Arbitration CAS 2016/A/4815 Edward Takarinda Sadomba v. Club Al Ahli SC, award of 12 July 2017

Panel: Mr Fabio Iudica (Italy), President; Mr Manfred Nan (The Netherlands); Mr Lucas Anderes (Switzerland)

Football
Termination agreement between a player and a club by mutual agreement
Lack of evidence of the club's fulfillment of its obligation of payment towards the player

In consideration of the general principle of the burden of proof and taking in consideration the fact that, moreover, it would have been reasonably easier for a football club to produce documents (or witness statements) in order to corroborate an alleged cash payment in favour of a player employed by said club, rather than for the player to demonstrate that he has not received any payment, it is the responsibility of the club to overcome the inconsistencies inherent in a "cash payment order". Therefore, the club shall bear the consequences of its failure to prove having fulfilled its financial obligation toward the player notwithstanding the ambiguousness of the "cash payment order" on which the club relied to resist the player's claim.

I. INTRODUCTION

1. This appeal is brought by Mr Edward Takarinda Sadomba against Club Al Ahli SC with respect to the decision rendered by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (hereinafter also referred to as "FIFA DRC") on 15 July 2016 regarding an employment-related dispute (hereinafter the "Appealed Decision").

II. THE PARTIES

2. Mr Edward Takarinda Sadomba (the "Player" or the "Appellant") is a Zimbabwean professional football player, born in Harare, Zimbabwe, on 31 August 1983.

3. Club Al Alhi SC (the "Club" or the "Respondent") is a professional football club based in Tripoli, Libya, competing in the Libyan Premier Ligue, affiliated with the Libyan Football Federation (the "LFF") which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA").

4. The Player and the Club will also hereinafter jointly referred to as "Parties".

III. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions, and the evidence examined in the course of the present appeals arbitration proceedings and at the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in the Award only to the submissions and evidence it considers necessary to explain its reasoning.

6. In 2014, the Player signed an employment contract with the Club as a professional football player, valid as from 15 December 2014 until 15 December 2016 (the "Employment Contract"). The Employment Contract was executed in Tunisia.

7. On 11 January 2016, a termination agreement was concluded between the Parties, according to which the Employment Contract was terminated by mutual consent (the "Termination Agreement"). Pursuant to Article 1 of the Termination Agreement, upon termination of the Employment Contract, the Club undertook to pay to the Player the amount of USD 450,000, although the date of payment was not specified.

8. According to Article 2 of the Termination Agreement, it is also established that no other payable to the Player under the Employment Contract was outstanding at the time when the Termination Agreement was signed.

9. On an unspecified date, the Player signed a document named *"cash payment order"* stating the following: *"TT is paid to Mr Edward Sadomba holder of id card n° EN813394 an amount of USD 450,000 say four hundred and fifty thousand dollars only, against terminate the contract"*.

10. On 25 January 2016, the Player' s legal representative sent a reminder letter to the Respondent, requesting the Club to fulfil its obligation with respect to the payment of the abovementioned amount of USD 450,000, within five days.

11. On 15 February 2016, the Player put the Club in default, requesting the payment of the amount due within ten days, failing which he would refer the case to FIFA.

12. Both the reminder letter and the letter of formal notice remained unanswered.

13. On 22 February 2016, the Club sent a letter to the LFF informing that *"the player received all his dues for the period of contract with him according to the contract termination agreement concluded between the two parties on Monday January 11th 2016"*, enclosing a *"copy of the receipt evidencing the receipt of all financial dues"*.

14. On 18 March 2016, the Player lodged a claim before the FIFA DRC, asking to be awarded the total amount of USD 562,500, as follows:

- USD 450,000 corresponding to the amount due by the Club under the Termination Agreement;
- USD 112,500 as *"legal costs in the tune of 25% of the total amount"* according to the Zimbabwean law;
- 5% interest per annum, as from 11 January 2016;
- as well as the imposition of sporting sanctions on the Club, by suspending it from registering new players for two consecutive registration period.

15. The Player claimed that the Club persuaded him to sign the *"cash payment order"* as if it was a formality in order to enable the Club to proceed with the relevant bank transfer, which on the contrary was never carried out by the Club.

16. In its reply, the Club argued that it actually made the payment to the Player in cash and that the *"cash payment order"* allegedly proved that the Player received the total amount of USD 450,000 in conformity with the Termination Agreement.

17. On 28 June 2016, FIFA informed the Parties that the investigation phase of the relevant case had been closed.

18. On 15 July 2016, the FIFA DRC rendered the Appealed Decision, by which the Player's claim was entirely rejected.

19. The grounds of the Appealed Decision can be summarized as follows:

20. The matter concerns an employment-related dispute with an international dimension between a Zimbabwean player and a Libyan club.

21. Since the claim was lodged on 18 March 2016, the 2015 edition of the FIFA Regulations on the Status and Transfer of Players (the "FIFA Regulations") is applicable, as to the substance of the present matter.

22. The FIFA DRC firstly acknowledged that the Player and the Club signed the Employment Contract valid from 15 December 2014 until 15 December 2016 and that, on 11 January 2016, the Parties signed the Termination Agreement by means of which the Employment Contract was terminated by mutual consent and according to which the Player was entitled to receive the amount of USD 450,000 from the Club.

23. The FIFA DRC further noticed that the Player claimed that the Club failed to pay him the amount of USD 450,000 which was due under the Termination Agreement, in spite of the reminder letter and the default notice respectively sent to the Club on 25 January and 15 February 2016.

24. With regard to the *"cash payment order"*, the FIFA DRC considered that the Player argued he was persuaded to sign it because the Club maintained that this document would enable it to process the relevant payment.

25. In this context, the FIFA DRC pointed out that the Player failed to meet the burden of proving that he had not received the mentioned amount, in spite of having admitted signing a document in which he, on the contrary, stated that such amount had been paid to him as a result of the mutual termination of the Employment Contract.

26. Therefore, since the Player acknowledged having signed the *"cash payment order"*, he must bear the relevant legal consequences of it.

27. In consideration of the clear content of the *"cash payment order"* signed by the Player and in the absence of any evidence to the contrary, the FIFA DRC rejected the Player's claim, entirely.

IV. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 22 September 2016, the Player filed an appeal before the Court of Arbitration for Sport (the "CAS") against the Appealed Decision by submitting a statement of appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"). The statement of appeal was drafted in English. The Appellant also requested that the appeal be referred to a sole arbitrator and suggested the nomination of Mr Manfred Nan, or, in the event that the matter would be finally submitted to a Panel of three members, nominated Mr Manfred Nan as arbitrator. The appeal was not directed at FIFA.

29. On 29 September 2016, the Appellant filed its appeal brief in accordance with Article R51 of the CAS Code.

30. On 17 October 2016, the Respondent raised an objection to the Appellant's choice of language and requested the CAS Court Office that the present proceedings be conducted in French.

31. On 19 October 2016, the Respondent informed the CAS Court Office that it agreed that the present appeal be submitted to a sole arbitrator, but objected to the nomination of Mr Manfred Nan and suggested the nomination of Mr Lucas Anderes instead.

32. On 20 October 2016, the Appellant informed the CAS Court Office that he objected to the Respondent's request that French be selected as the language of the present arbitration proceedings and requested the CAS to confirm English as language of this procedure.

33. On 21 October 2016, the CAS Court Office informed the Parties that, in view of their disagreement about the language of the procedure, and on the composition of the Panel, the relevant decisions would be referred to the President of the CAS Appeals Arbitration Division.

34. On 25 October 2016, the Club informed the CAS Court Office that, in the case the President of the CAS Appeals Arbitration Division would decide to submit the dispute to a Panel of three arbitrators, it wished to nominate Mr Lucas Anderes.

35. On 10 November 2016, an Order on Language was rendered by the President of the CAS Appeals Arbitration Division, ruling that English shall be the language of the present arbitration proceedings.

36. On the same date, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the present procedure to a Panel composed of three arbitrators.

37. Also on 10 November 2016, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present arbitration proceedings; moreover, with regard to the Appellant's request to impose sporting sanctions upon the Club, FIFA pointed out that, since it was not designated as a respondent in the appeal lodged by the Player against the Appealed Decision, the issue relating to the imposition of sporting sanctions is outside the scope of the relevant Panel's power of review, as it is confirmed by CAS jurisprudence.

38. On 14 November 2016, the CAS Court Office informed the Parties that the Respondent had failed to submit its answer within the prescribed time limit. Moreover, the Parties were invited to inform the CAS Court Office whether they preferred a hearing to be held in the present matter, or for the Panel to issue an award based solely on the Parties' written submissions.

39. On 17 November 2016, the Appellant requested the joinder of FIFA in the present arbitration proceedings, based on Article R41.2 of the CAS Code, for the purpose of requesting the imposition of sporting sanctions upon the Club.

40. On the same date, the CAS Court Office informed the Parties, with regard to the Appellant's request pursuant to Article R41.2 of the Code, as follows: *"the provision at issue is intended to apply only in cases in which the Respondent intends to cause a third party to participate in the arbitration, whereas the Appellant has to indicate all Respondents against which the appeal is filed within the time limit stipulated in Articles R47-49 of the Code which, in the present case, has already expired. In view of the foregoing, the Appellant's request for joinder is considered moot".*

41. Also on 17 November 2016, the Respondent requested the CAS Court Office to be granted a new deadline to file its answer, alleging that the Club was prevented from meeting the original time limit due to the uncertainty on the language of the procedure, until the Order on Language was rendered by the President of the CAS Appeals Arbitration Division. Subsidiarily, the Respondent requested that the time limit to file the answer be fixed after the payment by the Appellant of his share of the advance of costs, pursuant to Article R55 of the CAS Code.

42. On 18 November 2016, the CAS Court Office informed the Parties that the Respondent's request to postpone the time limit to file its answer in accordance with Article R55 of the CAS Code could not be upheld pursuant to Article R32 par. 2 of the CAS Code, since the initial time limit had already expired and no suspension of such time limit had been requested pending a decision on the language of the proceedings. In addition, the Appellant was invited to submit his position with respect to the Respondent's request for a new time limit for the filing of its answer.

43. On 21 November 2016, the Appellant informed the CAS Court Office that he objected to reinstate a time limit for the Respondent to file its answer.

44. On 28 and 29 November 2016, respectively, both the Respondent and the Appellant informed the CAS Court Office that they preferred a hearing to be held in the present matter.

45. On 27 February 2017, the CAS Court Office informed the Parties that the Panel appointed to decide the present dispute was constituted as follows:

President:	Mr Fabio Iudica, attorney-at-law in Milan, Italy
Arbitrators:	Mr Manfred Nan, attorney-at-law in Arnhem, the Netherlands
	Mr Lucas Anderes, attorney-at-law in Küsnacht-Zurich, Switzerland.

46. On 21 March 2017, on behalf of the Panel, FIFA was invited to provide the CAS Court Office with a copy of the complete case file related to the present matter.

47. On 22 March 2017, the CAS Court Office informed the Parties that the Respondent's request for the reinstatement in the time limit for the filing of the answer had been dismissed, in the absence of any exceptional circumstance. The Parties were further advised that the Panel had decided to hold a hearing and that, at the hearing, the Panel intended to examine the Appellant himself and the Respondent's representative that, in the Respondent's view, would be able to testify on the cash payment allegedly made to the Appellant. The Panel explicitly requested the Parties to be available for such examination. In addition, the Respondent was invited to provide the CAS Court Office with further evidence, if any, relating to the origin of the amount allegedly paid to the Appellant.

48. On 27 March 2017, in reply to the CAS Court Office's request, the Respondent submitted copy of the *"cash payment order"* and copy of the Termination Agreement.

49. On 3 April 2017, FIFA submitted a copy of its complete file in relation with the present dispute.

50. On 13 April 2017, the CAS Court office forwarded the Order of Procedure to the Parties inviting them to return a signed copy to the CAS Court Office within 20 April 2017.

51. The Order of Procedure was returned duly signed to the CAS Court Office by the Respondent and the Appellant on 18 and 20 April 2017, respectively.

V. HEARING

52. On 12 May 2017, a hearing took place in Lausanne at the CAS Court Office.

53. In addition to the Panel and Mr José Luis Andrade, Counsel to the CAS, the following persons attended the hearing:

- For the Appellant: the Player in person, assisted by his legal counsels, Mr Roy Vermeer and Mr Kudawashe Chisekereni, as well as Mr Desmond Maringwa, President of the Footballers Union of Zimbabwe;
- For the Respondent: Mr Imed Mssedi, the Club's legal counsel.

54. The Parties confirmed that they did not have any objection to the appointment and composition of the Panel or to the jurisdiction of the CAS.

55. At the outset of the hearing, the Appellant withdrew his request to impose sporting sanctions on the Club and renounced its argument regarding the failure by FIFA to notify the Club's answer during the FIFA DRC proceedings, and also reduced the requested amount for legal costs (i.e. USD 112,500) to a reasonable contribution to be decided by the Panel in relation to the costs incurred by the Player.

56. During the hearing, the Parties submitted new documents. After consideration of the Parties' requests, taking into account their objections to the filing of the new documents and in the absence of exceptional circumstances, the Panel decided not to admit to the file the Parties' new documents, pursuant to Article R56 par.1 of the CAS Code.

57. As to the merits of the case, the Appellant basically confirmed the content of his written submissions and insisted that the *"cash payment order"* is too unclear in the wording to unambiguously establish that the Player actually received the money; that in fact, the word "order" suggests an instruction to a bank to make a future payment to a third party and does not constitute a payment receipt.

58. The Respondent maintained that since the beginning of the civil revolution in Libya, the Club has always made cash payment to its players and coaches and that, in this situation, banks in Libya does not even operate wire transfers, especially with regard to foreign currency and that, in any case, the Termination Agreement does not stipulate that the Club shall pay the relevant sum through a bank transfer, nor did the Parties reach any other agreement in that sense. In the event that the Parties had agreed that the payment was to be made through bank transfer, there would have been no need to sign the *"cash payment order"*. Besides this, the *"cash payment order"* does not even contain the Player's bank details. Therefore, the *"cash payment order"* shows that the Player received the money due under the Termination Agreement.

59. Moreover, the Respondent argued that Article 2 of the Termination Agreement suggests that, at the time of signing, the Club had already fulfilled all its financial obligations towards the Player which implies that, since the *"cash payment order"* was also signed on the same date, the Player had already received the relevant amount.

60. In addition, the Respondent maintained that the Player had received from the Club other cash payments before the disputed facts and that, in those cases as well, the Player signed a *"cash payment order"* similar to the one under dispute; in any case, the fact that the *"cash payment order"* is signed by the Player, suggests that it is a receipt instead of an order to a bank to make a wire transfer, in which case it would be signed by the Club making the payment.

61. With regard to the bank statement produced by the Appellant with the statement of appeal, showing a bank transfer of USD 16,532.23, corresponding to the amount of the Player's monthly salary, the Respondent's counsel contended that there is no evidence that the relevant bank transfer on the Player's bank account was actually made by the Club and, moreover, the relevant cash payment order was signed in May 2015, while the bank transfer is dated July 2015.

62. Finally, the Respondent maintained that the cash payment order is conclusive evidence and therefore requested the Panel to reject the Player's appeal.

63. Since none of the Club's representative was present nor available for examination, the Panel only heard evidence from the Player. The counsels for the Player, the Club and the Panel had the opportunity to examine and cross-examine the Player.

64. With regard to the absence of any representative of the Club, notwithstanding the content of the CAS Court Office by letter dated 22 March 2017 for the purpose of the examination of the Parties, the Club's counsel alleged that the Club's President has difficulty to leave the country due to political and security reasons.

65. By answering to the Panel's questions, the Player testified a) that during the course of the Employment Contract with the Club, he only received payment of the signing fee (i.e. USD 200,000) and the corresponding amount of a monthly salary (i.e. USD 16,600 approximately), and that both payments were made through bank transfer; b) that the *"cash payment order"* was signed on the same date as the Termination Agreement (i.e. 11 January 2016), in Tunisia; c) that, on the same date, after signing the Termination Agreement and the *"cash payment order"*, the Club's President invited him to go to the Club's bank where the same President would give instructions for the relevant bank transfer; d) that, however, the bank teller informed them that the transfer would be postponed since it was not possible to execute it at that time; e) that he left the country the next day because he could not afford to change his flight ticket to Zimbabwe; f) that since that moment, he has never received any bank transfer, nor any other payment by the Club.

66. The Appellant and the Respondent had ample opportunity to present their cases, submit their arguments and answer the questions posed by the Panel. The Panel listened carefully and took into account in its subsequent deliberations all the evidence and arguments presented by the Parties even if they have not been expressly summarised in the present Award.

67. Upon closing the hearing, the Appellant and the Respondent expressly confirmed that they did not have any objections in respect of their right to be heard and to be treated equally in these arbitration proceedings. The Parties were also satisfied that due process had been fully observed.

VI. SUBMISSIONS OF THE PARTIES

68. The following outline is a summary of the main position of the Appellant, as made in particular in his written submissions, which the Panel considers relevant for the decision in the present dispute and does not 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 has been made in what follows. The Appellant's written submissions, the Parties' oral submissions at the hearing, the documentary evidence, the FIFA file and the content of the Appealed Decision were all taken into consideration.

A. Appellant's Submissions and Requests for Relief

69. The submissions of the Appellant, in essence, can be summarized as follows.

70. First, with regard to the facts of the present dispute, the Player maintained that the Club was in default of paying the Players' receivables from the very beginning of the employment relationship between the Parties and that he has never received the amount of USD 450,000 which was due by the Club under the Termination Agreement.

71. When the Termination Agreement was signed on 11 January 2016, it was established that the Club had to pay USD 450,000 in favour of the Player and that the payment would be executed through bank transfer; notwithstanding the above, the Player has never received the relevant amount.

72. In this context, the Appellant contended that he was requested to sign the *"cash payment order"* for the purpose of enabling the Club to process the payment through bank transfer to his bank account. The Player affirmed that the same procedure was also adopted by the Club for two previous payments in July 2015, when the signature of the *"cash payment order"* was followed by a bank transfer to the bank account of the Player's wife at FBC Bank.

73. However, since the Club did not proceed with the relevant bank transfer, the Player made several attempts in order to urge the Club to comply with its financial obligations but the Club completely disregarded any of the Player's calls or messages and, eventually, did not even reply to the Players' reminder letter nor to his formal notice, before the claim was lodged in front of FIFA.

74. With regard to the legal grounds of the appeal, the Player admitted having signed the *"cash payment order"* but argued that the FIFA DRC mistakenly interpreted the relevant document as an evidence of the fact that the Appellant actually received the amount of USD 450,000, apparently cash, although the Club failed to produce any other document confirming that the payment was actually made, nor it provided any details of the alleged payment. This is all the more true, considering that the *"cash payment order"* was not even dated.

75. In this respect, the FIFA DRC failed to realize that it was the burden of the Club and not the Player, to prove that the payment was made, since the Player claimed that he has never received the money and it would be extremely arduous, if not impossible, for him to provide evidence of a negative fact such as the non-payment. In order to support his claim, the Player provided copy of a bank statement relating to his wife's bank account at FBC Bank, for the period 1 May 2015 until 31 December 2015, from which there is no evidence of any transfer of the relevant amount of USD 450,000.

76. In fact, since it is the duty of the Club to pay the salaries and other receivables to the employee, an employee should never be expected to prove that he has not been paid, as the act of payment is an obligation of the employer.

77. With regard to the legal nature of the relevant *"cash payment order"*, the Player maintained that, far from being a payment receipt, it is actually a directive to a bank or other financial institution from a bank account holder instructing the bank to make a payment or series of payments to a third party via paper or electronic means. Since no further money transfer followed, the *"cash payment order"* cannot be considered as a valid proof of the Club's alleged payment.

78. Furthermore, the Player pointed out that it would be unusual to make a cash payment of such an amount of money and it would be also difficult to export such a huge amount out of a country, and particularly with regard to Tunisia where strict rules apply with respect to currency export.

79. Moreover, the Player pointed out that he was deceived by the Club about the real purpose of the signature of the *"cash payment order"* and, as a consequence, the relevant document should not be used against the Player by inferring that he is bound by his signature; in fact, the Player was misled by a fraudulent misrepresentation by the Club; and in any case, the Player would never have signed the *"cash payment order"* without actually having already received the monies, if he knew that the "cash payment order" was a receipt of payment. Therefore, the principle of the *"caveat subscriptor"* shall not apply to the present case.

80. In addition, the wording in the *"cash payment order"* is far from unequivocal since the expression *"it is paid to Mr Edward Sadomba"* does not really equal to a confirmation by the Player having received the amount at issue as it would be the explicit wording *"I, Mr Edward Sadomba confirm I have received the sum of USD 450,000.00 from Al Alhi SC on (date) in (place)"*. Likewise, the term "order", underlying an instruction for a future payment, is in conflict with the wording *"it is paid"*.

81. In its Appeal Brief, the Appellant referred to the prayers provided in his statement of appeal, in which the Appellant submitted the following requests for relief:

"The Appellant prays that the decision by the Dispute Resolution Chamber to reject the Appellant's claim be set aside and be substituted with the following,

a) The Claimant's claim be and is hereby upheld and the Respondent is ordered to pay to the Appellant:
   (i) USD 450,000.00 being the value corresponding to the mutual termination of the contract of employment;
   (ii) USD 112,500.00 being the legal costs in the tune of 25% of the total amount claimable by legal practitioners in terms of Statutory Instrument 154 of 2014;
   (iii) 5% interest per annum on the capital sum as from 11 January 2016 to date of full and final payment as prescribed by the Prescribed Rate of Interest Act [Chapter 8: 10];
   (iv) That the Respondent be barred from registering and signing any foreign players for two consecutive football seasons;

b) Costs of appeal in the sum of CHF 1000 and legal costs for dealing with the appeal in the sum of USD 100 000.00;

c) Payment of all monies should be made into the player's representatives trust account whose details are the follows …".

82. As indicated above (par. 54), at the outset of the hearing, the Appellant withdrew his request to impose sporting sanctions on the Club and renounced its argument regarding the failure by FIFA to notify the Club's answer during the FIFA DRC proceedings, and also reduced the requested amount for legal costs (i.e. USD 112,500) to a reasonable contribution to be decided by the Panel in relation to the costs incurred by the Player.

B. The Respondent's Submissions and Requests for Relief

83. Since the Respondent failed to submit its answer within the prescribed time-limit, its position was set forth during the hearing which is summarized under para V above. At the end of the oral pleadings, the Respondent requested the Panel to reject the Appellant's appeal.

VII. CAS JURISDICTION

84. The jurisdiction of the CAS, which is not contested, shall be examined in the light of Article R47 of the CAS Code, which reads as follows: *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".*

85. The Appellant relies on Article 58, par. 1 of the FIFA Statutes (2016 edition) which reads 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 notification of the decision in question".*

86. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the Parties.

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

88. Under Article R57 of the CAS Code, the Panel has the full power to review the facts and the law and may issue a new decision which replaces the decision appealed or annul the challenged decision and/or refer the case back to the previous instance.

VIII. ADMISSIBILITY OF THE APPEAL

89. The appeal was filed in compliance with all the requirements set out in Article R48 of the CAS Code, including the payment of the CAS Court Office fee. The admissibility of the Appeal was

not contested by the Respondent and is confirmed by the parties' signature of the Order of Procedure.

90. It follows that the appeal is admissible.

IX. APPLICABLE LAW

91. Article R58 of the CAS Code provides the following:

"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".

92. In addition, Article 57 par. 2 of the FIFA Statutes provides:

"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".

93. The parties did not provide their position regarding the applicable law.

94. The Panel notes that the Termination Agreement does not contain any specific clause concerning the applicable law, nor did the Parties agree otherwise on the law applicable to the present dispute.

95. Consequently, the Panel will apply the various regulations of FIFA, and, subsidiary, Swiss law should the need arise to fill a possible gap in the regulations of FIFA.

X. MERITS

96. The Panel preliminarily observes that, with regard to the Appellant's requests for relief, at the hearing the Player withdrew the claim regarding the imposition of sporting sanctions and he also reduced the requested amount for legal costs (USD 112,500) to a reasonable amount to be decided by the Panel.

97. Therefore, with regard to the merits of the present case, the issue to be decided by the Panel is whether the Appellant is entitled to receive from the Club the amount of USD 450,000 agreed upon by the Parties under the Termination Agreement.

98. In this context, the following facts are undisputed between the Parties: a) that the Player and the Club signed the Termination Agreement on 11 January 2016, according to which the Employment Contract was early terminated, with the obligation of the Club to pay to the Player the amount of USD 450,000; b) on the same date, the Player signed a document titled *"cash payment order"* which reads as follows: *"It is paid to Mr Edward Sadomba, holder of id card no EN 813394 an amount of ($ 450.000) say four hundred and fifty thousand Dollars only, against terminate the contract"*. The dispute between the Parties concerns whether the Club already fulfilled its

obligation of payment towards the Player, which fact is contended by the Respondent, as opposed by the Appellant, and is based on the different interpretation of the *"cash payment order"* offered by the Parties.

99. *In thi*s respect, the Player claims a) that the payment was expected to be executed through bank transfer and that he has never received the relevant amount; b) that, in fact, the *"cash payment order"* does not constitute any receipt of payment; c) that he was requested by the Club to sign it with the purpose of formally instructing the Club to initiate the process of payment through bank transfer; d) that from a formal point of view, the *"cash payment order"* is ambiguous in its wording, and, in any case, the word "order" is in contradiction with the assumption by the Club that the document is a payment receipt.

100. On the contrary, the Club argues that the Player was paid in cash on the same day when the Termination Agreement was concluded and that the *"cash payment order"* is the relevant receipt by the Player, confirming that he had received the amount of USD 450,000.

101. To support its argument, the Respondent alleges the following: a) that, since the beginning of the civil revolution in Libya, it has been the practice of the Club to pay the players' and coaches' salaries in cash, also because banks in Libya are not inclined to operate wire transfers, especially in foreign currency; b) that there was no agreement between the Parties that the payment would be made through bank transfer; c) that any previous payment to the Player under the Employment Contract with the Club was also made in cash, as it is confirmed by the document signed by the Player on 2 May 2015 concerning the amount of USD 16,600; d) that it is clear from the wording of Article 2 of the Termination Agreement that the Club had already fulfilled all its financial obligations towards the Player, which also includes the payment of the amount in dispute.

102. As a first consideration, the Panel notes that the *"cash payment order"* signed by the Player on 11 January 2016, lacks a clear and unambiguous wording as to the statement made by the Player. In fact, the term "order" suggests an instruction for a payment which is still to be made, while the expression *"it is paid"* seems quite to assume a contextual payment. The lack of a clear and unambiguous wording of this document is in the responsibility of the Respondent as the author of it (*"in dubio contra stipulatorem"*).

103. The Panel believes that the wording *"it is paid"* is not an unequivocally way to attest that the payment has been completed, as it would be the expression by the Player *"I acknowledge receipt of the amount of…"*.

104. Moreover, the Panel emphasizes that, on the one hand, it is not common that such a considerable amount of money, as the amount in dispute, especially when it comes to the termination of an employment agreement, is paid in cash rather than with bank checks or a bank transfer; on the other hand, since the Club maintains having paid USD 450,000 in cash, it would be reasonable to expect that the Respondent would be able to produce some kind of documentation regarding the supply of the money (for example a bank withdrawal form), which it failed to do. Moreover, the Club could have produced a written statement by the Club's representative who materially delivered the money or a witness statement by other Club's

players confirming the practice by the Club to pay their salaries in cash. On the contrary, the Club failed to produce any document relating to the origin of the amount allegedly paid to the Appellant, notwithstanding the Panel's request on 22 March 2017.

105. Especially, the Panel is disappointed that none of the Club's representatives were present at the hearing in order to give evidence on the alleged cash payment and the relevant facts and circumstances occurred on the date the Termination Agreement was concluded, notwithstanding the clear request of the CAS Court Office by fax letter to the Parties on 22 March 2017, in which the Panel not only explicitly requested the Appellant himself to be available to testify at the hearing (which he did), but also explicitly requested the Respondent to make available at the hearing its representative that, in the Respondent's view, would be able to testify on the cash payment allegedly made to the Appellant. As a consequence, the Respondent failed to refute or deny the Player's version of the events occurred on 11 January 2016.

106. In addition, the Panel observes that, while the Respondent excludes having made any payment to the Player through bank transfer, it resulted from document n°12 attached to the Appellant's statement of appeal, that the Player received a wire transfer on 13 July 2015 in the amount of USD 16,532.23. Although, at the hearing, the Respondent's counsel argued that there is no evidence in the said document confirming that the wire transfer was made by the Club, the Panel notes that the relevant amount corresponds to the Player's monthly salary under the Employment Contract with the Club (the difference between USD 16,600.00 and USD 16,532.23 being justified by plausible bank charges). In this respect, the Panel also notes that the Player claims that such a bank transfer is in strict relation with another cash payment order signed on 2 May 2015; which would confirm that the *"cash payment order"* was the common way, or at least not an unusual way to request the Club to proceed with the bank transfer.

107. Further, the Panel notes that the Club has never replied to the Player's reminder letter nor to the formal notice before the Player's claim was lodged before the FIFA DRC.

108. In view of all the foregoing, and in consideration of all the evidentiary materials of the present case, the Panel reaches the conclusion that the *"cash payment order"* is too ambiguous to be considered as a conclusive evidence of the fact that the Player actually received the amount due by the Club under the Termination Agreement.

109. In consideration of the general principle of the burden of proof and taking in consideration the fact that, moreover, it would have been reasonably easier for the Club to produce documents (or witness statements) in order to corroborate the alleged cash payment, rather than for the Player to demonstrate that he has not received any payment, it is the Panel's opinion that it was the responsibility of the Club to overcome the inconsistencies inherent in the *"cash payment order"*. Therefore, the Respondent shall bear the consequences of its failure to prove having fulfilled its financial obligation toward the Player notwithstanding the ambiguousness of the *"cash payment order"* on which the Club relied to resist the Player's claim.

110. In this respect, the Panel makes reference to Article 8 of the Swiss Civil Code which stipulates that each party must prove the facts upon which it is relying to invoke a right, thereby implying that the case must be decided against the party that fails to adduce such evidence.

111. In the light of all the considerations above, and taking into account all the arguments put forward by the Parties, the Panel establishes that the claim filed by the Player shall be upheld accordingly and the Appealed Decision shall consequently be set aside.

112. As a consequence, the Player is entitled to receive the amount of USD 450,000 agreed upon under the Termination Contract, plus interest at the rate of 5% per annum in accordance with Article 104 of the Swiss Code of Obligations (the "SCO") from the moment when the relevant payment became due. Since the Termination Agreement does not specify any time limit for the payment, the Panel concludes that interest shall accrue from 11 January 2016 according to Article 75 SCO pursuant to which, where no time of performance is stated in the contract, or evident from the nature of the legal relationship, the obligation may be discharged or called immediately.

113. All the other motions or prayers for reliefs are dismissed or not being addressed by the Panel since they were renounced by the Appellant.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Edward Takarinda Sadomba on 22 September 2016 against the decision rendered by the FIFA Dispute Resolution Chamber on 15 July 2016 is upheld.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 15 July 2016 is set aside.

3. Club Al Alhi SC is ordered to pay to Mr Edward Takarinda Sadomba the amount of USD 450,000 (four hundred fifty thousand US dollars) plus interest at the rate of 5% per annum as of 11 January 2016 until the date of effective payment.

4. (…).

5. (…).

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