



**Arbitration CAS 2015/A/4124 Neftci Professional Football Klub v. Emile Lokonda Mpenza, award of 10 December 2015**

Panel: Mr Lars Hilliger (Denmark), President; Mr Manfred Nan (The Netherlands); Mr Mark Hovell (United Kingdom)

*Football*

*Termination of a contract of employment by the club without just cause*

*Unauthorised absence of the player*

*Validity of a contractual clause providing for a maximal amount of compensation for damages payable to the player*

1. **If a club did not inform a player that his absence from the club was unauthorised and that it could cause problems for the player, and it did not expressly ask the player to come to the club by a specific day, the player’s failure to show up at the club on that specific day does not constitute such a breach of contract to allow the club to terminate the contract unilaterally.**
  
2. **On the basis of article 17 of the FIFA Regulations for the Status and Transfer of Players, a player is entitled to receive from the club compensation for breach of contract in addition to the outstanding remuneration. A clause providing that a compensation payable to the player for termination of the contract by the club can never exceed “the sum of two months” is to the benefit of the club only, i.e. it is not reciprocal as it does not grant similar rights to the player. Such a clause must not be taken into consideration in the determination of the amount of compensation.**

**1. THE PARTIES**

- 1.1 Neftci Professional Football Klub (“the Appellant” or “the Club”) is an Azeri football club affiliated with the Azeri Football Federation, which in turn is affiliated with FIFA.
- 1.2 Mr Emile Lokonda Mpenza (“the Respondent” or “the Player”) is a former professional football player of Belgian nationality.

**2. FACTUAL BACKGROUND**

- 2.1 The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the decision rendered by the FIFA Dispute Resolution Chamber (the “FIFA DRC”) on 21 January 2015 (the “Decision”), the written and oral submissions of the

Parties and the exhibits filed. Additional facts may be set out, where relevant, in the legal considerations of the present Award.

- 2.2 On 5 August 2010, the Club and the Swiss football club Olympique des Alpes SA agreed on the transfer of the Player to the Club for a fixed amount of EUR 550,000.
- 2.3 On the same date, the Player and the Club signed an employment contract (“the Contract”), valid for a period of three football seasons, from 1 August 2010 until 30 June 2013.
- 2.4 The Contract stated, *inter alia*, as follows:

*“3.1 ... In case if player’s physiological, physical and functional condition will not suit coach and club will not be satisfied of his playing the Contract may be terminated in terms of giving compensation with the sum of two months salary of Player.*

....

*4.2 This contract signed for three years, From 01 August 2010 till 30 June 2013.*

*Total amount of the contract is 1 6000 000 USD (one million six hundred USD) (1 500 000 USD (one million five hundred USD) for the football player (100 000 USD (one hundred thousand USD) for the manager)).*

*150 000 USD (one hundred fifty thousand USD) from the total amount of the contract will be paid immediately after signing.*

*4.2.1 From 01 August 2010 – 30 June 2011 the amount of 400 000 USD (four hundred thousand USD) will be paid in 11 month, 36 363 USD (thirty six thousand three hundred sixty three USD) per month.*

*4.2.2 From 01 July 2011 – 30 June 2012 the amount of 450 000 USD (four hundred fifty thousand USD) will be paid in 12 month, 37 500 USD (thirty seven thousand five hundred USD) per month.*

*4.2.3 From 01 July 2012 – 30 June 2013 the amount 500 000 USD (five hundred thousand USD) will be paid in 12 month, 41 666 USD (forty one thousand six hundred sixty six USD) per month.*

*4.3 NEFTCHI will further provide the player following terms during his work in Neftchi:*

- the apartment with.*
- air tickets to home two times in a season for player and his family*
- A car with the driver.*

*4.4 After signing contract according to above mentioned condition to the manager of the player will be paid 100 000 USD (hundred thousand USD).*

....

*6.2 This contract may be cancelled before the expiry date on the Player’s initiative only in the following circumstances:*

- If NEFTCHI has breached any obligation stipulated by this Contract.*

6.3 Should the Player unreasonably cancel the Contract before the expiry date, NEFTCHI will not be responsible for any payment concerning the time after the termination and apply to FIFA for punishment of Player and declare penalty for the Player.

6.4 NEFTCHI may annul [sic] the contract in the following circumstances:

- is found to appear in state of alcoholic, narcotic, or other intoxication
- If Player shall be disqualified for a long time (more than 3 months) due to his own fault;
- If Player shall be convicted due to Court decision;
- failed seriously to comply with the conditions of Contract and other normative documents of Azerbaijan Republic.

....

10.1 The Parties are obliged to settle by negotiations all the disputes and disagreements which may arise during the performance of their duties under this Contract. The Parties will do the settlement of their conflicts without applying to court. Conflicts are not solve by negotiations will regulated with corresponding laws of the AFFA, PFL, FIFA and the Azerbaijan Republic”.

- 2.5 The Player joined his new team in August 2010 and started playing regularly from the beginning of the 2010/2011 season, participating in 23 matches and scoring six goals.
- 2.6 However, during the beginning of the 2011/2012 season, the Player only made eight partial appearances without scoring any goals for the Club.
- 2.7 On 22 December 2011, the Player left for Belgium for his holidays, and on 10 January 2012, the Player, along with the rest of the team, joined the mid-season training camp in Antalya, Turkey, scheduled to take place until 4 February 2012.
- 2.8 On 18 January 2012, the Player left the training camp and went to Istanbul for meetings regarding a possible transfer. The Player never returned to the training camp or to the Club again.
- 2.9 The following day, on 19 January 2012, the Club issued a press release announcing that the Player had left the training camp in order to attend negotiations with several clubs for a possible transfer during the present transfer window.
- 2.10 On 23 January 2012, the Club issued an authorisation as follows:

“1. Neftchi PFC gives authority, from dates 23.01.2012-27.01.2012, to Europe Sports IZC Management for all negotiations (in the base of options 2 and 3) about the transfer of [the football player] Lokonda Mpenza, in the football clubs China, Belgium and Qatar.

2. 400 000 Euro from the transfer fee will be paid for Neftchi PFC.

3. If the money for transfer will be more, the amount will be divided in follow conditions:

- 50% Neftchi PFC
- 50% Europe Sports IZC Management”.

2.11 On 2 February 2012, a meeting was arranged in Istanbul regarding the transfer situation of the Player.

2.12 On 7 February 2012, the Club issued a new authorisation to the Belgian players' agent, Mr Geoffrey Englebert, as follows:

*"Neftchi PFC gives permission to Englebert Geoffrey, till date 15.02.2012, for negotiations about the transfer of the football player Lokonda Mpenza. Transfer fee for PFC Neftchi, for the football player Lokonda Mpenza is net 200 000 (two hundred thousand) Euro".*

The Player left Istanbul for Belgium at the same time.

2.13 On 11 February 2012, the Club informed FIFA in writing that the Player had left the Club without the permission of the Club and had not returned.

2.14 By email of 12 February 2012, Mr Geoffrey Englebert requested the Club to allow the Player to go to the USA in order to negotiate a possible transfer. Such authorisation was not granted.

2.15 On 15 February 2012, the first match of the second round of the 2011/2012 season was played without the Player being a part of the Club's team.

2.16 On 16 February 2012, the Club issued a new authorisation as follows:

*"1. Neftchi PFC gives authority, from dates 15 February 2012 till 18 February 2012, to Europe Sports IZC Management for primary negotiations (in the base of options 2 and 3) about the transfer of football the player Lokonda Mpenza, in the club Colorado Rapids in USA.*

*2. 200 000 (Two hundred thousands) Euro net from transfer fee will be paid for Neftchi PFC.*

*3. If the money for transfer will be more, the amount will be divided in follow conditions:*

*- 50% Neftchi PFC*

*- 50% Europe Sports IZC Management.*

*The result of the negotiations, from the Colorado Rapids USA must be sent to the PFC Neftchi in official agreement letter".*

2.17 By letter of 17 February 2012, the Club wrote to Mr Nacar from Europe Sports IZC Management as follows:

*"We gave you a document with the wish of our player Emil Mpenza to hold primary negotiations with the club Colorado Rapids USA. As you informed us, you were going to send us an official invitation letter from the club Colorado Rapids USA in a short time, exactly in 3 hours, But we haven't received any documents from you yet. We tried to contact you during today, but you didn't answer our calls. We ask you to give us information about this. We kindly inform you that the document given to you expires tomorrow on 18 February 2012".*

2.18 On the same date, the Club informed the Player directly that no offer had been received from other clubs and that the Player had been absent from the Club without a reasonable explanation. The Parties agreed that during the period after 18 January 2012, the Club was in regular phone contact with the Player to receive news about a possible future transfer.

2.19 By letter of 20 February 2012, the Club informed the Player as follows: *“We are urgently inviting Eka Basunga Loconda Emil and your agent to Baku”.*

2.20 On the same date, a new authorisation was issued as follows:

*“1. Neftchi PFC gives authority, from dates 20 February 2012 till 25 February 2012, to Europe Sports IZC Management for primary negotiations (in the base of options 2 and 3) about the transfer of football the player Lokonda Mpenza, in the club Colorado Rapids in USA.*

*2. 200 000 (Two hundred thousands) Euro net from transfer fee will be paid for Neftchi PFC.*

*3. If the money for transfer will be more, the amount will be divided in follow conditions:*

*- 50% Neftchi PFC*

*- 50% Europe Sports IZC Management.*

*The result of the negotiations, from the Colorado Rapids USA must be sent to the PFC Neftchi in official agreement letter”.*

2.21 By fax letter dated 21 February 2012 to the Player, the Club stated as follows:

*“As you know, after the friendship game (17 January 2012) against Dinamo Drezden (you didn’t want to train with the team in order to avoid injuring) you are absent since 18 January 2012 and you have abandoned your work without explanation. We have submitted twice to FIFA about your absence despite our effort to contact with you FIFA and other means of communication and he hasn’t yet returned to our club until now.*

*This behavior means termination of labour contract without just cause by the player according to article 17 of FIFA Regulation for the Transfer of Player (hereinafter “RSTP”).*

*As of notification of this official warning, we want to inform you that the contract (01 August 2010 – 30 June 2013) concluded between our club and the player is terminated without just cause by player and we will claim compensation and sporting sanction because of this termination during protected period before Dispute Resolution Chamber of FIFA”.*

This fax letter was communicated to the legal counsel of the Player via the Belgium Football Federation.

2.22 On 19 March 2012, the Club lodged a claim in front of FIFA against the Player, maintaining that the Player was to be held liable for breach of contract without just cause on 18 January 2012 and ordered to pay compensation in the amount of USD 702,500 plus 5% interest p.a. as of 18 January 2012.

2.23 On 30 March 2012, the Player rejected the Club’s claim and lodged a counter-claim against the Club for breach of contract. In this regard, the Player asked to be awarded payment of the following outstanding remuneration and compensation for breach of contract:

- a) If the contract is considered terminated on 18 January 2012:
- USD 64,274.20 as outstanding remuneration (USD 15,000 for the 2010/11 season and USD 49,274.20 for the 2011/20112 season (USD 246,774.20 due until 18 January 2012 minus USD 197,500 received);
  - USD 752,016.20 as compensation;

- USD 50,000 *ex aequo et bono* for loss of fringe benefits;
  - 5% interest p.a. as of 30 March 2012 on all amounts
- b) If the contract is considered terminated on 21 February 2012:
- USD 107,155.20 as outstanding remuneration (USD 15,000 for the 2010/11 season and USD 92,155.20 for the 2011/2012 season (USD 289,655.20 due until 21 February 2012 minus USD 197,500 received)
  - USD 752,016.20 as compensation
  - USD 50,000 *ex aequo et bono* for loss of fringe benefits;
  - 5% interest p.a. as of 30 March 2012 on all amounts.
- 2.24 On 1 October 2013, the Player and the Belgian club, VZW SE Eendracht Aalst, signed an employment contract valid as from 1 October 2013 until 30 June 2014.
- 2.25 The FIFA DRC, after having confirmed its competence, first of all concluded that the central issues of this dispute, considering the claim and the counter-claim of the Parties, was to determine which party was to be held liable for the early termination of the Contract, whether the termination was with or without just cause and what the consequences thereof should be.
- 2.26 In view of the submissions of the Parties, the FIFA DRC firstly established that none of the Club's faxes to FIFA had apparently been received by the Player, which position seemed confirmed by the lack of evidence of transmission of the said faxes to the Player.
- 2.27 The FIFA DRC then went on noting that the Club had mandated various players' agents for the period of time between 23 January 2012 and 25 February 2012 in order to find a new club for the Player and that the Club's notification to the Player of 20 February 2012, inviting the Player and his agent to Baku, did not refer to the Player's alleged absence without the Club's consent at that time.
- 2.28 As a consequence, due to the lack of documentation corroborating the Club's position, the FIFA DRC decided that it could not be established that the Player was absent without the approval of the Club and that the Club's related argument therefore had to be rejected.
- 2.29 With reference to the mandates granted to various players' agents from 23 January 2012, the FIFA DRC highlighted that a few days of absence between 18 January 2012 and 23 January 2012 could not constitute, *per se*, a valid reason for terminating an employment contract. On that account, the Club had no just cause to terminate the Contract unilaterally on 21 February 2012, and, therefore, it was decided that the Club was to be held liable for the early termination without just cause. Consequently, the claim of the Club was rejected.
- 2.30 With regard to the Player's financial claim for outstanding salaries etc., the FIFA DRC concurred that the Club must fulfil its obligations in accordance with the Contract until the termination of the Contract in accordance with the general legal principle of *pacta sunt servanda*. Consequently, the FIFA DRC held that the Club was liable to pay to the Player the remuneration that was outstanding at the time of the termination of Contract, i.e. the amount of USD 80,000, derived by adding USD 15,000 relating to the 2010/2011 season, which

amount was not disputed by the Club as being due to the Player, and the amount of USD 65,000, i.e. USD 262,500 which had fallen due by the end of January 2012 minus USD 197,500 paid by the Club.

2.31 Furthermore, the FIFA DRC decided that, on the basis of article 17 par. 1 of the FIFA Regulations on the Status and Transfer of Players (the “RSTP”), the Player was entitled to receive from the Club compensation for breach of contract and noted, *inter alia*, that under the terms of the Contract for the remaining duration as from February 2012 until June 2013, the Player would have received a total remuneration of USD 687,500.

2.32 On 21 January 2015, the FIFA DRC rendered the Decision and decided that:

*“1. The claim of the Claimant/Counter-Respondent, Neftchi PFC, is rejected.*

*2. The counterclaim of the Respondent/Counter-Claimant, Emile Lokonda Mpenza, is partially accepted.*

*3. The Claimant/Counter-Respondent has to pay to the Respondent/Counter-Claimant, within 30 days as from the date of notification of this decision, the outstanding remuneration in the amount of USD 80,000 plus interest of 5% p.a. as from 30 March 2012 until the date of effective payment.*

*4. The Claimant/Counter-Respondent has to pay to the Respondent/Counter-Claimant, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of USD 687,500 plus interest of 5% p.a. as from 30 March 2012 until the date of effective payment.*

*5. In the event that the amounts due to the Respondent/Counter-Claimant are not paid by the Claimant/Counter-Respondent within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

*6. Any further claim lodged by the Respondent/Counter-Claimant is rejected”.*

### **3. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS**

3.1 On 1 July 2015, the Appellant filed its Statement of Appeal against the Decision rendered by the FIFA DRC on 21 January 2015.

3.2 On 15 July 2015, the Appellant filed its Appeal Brief.

3.3 On 18 August 2015, the Respondent filed his Answer.

3.4 By letter dated 21 August 2015, the Parties were informed by the CAS Court Office that the Panel had been constituted as follows: Mr Lars Hilliger, attorney-at-law in Copenhagen, Denmark (President of the Panel), Mr Manfred Nan, attorney-at-law in Arnhem, the Netherlands (nominated by the Appellant), and Mr Mark Hovell, solicitor in Manchester, United Kingdom (nominated by the Respondent).

- 3.5 By letter of 25 August 2015, the Parties were informed that the Panel had determined to hold a hearing in this matter.
- 3.6 The Parties both signed and returned the Order of Procedure.

#### **4. HEARING**

- 4.1 A hearing was held on 22 October 2015 in Lausanne, Switzerland.
- 4.2 The Parties confirmed that they did not have any objections to the constitution of the Panel.
- 4.3 In addition to the Panel and Mr William Sternheimer, Managing Counsel and Head of Arbitration at the CAS, the following people attended the hearing and were, apart from the counsel – duly invited by the President of the Panel to tell the truth subject to the sanctions of perjury – heard by the Panel and the Parties:

For the Appellant: Mr Josep Vandellos (attorney-at-law), the CEO of the Club, Mr Elnur Mammadov, the TMS and protocol manager of the Club, Mr Gadir Hasanov, and the former assistant to Mr Suleymanov, Mr Tural Piriyeu. Furthermore, the former VP of the Club, Mr Tahir Suleymanov, was heard by videoconference.

For the Respondent: Mr Laurent Dennis (attorney-at-law), the Respondent, Mr Emile Lokonda Mpenza, and former players' agent Mr Geoffrey Englebert.

- 4.4 The Parties had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel. After the Parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel listened carefully and took into account in its subsequent deliberation all the evidence and arguments presented by the Parties although they have not been expressly summarised in the present Award. Upon closure, the Parties expressly stated that they had no objections in respect of their right to be heard and to have been treated equally in these arbitration proceedings.

#### **5. CAS JURISDICTION AND ADMISSIBILITY OF THE APPEAL**

- 5.1 Article R47 of the Code of Sports-related Arbitration ("the CAS Code") states as follows: "*An appeal against the decision of a federation, association or sports-related body may be filed with the 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 the said sports-related body*".
- 5.2 With respect to the Decision, the jurisdiction of CAS derives from article 67 of the FIFA Statutes. In addition, neither the Appellant nor the Respondent objected to the jurisdiction of CAS, which was furthermore confirmed by the Parties signing the Order of Procedure.

- 5.3 The Decision with its grounds was notified to the Appellant on 15 June 2015, and the Appellant's Statement of Appeal was lodged on 1 July 2015, i.e. within the statutory time limit set forth by the FIFA Statutes, which is not disputed. Furthermore, the Statement of Appeal complied with all the requirements of Article R48 of the CAS Code.
- 5.4 It follows that CAS has jurisdiction to decide on this Appeal and that the Appeal is admissible.
- 5.5 Under Article R57 of the CAS Code, the Panel has full power to review the facts and the law and may issue a *de novo* decision superseding, entirely or partially, the decision appealed against.

## 6. APPLICABLE LAW

- 6.1 Article R58 of the CAS Code states as follows: *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.
- 6.2 In their submissions, the Parties maintain that pursuant to Article 58 of the CAS Code, the FIFA regulations are applicable and, additionally, Swiss law.
- 6.3 However, the Appellant furthermore submitted that reference to the substantive law of the Republic of Azerbaijan will also be made, since clause 10.1 of the Contract specifically points out that this is the governing law to be applied to any dispute arising between the Parties.
- 6.4 The Respondent on its side rejected the possible reference to any applicable law other than the regulations of FIFA and, additionally, Swiss law, stating, *inter alia*, that the Appellant failed to refer to such other law during the FIFA DRC case.
- 6.5 The Panel observes that article 10.1 of the Contract and the respective heading determines the following:
- "10. Settlement of disputes*
- 10.1 (...) Conflicts are not solve by negotiations will regulated with corresponding laws of the AFFA, PFL, FIFA and the Azerbaijan Republic"*.
- 6.6 The Panel notes that article 66(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"*.
- 6.7 Based on the above, the Panel notes that the Parties agreed to the application of the various regulations of FIFA, in particular the RSTP, and, subsidiarily, to the application of Swiss law. The Panel is therefore satisfied to accept the subsidiary application of Swiss law should the

need arise to fill a possible gap in the regulations of FIFA. However, to the extent necessary in respect of specific arguments put forward by the Appellant based on Azeri law, and if the Panel deems itself sufficiently well-informed in this respect, the Panel will consider the direct applicability (or non-applicability) of such provisions to the present dispute in more detail below.

- 6.8 Since the Appellant's claim was lodged with FIFA on 19 March 2012, the Panel agrees with the FIFA DRC that the 2010 edition of the RSTP is applicable to the present matter.

## 7. THE PARTIES' REQUESTS FOR RELIEF AND POSITIONS

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

### 7.2 The Appellant

- 7.2.1 In its Statement of Appeal of 1 July 2015 and in its Appeal Brief of 15 July 2015, the Appellant requested the following from CAS:

*"...to uphold the Appeal and:*

- *In principal, to acknowledge the First Respondents' termination without characterized just cause of the employment contract of 1 August 2010, or, in the alternative, the termination by the Club with just cause, and accordingly, to set aside the FIFA DRC Decision of 21 January 2015, awarding compensation in favour of the Appellant in the amount to be determined by CAS in accordance with article 17 of the FIFA Regulations on the Status and Transfer of Players (Ed. 2010) plus interest of 5% p.a. from 21 January 2012 until the date of effective payment.*
- *In subsidiary, only for the case in which the Panel considers that the Appellant terminated the employment contract of 1 August 2010 without just cause, to modify the FIFA DRC Decision of 21 January 2015 awarding no compensation to the Player, or alternatively, to award a minimal economical compensation in accordance with contractual provisions and/or the applicable law and regulations, and the practice of TAS-CAS.*
- *To fix a sum, to be paid by the RESPONDENTS to the Appellant, in order to pay all defence fees and costs of any nature incurred by the Appellant as a consequence of the present procedure".*

- 7.2.2 In support of its requests for relief, the Appellant submitted as follows:

- a) In August 2010, the Club and the Player entered into a three-season contract valid until 30 June 2013.

- b) During his first season (2010/2011) with the Club, the Player was very successful. However, that was not the case in the first half of the second season (2011/2012), which led to only eight partial appearances without scoring a single goal.
- c) During the winter-break vacation, the Player admitted in an interview published on the Club's website that he was not satisfied with his performance for the Club and that he was thinking of leaving the Club during the winter transfer window.
- d) On 10 January 2012, the Player, along with the rest of the team, joined the mid-season training camp in Antalya, Turkey, scheduled to last until 4 February 2012.
- e) On 18 January 2012, the Player left the training camp without any authorisation of the Club and, after this date, the Player never returned to the Club.
- f) On 19 January 2012, the Club informed the press that the Player had left the training camp in order to attend negotiations with two clubs for a possible transfer. However, this information never implied that the Club authorised the Player's absence, and the information was only forwarded to the press to protect the reputation of the Player.
- g) Several times, the Club authorised the players' agents, Mr Nacar of the company Europe Sports IZC Management and Mr Geoffrey Englebert, to negotiate a possible transfer for the Player.
- h) However, these authorisations never included an authorisation to the Player to be absent from the Club.
- i) During the Player's absence from the Club, multiple exchanges of email correspondence were conducted between the Club, the Player and the players' agents. Furthermore, the Club and the Player had regular phone contact discussing a possible transfer.
- j) Furthermore, on 11 February 2012, the Club informed FIFA in writing that the Player had left without the Club's permission and transmitted its concern regarding the unlawful absence as the national championship was about to re-start.
- k) On 12 and 13 February 2012, the Club was asked to authorise the Player to go to the USA in order to negotiate a possible transfer to an American club, but this authorisation was never granted. However, the request confirmed that the Player was aware that he needed an authorisation from the Club to be absent.
- l) On 17 and 18 February 2012, the Club contacted the Player directly by email, informing him that he had been absent for a month without a reasonable explanation and with no authorisation from the Club.

- m) Despite promises to the Club, the Player did not return to the Club within the following days, and on 20 February 2012, the Club therefore formally invited the Player and his agent to attend a meeting in Baku the next day.
- n) The Player never showed up for the meeting on 21 February 2012, and on the same date, the Club consequently terminated the Contract with just cause on grounds of unjustified absence since 18 January 2012.
- o) According to the Contract, the Player must be present at the Club unless authorised by the Club to be elsewhere. There was no obligation on the Club to remind the Player of his obligation to be present at the Club in accordance with the terms of the Contract.
- p) Even if the Club had the intention to accept a possible transfer of the Player, the Club had a legitimate interest in and contractual right to benefit from the services of the Player during the period of time when the Player's agents were negotiating a possible transfer.
- q) The Club never authorised or otherwise granted permission to the Player to be absent from the Club from 18 January 2012.
- r) In accordance with *inter alia* the FIFA rules, a party claiming a right shall carry the burden of proof.
- s) The Player has not in any way proven that his absence from the Club was authorised, neither expressly nor implicitly.
- t) Even assuming that the Player was entitled to attend meetings with potential third-party clubs or that the Club implicitly consented to the leave of the Player on 18 January 2012 (*quod non*), such a license existed exclusively for that particular purpose and was therefore time-limited and cannot be interpreted to give an unrestricted right to be absent from the Club.
- u) The Player was obliged, under all circumstances, to resume his duties immediately after particular negotiations with a potential club had taken place, rather than being authorised to return at his free will.
- v) According to article 14 of the RSTP, a party may terminate an employment contract – without consequences of any kind – if there is “just cause”.
- w) According to Swiss law and CAS jurisprudence, just cause exists when the terminating party, in good faith, cannot be expected to continue the employment relationship.
- x) The Player was absent from work between 18 January and 21 February 2012 without any valid authorisation.

- y) Furthermore, after being summoned to return to the Club, the Player failed to do so and was not able to provide any just explanation for his absence.
- z) Even if the Player was of the opinion that his absence was authorised by the Club, the Player should have acted more diligently in order to have this confirmed by the Club.
- aa) In light of the above, it is beyond doubt that the Player repeatedly breached the terms of the Contract without just cause and that the confidence between the Parties was therefore breached, which means that the termination of the Contract by the Club was made with just cause.
- bb) As the termination of the Contract derives from the Player's breach of contract, the compensation to the Club should be the "positive interest" of the Contract.
- cc) Since the Player did not find any new employment during the remaining original contract period, the residual value of the Contract must serve as the basis for the final determination of the amount of compensation payable to the Club as breach of contract.
- dd) In the present case, the Player would have been entitled to receive from the Club USD 659,373 for the remaining original contract period from 21 February 2012 until 30 June 2013, so this sum should form the compensation due to the Club from the Player.
- ee) In addition, the Club is entitled to receive the non-amortised part of the transfer fee paid by the Club to the Player's former club in August 2010 and of the total agents' fees paid by the Club at the start of the contract period, corresponding to a total amount of USD 301,784.
- ff) In the alternative, in the unlikely situation that the Panel should find the Player entitled to receive compensation from the Club, the Player's compensation should be reduced or denied in accordance with Swiss law and CAS jurisprudence, but also as the labour laws of Azerbaijan do not recognise the principle of compensation for a full amount of salary for a period when an employee did not perform any services under the contract.
- gg) Furthermore, in accordance with Article 3 of the Contract, the Club is entitled to terminate the Contract and pay the Player an amount equivalent to two monthly salaries, which is why any compensation payable by the Club to the Player cannot exceed such an amount.

### 7.3 The Respondent

7.3.1 In his Answer of 18 August 2015, the Respondent requested the following from CAS:

- “
- TO DECLARE *the appeal brought by NEFTCHI PFC against Mr. E.L. MPENZA, admissible but not founded.*
  - TO CONFIRM THE FIFA DRC DECISION PRONOUNCED ON 21 JANUARY 2015 AS FOLLOWING:  
  
TO DECLARE *the unilateral termination of the contract of employment by NEFTCHI PFC (on 21 February 2012) without just cause.*
  - TO CONDEMN NEFTCHI PFC *to pay an amount of \$ 777,500.00 NETS (outstanding remuneration + compensation for breach of contract) increased by an interest of 5% per annum from 21 February 2012 until the effective date of payment to Mr. E.L. MPENZA.*
  - TO REJECT *any request of any nature by NEFTCHI PFC against Mr E.L. MPENZA*
  - TO CONDEMN NEFTCHI PFC *to pay all arbitration costs.*
  - TO CONDEMN NEFTCHI PFC *to pay defence costs and other miscellaneous costs incurred by Mr. E.L. MPENZA, these costs being estimated ex aequo et bono to the amount of CHF 10,000.00”.*

7.3.2 In support of his requests for relief, the Respondent submitted as follows:

- a) Following his transfer to the Club, the Player had a successful first season (2010/2011) with the Club.
- b) However, from the beginning of the 2011/2012 season, the new coach of the Club made the Player understand that he was no longer to be considered as a part of the regular starting line-up. During the first half of that season, the Player only participated in eight games as a substitute and scoring no goals.
- c) During the winter break (2011/2012), in an interview published on the Club’s website, the Player stated, *inter alia*, that he respected the choice of the head coach and that he did not want to leave the Club; however, he would have liked to stay with a club where he would be able to participate in every match.
- d) The Player never wanted to leave the Club, but was willing to accept a transfer to another club if there was no other solution for him. The Club wanted to transfer the Player to another club.
- e) After having joined the mid-season training camp in Antalya, on 18 January 2012, the Player was verbally authorised by the Club to leave the training camp to go to Istanbul in order to facilitate a possible transfer to another club.

- f) This authorisation was supported by the Club on 19 January 2012, when it informed the press that the Player had left the training camp in order to attend negotiations with two clubs for a possible transfer.
- g) Beginning from 23 January 2012, several times the Club authorised the players' agents, Mr Nacar of the company Europe Sports IZC Management and Mr Geoffrey Englebert, to negotiate a possible transfer for the Player.
- h) As a consequence of these authorisations, the Player was authorised to be absent from the training camp and, later on, from the Club, in order to be available for the players' agents.
- i) The Player never entered into any contract with either Mr Nacar of the company Europe Sports IZC Management nor with Mr Geoffrey Englebert, and both were acting on behalf of the Club.
- j) Without any explanation, the Club never paid the Player his monthly salaries for December 2011 and January 2012, i.e. a total net sum of USD 75,000.00 (2 x USD 37,500).
- k) During his absence from the training camp and the Club from 18 January until 18 February 2012, the Player never received any letters or emails from the Club. However, during the same period of time, the Club called the Player numerous times in order to discuss any progress in the negotiations of a possible transfer, but never mentioned the Player's alleged unjustified absence.
- l) Furthermore, the Player never received a copy of the Club's correspondence with FIFA regarding his absence.
- m) Suddenly, on 17 and 18 February 2012, the Club contacted the Player directly by email, informing him that he had been absent from the Club for a month without a reasonable explanation.
- n) On 20 February 2012, at 4.54 pm, the Player received from the Club a formal invitation to come to Baku together with his agent.
- o) On 21 February 2012, the Club terminated the Contract, which termination letter was apparently only communicated to FIFA as the Player never received the letter directly from the Club.
- p) The unilateral termination of the Contract by the Club was made without just cause.
- q) The Player never breached the Contract with the Club as his absence was authorised by the Club and indirectly by the players' agents acting on behalf of the Club.

- r) During his absence from 18 January until 18 February 2012, the Player never received any warnings or other notifications indicating that the Club in fact considered the Player's absence to be unauthorised.
- s) The fact that the Player did not go to Baku on 21 January 2012 following the formal invitation from the Club does not constitute such breach of contract that it justifies the unilateral termination of the Contract by the Club.
- t) In accordance with the general legal principle of *pacta sunt servanda*, the Player is entitled to receive the outstanding payments for the period from December 2011 until the termination of the Contract on 21 February 2012. i.e. USD 103,125.00 (USD 37,500.00 + 37,500.00 + 28,125.00).
- u) Furthermore, the Player is entitled to receive the amount of USD 15,000.00 outstanding from the 2010/2011 season.
- v) In addition, and since the termination of the Contract by the Club was without just cause, the Club has to pay compensation to the Player.
- w) In accordance with the FIFA and CAS jurisprudence, this compensation should be equivalent to the residual value of the Contract, i.e. the contractual remuneration due from the day of the termination of the Contract until the last day of the original contract period, i.e. 30 June 2013, USD 659,375.00 net.
- x) In the case at hand, there are no grounds for reducing the compensation payable to the Player for the Club's unilateral termination of the Contract without just cause, which termination took place within the "protected period".
- y) The Player never succeeded in signing a new contract with another club during the original contract period.
- z) Furthermore, Article 3.1 of the Contract, according to which the Club should apparently be entitled to terminate the Contract by paying to the Player an amount equivalent to two monthly salaries, is not applicable.

## **8. DISCUSSION ON THE MERITS**

- 8.1 Initially, the Panel notes that it is undisputed by the Parties that on 5 August 2010, the Parties signed the Contract valid for a period of three football seasons, from 1 August 2010 until 30 June 2013.
- 8.2 Furthermore, it is undisputed that on 18 January 2012, the Player left the Club's training camp and went to Istanbul for meetings regarding a possible transfer and that the Player never returned to the Club after that date.

8.3 Finally, it is undisputed that the Contract is to be considered unilaterally terminated with effect from 21 February 2012, at the latest, since the Club wrote in a fax letter of that date to the Player, *inter alia*, that the Player's absence from the Club "...means termination of labour contract without just cause by the player according to article 17 of FIFA Regulations for the Transfer of Player (hereinafter "RSTP")".

8.4 The Parties disagree, however, whether or not the Club's termination was with or without just cause and over which Party was ultimately responsible for the early termination of the contractual relationship between them. The Panel has taken into consideration the Club's request for relief that the Player terminated the Contract but it is understood that only the issue above needs to be addressed as the facts agreed upon by the Parties clearly show the termination was made by the Club.

8.5 Thus, the main issues to be resolved by the Panel are:

- a) Did the Club terminate the contractual relationship between the Parties with or without just cause?
- b) Depending on the answer to a), what are the financial consequences for the Parties of the early termination of their contractual relationship, and, in this context, is one party entitled to receive compensation from the other party and, if applicable, in what amount?

**a. Was the termination of the Contract by the Club with or without just cause?**

8.6 According to the Club, its termination of the Contract was in response to the Player's unauthorised absence from the Club from 18 January 2012, whereas the Player alleges that it was the Club that terminated the Contract unilaterally and without just cause.

8.7 To be able to reach a decision on this issue, the Panel has conducted an in-depth analysis of the facts of the case, including not least the circumstances concerning the Player leaving the training camp on 18 January 2012 and the subsequent absence/negotiations.

8.8 Against the background of the information and evidence gathered during the proceedings, including the witness statements/testimony, the Panel primarily finds that sufficient evidence is available to prove that the Club allowed the Player to leave for Istanbul on 18 January 2012.

8.9 For instance, multiple persons stated before the Panel that both the Club's Vice-President at the time and his assistant left for Istanbul on 18 January 2012 together with the Player and Mr Nacar in order to attend meetings regarding a possible transfer of the Player to another club.

8.10 Moreover, it appears from the Club's press release of 19 January 2012 that the Club was at least informed about the meetings set up in Istanbul in order to negotiate a possible transfer of the Player.

- 8.11 It is evident, though, that these meetings held in Istanbul on 18 and 19 January 2012 were not successful and that the Club therefore, on 23 January 2012, issued an authorisation to Europe Sports IZC Management, and thereby to Mr Nacar, for all negotiations regarding a possible transfer of the Player to a new club in either China, Belgium or Qatar.
- 8.12 The Club submitted that the Club's representatives, after the meetings, returned to the Club's training camp in Antalya and, on this occasion, asked the Player to go back with them, which the Player did not want to do according to the available information.
- 8.13 The Player, on the other hand, stated how first Mr Nacar and then Mr Geoffrey Englebert, in accordance with the Club, instructed the Player to stay in Istanbul with Mr Nacar / go to Belgium with Mr Englebert and in that manner constantly be at the disposal of the players' agents for any future negotiations in accordance with the authorisations issued to them by the Club.
- 8.14 In relation to this, the Panel has attempted to ascertain whether the two players' agents must be deemed to have acted on behalf of the Player or the Club.
- 8.15 Both Parties deny having asked the relevant players' agents to come to the Club's training camp in Antalya, and the Player further denies ever having signed a representation agreement with either of the two players' agents. He submitted that he had his own agent who he had used when he came to the Club and entered into the Contract.
- 8.16 The Player's statement is supported by Mr Englebert's statement to the Panel that he had left for Istanbul at the invitation of Mr Nacar and that he did not at any time act as the agent of the Player, but, on the other hand, was ultimately authorised by the Club to try to negotiate a transfer for the Player. Mr Englebert further stated that he expressly asked the Club to grant the Player permission to go with him to Belgium, which the Club then accepted.
- 8.17 None of these statements were denied by the Club during the hearing.
- 8.18 Against the background of the information and evidence gathered during the proceedings, the Panel adheres to the view that it is not unlikely that first Mr Nacar and then Mr Englebert contacted the Club at their own initiative with a view to pursuing the possibilities of trying to negotiate a possible transfer of the Player.
- 8.19 The Panel also notes that no evidence has been produced during the proceedings to prove the existence of a contractual relationship between the Player and either of the players' agents. On the contrary, it has been proven that the Club issued multiple authorisations to these players' agents with a view to a possible transfer.
- 8.20 Given these circumstances, and as the Panel finds that evidence has been produced to prove that the Player was initially allowed to go to Istanbul on 18 January 2012 for a few days and also that at least Mr Englebert had been granted permission by the Club to take the Player back to Belgium, the Panel acknowledges that the Player, as stated to the Panel, could have

gained in good faith the impression that the Club had permitted, or at least impliedly accepted, the Player remaining in Istanbul and Belgium during the entire open transfer window.

- 8.21 Furthermore, in this connection, the Panel attaches importance to the evidence given by the Club's witnesses, who testified that countless phone calls had taken place between the Club and the Player during this period regarding the status of the contract negotiations, but that the Club never, during any of these phone calls, informed the Player that his current absence from the Club was to be considered as a breach of contract or that he was obliged to return to the Club. Besides, against the Player's statement to the contrary, the Panel sees no evidence to prove that any of the Club's (text) messages to the Player regarding this issue was ever received by the Player until 18 February 2012.
- 8.22 The Panel agrees with the Club, *prima facie*, that even if the Club had the intention to accept a possible transfer of the Player, it still had a legitimate interest in and a contractual right to benefit from the services of the Player during the period of time when negotiations were taking place.
- 8.23 Similarly, the Panel agrees with the Club that, against this background, the Player should essentially be carrying the burden of proof to establish that his absence from the Club was duly authorised.
- 8.24 However, given the specific circumstances of this case, the Panel finds that sufficient evidence has been produced to prove that a possible transfer in the transfer window in question would be to the benefit of both the Player and the Club, and the Panel likewise finds, against the background of the information and evidence gathered, that both Parties worked together to facilitate this.
- 8.25 With reference to this, and as the Player, based on the Club's actions and omissions, in the Panel's view, could reasonably have gained the impression that the Club – at the least – impliedly accepted the Player being absent, the Panel finds that although the Player has not expressly produced evidence to prove that the Club had expressly authorised his absence, the Club has contributed to/accepted this absence in such a manner that the Player's absence from the Club from 18 January 2012 until 17 February 2012 did not constitute a breach of contract.
- 8.26 The question is accordingly whether the Player's subsequent absence should have any legal consequences.
- 8.27 By emails of 17 February 2012 to the Player, the Club apparently for the first time informed the Player directly that his absence from the Club was unauthorised and that it could cause problems for the Player.
- 8.28 On 20 February 2012, these emails from the Club were followed by a letter from the Club to the Player "*inviting Eka Basunga Loconda Emil and your agent to Baku*".

- 8.29 However, the Player stayed with Mr Nacar, whose latest authorisation was still valid until 25 February 2012, and never returned to the Club in Baku, and on 21 February 2012, the Club informed the Player that the Contract was to be considered terminated. As such, the Panel finds that the Club terminated the Contract via its letter dated 21 February 2012.
- 8.30 Bearing in mind the preceding events, including the still valid authorisation to Mr Nacar, combined with the circumstances that the Club did not inform the Player until 17 February 2012 that his absence from the Club was unauthorised and that it could cause problems for the Player, and the circumstances that the Club did not expressly ask the Player to come to the Club in Baku until 20 February 2012, the Panel finds that the Player's failure to show up at the Club on 21 February 2012 does not constitute such a breach of contract that the Club is entitled to terminate the Contract unilaterally. The Panel felt that 1 days' notice to travel to Baku was unreasonable.
- 8.31 Insofar the Club maintains that, based on article 68, 70(d) and 72(a) of the Labour Code of Azerbaijan, an *"unauthorized absence from work for a single working day is considered as a material breach of employment contract and the important ground to terminate the employment contract by the employer"*, the Panel finds that it is not sufficiently informed about the context of such provisions to apply them in the matter at hand and that, since the RSTP is primarily applicable, such circumstances are not sufficient to constitute just cause for the termination of the Contract.
- 8.32 The Panel finds that the Player's absence, either from 18 January to 17 February 2012 or from 18 February to 21 February 2012, did not constitute such a breach of contract that the Club was entitled to terminate the contractual relationship with just cause, as such.
- 8.33 The Panel therefore concludes that the Contract was terminated unilaterally by the Club without just cause.
- b. What are the financial consequences for the Player of the termination of the Contract without just cause by the Club?**
- 8.34 The Panel initially notes that since the Contract was terminated unilaterally without just cause by the Club, the Club is not entitled to receive any compensation from the Player.
- 8.35 According to the Decision, the Player is entitled to receive the amount of USD 80,000 as unpaid salary, derived by adding USD 15,000 relating to the 2010/2011 season, which amount was not disputed by the Club as being due to the Player, and the amount of USD 65,000, i.e. USD 262,500, which had fallen due by the end of January 2012 minus USD 197,500 paid by the Club.
- 8.36 Furthermore, the Decision stated that under the terms of the Contract, for the remaining duration as from February 2012 until June 2013, the Player would have received a total remuneration of USD 687,500, and the Player must therefore receive this amount in addition to the above-mentioned outstanding salary of USD 80,000.

- 8.37 During the hearing, the Panel confronted the Player with the fact that in his requests for relief, the financial claim was set at USD 777,500 and not USD 767,500 as set out in the Decision. The Player confirmed that this was a clerical mistake since the claim should be in accordance with the Decision.
- 8.38 During the hearing, the Club confirmed that the Player's salaries for December 2011, January – 21 February 2012 (USD 37,500 per month) were not paid by the Club, just as the Club did not dispute that the amount of USD 15,000 relating to the 2010/-2011 season was still outstanding.
- 8.39 In view of the above and in accordance with the general legal principle of *pacta sunt servanda*, the Panel finds that the Club should have fulfilled its contractual obligations towards the Player until the date of termination of the Contract, 21 February 2012.
- 8.40 According to the Panel, the Club should to be held liable to pay to the Player as outstanding salaries the amount of USD 117, 155, corresponding to the monthly salaries for the months of December 2011 through January 2012 and 21 days of the month of February 2012 plus the amount of USD 15,000 relating to the 2010-2011 season. However, as the Player did not file an appeal against the Decision in this respect, the Panel can only confirm the Decision and therefore decides that only an amount of USD 80,000 can be awarded to the Player as outstanding salaries.
- 8.41 The Panel subsequently confirms its agreement with the FIFA DRC in the Decision that on the basis of article 17 of the RSTP, the Player is entitled to receive from the Club compensation for breach of contract in addition to the outstanding remuneration.
- 8.42 The Club argues that pursuant to article 206 of the Azerbaijan Labour Code, the contributory fault of the injured party should be taken into account when assessing damages. Moreover, *“the labor laws of Azerbaijan do not recognize the principle of compensation for a full amount of salary (‘loss of profit’) for a period when an employee did not perform any services under the labor contract if such contract is prematurely terminated (...)”*. The Club maintains that only direct damages could be awarded because *“such a claim would be disproportionate and unreasonable”*.
- 8.43 The Panel finds that it lacks the necessary evidence in order to rule on this issue according to the Azeri Labour laws with regard to the consequences of a termination of the Contract without just cause. Furthermore, article 17 of the RSTP, which is primarily applicable, provides for all elements to be taken into consideration for the calculation of the compensation to be paid by the Club to the Player.
- 8.44 In this respect, according to the Club, and with reference to clause 3.1 of the Contract, any compensation payable to the Player for termination of the Contract by the Club can never exceed *“the sum of two months salary of Player”*.
- 8.45 However, the Panel agrees with the FIFA DRC that since this clause is to the benefit of the Club only, i.e. it is not reciprocal as it does not grant similar rights to the Player, the said clause

must not be taken into consideration in the determination of the amount of compensation. Further, it was not cited as the grounds for termination by the Club, rather it based the termination on the alleged unauthorised absences of the Player.

- 8.46 The Panel then notes that the amount originally payable by the Club to the Player in accordance with the Contract for the period from 22 February 2012 until the end of the original contract period on 30 June 2013 is not disputed.
- 8.47 Finally, the Panel notes that the Player did not manage to sign a new employment contract with another club within the original contract period, which, according to the information available, was partly caused by problems involved in obtaining the ITC due to the contractual dispute between the Parties. The Panel observes that the Player only concluded an employment contract with the Belgian football club VZW SE Eendracht Aalst on 1 October 2013, which is after the Contract with the Club would have already expired. As such, the conclusion of such contract did not mitigate the damages of the Player.
- 8.48 Based on that, the Panel finds no reason to amend the ruling made by the FIFA DRC in its Decision, according to which the Club must pay as compensation for breach of contract to the Player an amount equal to the amount payable to the Player under the terms of the Contract, always provided that the total amount payable to the Player cannot exceed the total amount payable as stated in the Decision.
- 8.49 Therefore, the Club must pay to the Player the amount of USD 767,500 as outstanding remuneration and compensation for breach of contract.
- 8.50 Finally, the Panel sees no reason to deviate from the Decision concerning the interest rate and therefore confirms that the Respondent is entitled to receive interest at the rate of 5% p.a. on the full amount of USD 767,500 as from 30 March 2012 until the date of effective payment.

## ON THESE GROUNDS

### **The Court of Arbitration for Sport rules:**

1. The appeal filed on 1 July 2015 by Neftci Professional Football Klub against the Decision rendered by the FIFA Dispute Resolution Chamber on 21 January 2015 is dismissed.
  2. The Decision rendered by the FIFA Dispute Resolution Chamber on 21 January 2015 is confirmed.
- (...)
5. All further and other requests for relief are dismissed.