a player is expected to cooperate in completing the processes associated with obtaining these documents. Moreover, considering the principle that terminating a contract should be a last resort, a warning should be sent to the club ahead of any move to put an end to the contractual relationship.*"

93. The Panel makes the following observations based on the Parties' submissions:

a) The Player repeatedly attempted to engage TP Mazembe in discussions around his return to the club following the intended expiry date of the Loan Contract on 30 June 2021. The first such attempt was made by the Player as early as 7 July 2021 when he contacted Mr Mtine, whose response to the Player was far from encouraging or informative. TP Mazembe submitted that Mr Mtine was purely expressing a personal opinion as to the Player's future prospects at the club and that he was not authorised to speak on behalf of TP Mazembe with respect to sporting matters. However, TP Mazembe did not produce any evidence in support of this and the Player appeared to view Mr Mitne as having authority to deal with his situation. For example, in attempting to contact Mr Kitengie, the Player was following Mr Mtine's instructions.

b) Until 11 August 2021, TP Mazembe's responses to the Player's communications suggested there was no desire on the club's part for him to return. Indeed, the team manager, Mr Kitengie, did not even respond to the Player's messages, despite the Player having been told by Mr Mitne to contact him.

c) On 11 August 2021, approximately nine days after pre-season training had commenced, TP Mazembe appeared to engage with the Player in a more meaningful manner when Mr Eritee from the club advised him that he would be sent flight tickets to return. On the same day, the Player reminded TP Mazembe of his need for a visa in order to re-commence living and working in the Democratic Republic of Congo. TP Mazembe did not provide any evidence of it attempting to secure a visa for the Player or of providing the Player with meaningful support so that he could do so himself. At the hearing, counsel for TP Mazembe submitted that it is straight forward to obtain a visa online and that the Player should have been aware of this. However, TP Mazembe did not produce any evidence on either of these points.

d) Although TP Mazembe sent the Player airline reservations, these were only provided on 13 August 2021 for a flight departing on 15 August 2021. TP Mazembe argued that they were under no contractual obligation to provide the Player with flight tickets and that their willingness to do so demonstrated their desire for the Player to return to the club. However, the following are inconsistent with this: (i) the fact that TP Mazembe's efforts to repatriate the Player came almost two weeks into the club's pre-season training; and (ii) TP Mazembe's indifference towards the Player's visa situation.

e) Following the events of 11 to 15 August 2021, there appears to have been no further contact between TP Mazembe and the Player until the Player's advisor contacted TP Mazembe on 27 August 2021 asking for clarity on the Player's position with the club.

f) Notably, TP Mazembe made no effort to contact the Player again until 27 October 2021, two days after the Player filed his claim with the FIFA DRC.

94. To recap the RSTP Commentary:

"[…] *it is the club's responsibility to obtain* [a valid *visa or work permit] (on time). As a result, a player will be considered to have a just cause to terminate their contract if the required permits are not available in good time. However, a player is expected to cooperate in completing the processes associated with obtaining these documents. Moreover, considering the principle that terminating a contract should be a last resort, a warning should be sent to the club ahead of any move to put an end to the contractual relationship.*"

95. In the view of the Panel, the Player's situation falls squarely within the parameters for just cause termination as described in the RSTP Commentary, except that the Player did not send TP Mazembe a warning prior to filing the FIFA DRC claim to end the Employment Contract with just cause. The Panel makes the following observations with respect to the absence of prior warning on the part of the Player:

a) In the context of Article 14bis, the RSTP Commentary states as follows:

"*With respect to the default notice, the jurisprudence prior to the introduction of article 14bis states that notification must have been issued for a player to have just cause. However, under certain specific circumstances, the absence of a default notice has not been considered sufficient grounds for preventing a player from invoking just cause when terminating their contract. In other words, the duty to issue a reminder or a warning (default notice) is not absolute. There are circumstances in which reminders and notifications are not strictly necessary, for instance where it is clear that the other side does not intend to comply with its contractual obligations.*"

b) By analogy, the Panel considers that there may be certain circumstances in which the absence of prior warning from a player should not preclude them from terminating with just cause where the club has failed to arrange a visa.

c) When taking into account all of the circumstances of the current case, the Panel does not consider this omission by the Player to invalidate the just cause termination. In particular, the Panel notes the following:

i. While the Player did not warn TP Mazembe of his intention to terminate the Employment Contract, in all other respects he adopted a proactive and diligent approach in seeking to: (1) establish his position with TP Mazembe; (2) make the club aware of his need for a visa; and (3) re-instigate communication with TP Mazembe after the abortive flight of 15 August 2021. The majority of his communications appear to have been met with either silence or procrastination.

ii. By refusing to engage with the Player in a meaningful or constructive way, TP Mazembe left the Player with little alternative but to terminate the Employment Contract. In other words, termination was the *ultimo ratio*.

iii. The Player submitted that, even after the Player filed his claim with the FIFA DRC on 25 October 2021, it was only on 4 February 2022 that TP Mazembe made a concrete settlement offer of USD 60,000 (the equivalent of 12 months' salary). TP Mazembe did not rebut this submission. This suggests that, even if the Player had warned TP Mazembe of his intention to terminate the Employment Contract, it would unlikely have resulted in a sudden change of conduct by TP Mazembe.

96. Accordingly, the Panel is satisfied that the Player terminated the Employment Contract with just cause at the point at which he filed his claim with the FIFA DRC (i.e. 25 October 2021).

C. Was TP Mazembe entitled to terminate the Employment Contract with just cause?

97. As the Panel has found issue C to be in the affirmative, there is no need for the Panel to consider issue D.

D. What level of compensation should be awarded to the wronged party?

98. The Panel is able to disregard the Compensation Clause because the Player did not appeal against the decision of the FIFA DRC to award compensation based on the residual value of the Employment Contract.

99. Accordingly, in considering the level of compensation the correct starting point is the residual value of the Employment Contract. The FIFA DRC calculated that to be USD 251,666 and did so as follows:

a) It calculated the residual period of the Employment Contract to be 50 months and 10 days (i.e. from 1 July 2021 to 10 September 2025).

b) It multiplied the monthly salary of USD 5,000 by 50 months and 10 days.

c) It did not make any deductions as the Player continued to be unemployed so had been unable to mitigate his loss.

100. TP Mazembe argued that the FIFA DRC miscalculated the residual value of the Employment Contract as: (i) clause 3.1 of the Employment Contract stipulates that TP Mazembe will pay a monthly salary for the duration of "*the football season*"; and (ii) the football season runs for 10 months out of 12. Accordingly, the residual value of the contract should be USD 192,499.90 covering the period from 26 October 2021 to 10 September 2025.

101. The Panel acknowledges that clause 3.1 of the Employment Contract does indeed provided for the Player to be paid "*a monthly salary for the duration of the football season equivalent to Five Thousand US Dollars US ($ 5,000)*". However:

a) The burden of proof in establishing the number of months in the football season in the Democratic of Congo sits with TP Mazembe and it failed to provide any evidence in this regard.

b) TP Mazembe's submissions do not explain why 26 October 2021 was the start of the football season.

102. The Panel accepts that the majority of football-playing countries have a period of at least one month during which professional football players are entitled to a vacation, with no duties to attend training or matches. Accordingly:

a) In the absence of any evidence on this point, for the purpose of the Employment Contract, the Panel shall deem the football season to run for 11 months out of 12.

b) The residual period of the Employment Contract is the period from 1 July 2021 to 10 September 2025, which is 46 months and 10 days.

c) The residual value of the Employment Contract is equal to USD 231,666 being 46 months times USD 5,000 plus a pro rata amount of USD 1,666 for the 10 days in September 2025.

103. The Panel notes, but rejects, TP Mazembe's argument that the Player should be awarded the lower amount of USD 25,000. TP Mazembe's position is based on a combination of the following:

a) The Player's contributory conduct – the Panel does not consider the evidence to supports this.

b) The absence of salary arrears and notice – the Panel queries whether TP Mazembe is again conflating Articles 14 and 14bis of the FIFA RSTP.

c) The excessiveness of the penalty – The Panel considers the residual value methodology, as applied by both the FIFA DRC in the Appealed Decision and the Panel in this case, to be consistent with Article 17 of the FIFA RSTP.

E. Should sporting sanctions be applied?

104. The starting position when considering the issue of sporting sanctions is Article 17(4) of the FIFA RSTP which states as follows:

"*sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period.* [...] *The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods.*"

105. TP Mazembe's breach of the Employment Contract took place during the protected period (i.e. the first two of the Employment Contract) meaning that, *prima facie*, the FIFA DRC was obliged to impose sporting sanctions. That said, in practice, it is clear from established CAS jurisprudence that the imposition of sporting sanctions in such circumstances is not actually mandatory despite the wording of the provisions. See CAS 2014/A/3754. However: (i) "*whenever the wording of a provision is clear, one needs clear and strong arguments to deviate from it*" (see CAS 2007/A/1359 and CAS 2009/A/1880, citing CAS 2009/A/1568 and CAS 2007/A/1429 and 1442); and (ii) sanctions imposed by FIFA can only be reviewed by the CAS if these are "*evidently and grossly disproportionate to the offence*" (see CAS 2014/A/3754, CAS 2018/A/5588 and CAS 2009/A/1844). If there is no basis for a panel to dis-apply Article 17(4) of the FIFA RSTP, then the Panel has no discretion to change level of the sanction. It must be that stipulated in Article 17(4) of the FIFA RSTP. See CAS 2017/A/5011, CAS 2014/A/3765, CAS 2011/A/2656, CAS 2011/A/2657 and CAS 2011/A/2666.

106. The onus is on TP Mazembe to make a compelling case warranting the non-application of Article 17(4) of the FIFA RSTP. TP Mazembe essentially made two arguments in this regard:

a) A two-window registration ban shall cause it great harm – While TP Mazembe did not provide any detail as to the nature of that harm, the Panel acknowledges that such a sanction will inevitably create significant disadvantage for TP Mazembe. However, a sanction is required to serve as a deterrent against future breaches and it would not achieve this if it did not cause the perpetrator a degree of jeopardy. In the absence of any specific evidence from TP Mazembe, the

Panel is not satisfied that the sanction exceeds what is reasonably required to deter further breaches of Article 17(4) by TP Mazembe.

b) The FIFA DCR wrongly took into account three prior breaches by TP Mazembe of Article 17(4) of the FIFA RSTP, as those alleged breaches are still subject to appeal with the CAS which TP Mazembe expects to be successful – Even if TP Mazembe is successful with all three appeals, the Panel is still satisfied that TP Mazembe has not put forward any clear and strong argument for the non-application of Article 17(4) of the FIFA RSTP.

107. Accordingly, the Panel sees no compelling reason to reverse the decision of the FIFA DRC to impose sporting sanctions.

X. COSTS

108. Pursuant to Article R64.4 of the Code, the CAS Court Office shall, upon conclusion of the proceedings, determine the final amount of the costs of this arbitration, which shall include the CAS Court Office fee, the costs and fees of the arbitrator, computed in accordance with the CAS fee scale, the contribution towards the costs and expenses of the CAS, and the costs of witnesses, experts and interpreters, if any. Article R64.4 of the Code provides as follows:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:
- *the CAS Court Office fee,*
- *the administrative costs of the CAS calculated in accordance with the CAS scale,*
- *the costs and fees of the arbitrators,*
- *the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*
- *a contribution towards the expenses of the CAS, and*
- *the costs of witnesses, experts and interpreters.*

The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs."

109. In addition to the payment of the arbitration costs, the award shall also determine to the prevailing party or parties a contribution towards its legal fees and other expenses incurred in connection with the proceedings. Article R64.5 of the Code provides as follows:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties".

110. In exercising its discretion with regards to the costs and contribution, the Panel decides as follows:

a) The Panel takes into consideration: (i) the outcome of these proceedings (in which TP Mazembe's appeal was rejected with the exception that the Panel reduced the level of compensation payable by TP Mazembe by approximately 8%); and (ii) the conduct of the Parties. Accordingly, the Panel finds it appropriate and equitable to order that the total costs of these proceedings shall be paid by TP Mazembe. The costs will be determined by the CAS and notified to the Parties in a separate communication.

b) Pursuant to Article R64.5 of the Code, and in consideration of the outcome of the proceedings, the Panel finds that in view of the wide discretion conferred upon it, the Appellant shall pay a contribution to the expenses of the First Respondent incurred in the present proceedings in the amount of CHF 5,000 (five thousand Swiss Francs). Since FIFA was represented by its in-house Counsel, the Panel decides that FIFA shall bear its own costs and legal expenses.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Tout Puissant Mazembe against the decision issued on 5 May 2022 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is partially upheld.

2. The decision issued on 5 May 2022 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed, except that paragraph 2 of that decision shall be replaced by the following:

   "*The Respondent, TP Mazembe, has to pay the Claimant* [Mr Isaac Amoah] *USD 231,666 as compensation for breach of contract.*"

3. The counterclaim filed by Mr Isaac Amoah on 21 July 2022 is dismissed.

4. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be paid by Tout Puissant Mazembe in their entirety.

5. Tout Puissant Mazembe is ordered to pay to Mr Isaac Amoah a total amount of CHF 5,000 (five thousand Swiss Francs) as contribution towards the expenses incurred in connection with these arbitration proceedings. The Fédération Internationale de Football Association shall bear its own costs and expenses incurred in connection with these arbitration proceedings.

6. All other motions or prayers for relief are dismissed.

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

THE COURT OF ARBITRATION FOR SPORT

Mr Patrick Stewart
President of the Panel

Mr Efraim Barak
Arbitrator

Mr Lars Hilliger
Arbitrator