Arbitration CAS 2016/A/4852 Zamalek Sporting Club v. Karim Alhassan, award of 13 October 2017

Panel: Mr Marco Balmelli (Switzerland), President; Mr Pedro Tomás Marqués (Spain); Mr Mark Hovell (United Kingdom)

Football
Termination of employment contract without just cause
Article R57 para. 3 CAS Code
Inadmissibility of counterclaims in CAS appeal procedures
Invalidity of a waiver of the right for compensation
Unilateral clause in player-club contract
Duty to mitigate and set-off against damages under Article 337c para. 2 CO

1. **The rationale of Article R57 para. 3 CAS Code is to avoid evidence submitted in an abusive way and/or retained by the parties in bad faith in order to bring it for the first time before CAS. CAS panels should reserve the application of this provision to exceptional circumstances and as a safeguard in order to avoid abusive conduct by one of the parties: the control of good faith should therefore be the key element prior to the application of Article R57 para. 3 CAS Code.**

2. **According to the constant construal of Article R55 CAS Code (based on the comparison with Article R39 CAS Code and the interpretive principle *inclusio unius est exclusio alterius*), counterclaims are inadmissible in CAS appeal procedures. Instead, a respondent needs to file an independent appeal within the applicable time limit. If it fails to do so, *i.e.* if the answer including the request is filed after the time limit for the appeal has expired, the counterclaim is inadmissible.**

3. **According to Article 341 Swiss Code of Obligations (CO) an employee may not validly waive any claims arising from mandatory law during and for 30 days after termination of the employment agreement.**

4 **A contractual clause contained in a footballer's employment contract under which only the club, but not the player may unilaterally terminate the employment contract is unilateral and potestative and therefore contrary to the regulations of FIFA. Consequently it is null and void.**

5. **Under Article 337c para. 2 CO, an employee must permit a set-off against the amount of damages (*i.e.* damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration) for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he intentionally failed to earn. Such rule implies**

that after a breach by the club, in accordance with the general principle of fairness, the player must act in good faith and seek for other employment, showing diligence and seriousness, with the overall aim of limiting the damages deriving from the breach and avoiding that a possible breach committed by the club could turn into an unjust enrichment for him. Furthermore, the duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign a contract with worse financial conditions, in the absence of any valid reason to do so.

I. PARTIES

1. Zamalek Sporting Club (the "Club" or "Appellant") is a football club, with registered seat in Cairo, Egypt. The Club is affiliated to the Egyptian Football Association (the "EFA"), which is a member of the Fédération Internationale de Football Association ("FIFA").

2. Mr Karim Alhassan (the "Player" or "Respondent") is a Ghanaian football player.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions. Additional facts and allegations found in the parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 14 August 2011, the Club and the Player entered into an employment agreement (the "Agreement"). *Inter alia*, the Agreement held the following:

"Second: Duration of the contract

Begins from season: 2011-2012

Expires on the end of season: 2015-2016

…

Third: Financial Provision

The club agreed that the player will join football team for the total amount of: (Only one million and five hundred thousand USD) Distributed on 5 years of the contract …".

5. The Player's remuneration was fixed at USD 300'000.00 per season. For the season 2011/2012 season, the remuneration was to be paid as follows:

   i. USD 150'000.00 payable 15 August 2011;

   ii. USD 7'500.00 monthly remuneration from 1 September 2011 until 1 June 2012; and

   iii. USD 75'000.00 payable on 1 July 2012.

6. Article 4 of the Agreement provided as follows: *"The player will incur the taxes of the total amount of the contract according to law. The club will settle the taxes to the concerned tax administration and inform the player for the document of paying after the end of the season and before the beginning of the next season".*

7. Article 5.10 of the Agreement provided as follows: *"The club has the right to inform the player in writing to terminate the contract between them at the end of the season during its validity within fifteen days after last national official match for the club. In this case the player does not deserve any compensation for the rest of the period of the contract the player will receive his financial dues up to the end of the contract".*

8. Article 5.11 of the Agreement provided as follows: *"If the player has not been informed of termination of the contract during fifteen days from last official match for the club the player will receive 50% of the amounts mentioned on the contract until the beginning of second entry period if he has not transferred to another club and 50% of advance payment if he has transferred to another club before".*

9. On 8 or 18 May 2012 (the translations differ), the Club sent a letter to the Player indicating it did not wish to continue with the Agreement and that it deemed that the parties' respective financial claims against each other as settled.

10. On 19 April 2014, the Player lodged a claim against the Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), claiming that the termination of the Agreement was without just cause. The Player claimed for unpaid remuneration of USD 90'000.00 (for the May and June 2012 salaries [2 x USD 7'500.00)] and the instalment due on 1 July 2012 [USD 75'000.00]) and USD 1'200'000.00 as compensation for termination without just cause. The Club filed in its belated answer and submitted the termination letter with (allegedly) the Player's confirmation of receipt on it, stating: *"I confirm receipt and accept for termination"*. Furthermore, the Club claimed that the Agreement was terminated only because the Player was eager to transfer to another club due to the suspension of the Egyptian Premier League. The termination was in line with Article 5.10 of the Agreement. Therefore, no compensation was due to the Player.

11. On 17 June 2016, FIFA DRC issued its decision, holding that the Club shall pay to the Player USD 7'500.00 as outstanding remuneration and USD 1'220'500.00 as compensation for breach of contract (the "Appealed Decision"). In its merits, the FIFA DRC deemed the Club's answer as belated (Appealed Decision, para. 6-8). Based on the Player's claim and the available

evidence, the FIFA DRC found that the termination was unilateral without just cause (Appealed Decision, para. 13). Based on Article 17.1 of the Regulations on the Status and Transfer of Player (2016) (the "RSTP"), the FIFA DRC decided that the Club had to pay the then-due salary of May 2012 in the amount of USD 7'500.00 (Appealed Decision, para. 15) and USD 1'282'500.00. This amount included the salary June 2012 in the amount of USD 7'500.00, the instalment in the amount of USD 75'000.00 due on 1 July 2012 and USD 300'000.00 due for each subsequent season, i.e. USD 1'200'000.00) minus salary earned from other clubs (mitigation of damages) in the approximate amount of USD 62'000.00; therefore USD 1'220'500.00 (Appealed Decision, para. 8, 21, 23, 24).

12. On 17 October 2016, the reasoned decision was notified to the parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 7 November 2016, the Appellant filed its Statement of Appeal in accordance with Articles R47 and R48 the Code of Sports-related Arbitration (the "CAS Code") with the Court of Arbitration for Sport (the "CAS").

14. In accordance with Article R51 of the CAS Code, the Appellant filed its Appeal Brief on 30 November 2016, filing the following prayers for relief:

"The Appellant herein respectfully requests the Court of Arbitration for Sport:

1. *To accept this appeal against the Decision of the FIFA Dispute Resolution Chamber dated 17th of June 2016.*

2. *To adopt an award annulling said decision and declaring that:*

   a. *The Respondent is not entitled to any amount following the valid termination by mutual consent of the employment contract by and between the Parties.*

3. *To fix a sum of 5,000 CHF to be paid by the Respondent to the Appellant, towards its legal fees and costs.*

4. *To condemn the Respondent to the payment of the whole CAS administration costs and Arbitrators' fees.*

5. *Awarding any such other relief as the Panel may deem necessary or appropriate".*

15. On 22 December 2016, the Respondent filed its Answer, pursuant to Article R55 of the CAS Code, requesting:

"Conclusions/Reliefs:

[…]

3. *The Appeal is incurably bad and must therefore be rejected in its entirety.*

4. *The player is entitled to all the awards of FIFA and ALSO the compensation for Moral damages.*

5. *All the financial request made by the Appellant, CHF 5,000, the total CAS administrative costs and Arbitrators fees by surcharged against the Appellant.*

6. *CHF 10.000 be awarded to player to cover legal cost".*

16. On 2 March 2017, the CAS Court Office informed the parties that the Panel appointed to decide this matter had been constituted as follows:

President: Dr Marco Balmelli, Attorney-at-Law in Basel, Switzerland

Arbitrators: Mr Tomás Marqués, Attorney-at-Law in Sitges, Spain

Mr Mark Andrew Hovell, Solicitor in Manchester, United Kingdom.

17. On 20 March 2017, further to the instruction given by the Panel, the Appellant filed its comments on the Respondent's answers regarding the production of documents which was requested in the Appeal Brief, reiterating the request that documents be produced. The Appellant also commented on the possibility expressed by the Panel of appointing an expert to assess the authorship of the handwritten remark made in the document filed as Annex 11 to the Appeal Brief. In this regard, the Appellant stated that, in its view, the fact that the Respondent had signed a termination agreement and did not raise any issue for almost two years was sufficient to demonstrate that the Player considered himself bound to that agreement. The Appellant stated that it would accept that the Panel would appoint an expert if it considered it necessary, noting, however, that the Club was not in possession of the original of the document submitted as Annex 11 to the Appeal Brief.

18. On 23 March 2017, the Respondent filed his answer to the Appellant's comments on the request for the production of documents and indicated, *inter alia*, that he had already provided all documents that were available to him. The Respondent also presented his position on the potential appointment of an expert, stating that *"we are struggling to understand the need to introduce a so called Expert".*

19. On 24 May 2017, the Panel ordered the Respondent to provide a copy of any and all employment contracts which he had entered into since the Agreement was terminated, together with a copy of any agreements by means of which those employment contracts were amended, replaced or terminated. In case the Respondent was not in a position to submit the requested documents, he was ordered to give detailed reasons in connection thereto. On the same date, the Panel requested FIFA to provide a copy of the full FIFA DRC's file.

20. On 26 May 2017, the Respondent filed its documents with respect to the document request.

21. On 30 May 2017, the Panel informed the parties that a hearing would be held on 10 July 2017. Furthermore, the Panel informed the parties that it would decide whether to appoint an expert to assess the authorship of the handwritten wording in Annex 11 to the Appeal Brief after the hearing had been held.

22. On 2 June 2017, the Appellant filed its comments on the documents provided by the Respondent and reiterated that the Respondent had not filed a copy of his employment contract with Adana Demirspor Kulubu or with FK Radnicki.

23. On 8 June 2017, the Respondent filed his response to the Appellant's comments.

24. On 30 June 2017, the CAS Court Office acknowledged receipt of the case file produced by FIFA.

25. On 10 July 2017 and 6 July 2017, the Appellant and the Respondent, respectively, filed with the CAS Court Office the Order of Procedure duly countersigned.

26. The hearing of the present procedure took place in Lausanne, Switzerland, on 10 July 2017. The following persons attended the hearing:

    For the Appellant:

    Mr Alfonso León Lleó and Mr Nasr El Din Azzam, Attorneys-at-law.

    Witness:

    Mr Ismail Youssef (Agent), by telephone.

    For the Respondent (by skype conference):

    Mr Ashford Oku, Counsel

    Mr Yaw Amponsah, the Respondent's Agent and representative

    Mr Karim Alhassan (Respondent).

27. In addition, Mr Jose Luis Andrade, counsel to the CAS assisted the Panel at the hearing. Neither party had any objection regarding the way the proceedings were conducted. Both parties explicitly confirmed that their right to be heard had been duly respected.

IV. SUBMISSIONS OF THE PARTIES

28. The following summarises the parties' arguments and submissions and does not necessarily address each point advanced. The Panel has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

A. The Appellant

29. The Appellant argued that by signing the Agreement, the Player agreed to the Club's internal regulations. The remuneration amounted to USD 1.5 million gross for the entire duration (i.e. 5 seasons, USD 300'000.00 per season) whereas the Player was only entitled to the net amount after taxes. Moreover, the Club argues that, according to the EFA Players' Affairs regulations (which the Club states is part of the Agreement), 1% of the Player's salary had to be deducted and paid to the EFA as part of the Player's registration fee.

30. The Player wished to leave the Club around November 2011 during the transfer window in January 2012. After the "Port Said massacre" (1 February 2012), the EFA suspended the league indefinitely and cancelled the remainder of the 2011/2012 season on 10 March 2012. The Player insisted (publicly) on moving to another club so that he could have the opportunity to play regularly and participate in official competitions.

31. As there was no indication on when the competition would resume in Egypt, the Club and the Player agreed to terminate the Agreement amicably. Accordingly, a document dated 18 May 2012 formalizing that agreement was prepared, by means of which the parties mutually terminated the Agreement. The Player signed that document in approval.

32. When the Agreement was mutually terminated, the Player had received all amounts to which he was entitled.

33. The mutual agreement for termination produced by the Respondent before FIFA strikingly did not bear his signature or the express handwritten acknowledgement and consent for the mutual termination.

34. By signing this termination agreement, the Player must bear the consequences arising from its execution.

35. The fact that the Respondent did not contest the validity of this termination agreement for almost two years after signing it, nor sent a single notice in order to claim for any outstanding amounts or damages, is evidence that both parties were satisfied with the mutual termination.

36. Furthermore, the circumstances existing after the Port Said incident and the sequence of events which followed, including the suspension of all football activity, meant that the continuation of the performance of its obligations by the Appellant would be excessively burdensome. The principle of *force majeure* and the doctrine *clausula rebus sic stantibus* should render the Appellant released of its obligations under the Agreement.

37. In insisting on the performance by the Appellant of its obligations under the Agreement and payment of compensation under the above-mentioned circumstances, the Respondent is in breach of the principle of good faith.

B. The Respondent

38. The Respondent argued that the Club unilaterally terminated the Agreement without just cause effective 25 May 2012, claiming USD 90'000.00 for outstanding remuneration and a due instalment payment, USD 1'200'000.00 for his salary for the remainder of the contract period, and an appropriate compensation for moral damages.

39. The Player claimed that the Club filed its reply before FIFA belatedly and thereby forfeited its right to defence. In case there was any defence by the Appellant, the Player refers to the previous submissions before FIFA. The Respondent also expressly indicated that he relies *"extensively on the finding of the decision of the FIFA DRC […]"*.

40. In relation to the alleged mutual termination of the Agreement, the Respondent states that *"The Panel […] will discover how Zamalek even fraudulently sought to validate the termination letter and other inputs bordering on fraud, that should even vitiate this attempt to reverse the decision"*.

41. In particular, he emphasises that he disclosed all documents regarding his engagements with his subsequent employers. The speculations about an employment contract with the South African club Black Leopards and the Serbian club Radnicki are unfounded.

V. JURISDICTION

42. Article R47 of the CAS Code provides 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 it prior to the appeal, in accordance with the statutes or regulations of that body"*.

43. The jurisdiction of CAS, which is not disputed, derives from Article 58 para. 1 of the FIFA Statutes (April 2016 edition) as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"*.

44. The parties further confirmed the jurisdiction of CAS by signing the Order of Procedure.

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

VI. ADMISSIBILITY

46. Article 58.1 of the FIFA Statutes states:

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

47. Article 58.2 of the FIFA Statutes states:

"Recourse may only be made to CAS after all other internal channels have been exhausted".

48. The appeal was filed within the 21 days set by Article 58 para. 1 of the FIFA Statutes. The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

49. It follows that the appeal is admissible.

VII. APPLICABLE LAW

50. Article R58 of the CAS Code provides as follows:

"Law Applicable to the merits

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".

51. The Panel notes that Article 57 para. 2 of the FIFA Statutes stipulates the following:

"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".

52. Moreover, pursuant to Clauses 5.14 and 6.17 of the Agreement, the parties agreed to apply *"FIFA rules and regulations".*

53. In light of the above, the Panel will decide the present dispute primarily in accordance with the FIFA Regulations and, subsidiarily, in accordance with Swiss law in case of any gap in the FIFA Regulations.

VIII. MERITS

A. The Panel's scope of review

54. According to Article R57 para. 1 of the CAS Code, the Panel has full power to review the facts and the law, to hold a trial *de novo* and to issue a new decision (see MAVROMATI/REEB, R57 para. 12).

55. The Respondent claimed that the Club's appeal was not to be heard as it had forfeited its right to defend itself by the late filing of its response before the FIFA DRC. The Panel assumes that the Respondent was referring to Article R57 para. 3 of the CAS Code, which states the following:

> *"The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply".*

56. The rationale of Article R57 para. 3 of the CAS Code is to avoid evidence submitted in an abusive way and/or retained by the parties in bad faith in order to bring it for the first time before CAS (see MAVROMATI/REEB, R57 para. 46). Panels should reserve the application of this provision to exceptional circumstances and as a safeguard in order to avoid abusive conduct by one of the parties: the control of good faith should therefore be the key element prior to the application of Article R57 para. 3 (see MAVROMATI/REEB, R57 para. 53, CAS 2015/A/3910, para. 114).

57. In this respect, the Panel notes, that the Appellant tried, even if it was too late, to file its response before the FIFA DRC. Furthermore, the Panel finds no evidence that would prove an abusive behaviour by the Appellant. Considering this, the Panel is of the opinion, that in the light of the specific circumstances of the case, the Panel's mandate is not limited according to Article R57 para. 3 of the CAS Code and therefore, the Appellants' arguments shall be examined.

58. Further, the Panel notes that on 2 June 2017, the Appellant specified its argument regarding the question of netting of the salary and provided (new) evidence to support such argument. The Respondent was given the opportunity to comment on such argument and evidence and filed his comments on 8 June 2017. As the Respondent did not object to the filing of the Appellant's filings, the Panel deems it appropriate to consider all submissions made.

B. Admissibility of Respondent's request for moral damages

59. In his prayers for relief in the Answer, the Player claimed for appropriate compensation for moral damages, which had been denied in the Appealed Decision. The Player did not file an appeal against the Appealed Decision. Within the appeal procedure initiated by the Club, this request for relief must be qualified as a counterclaim. The Panel notes that, according to the constant construal of Article R55 of the CAS Code in the CAS jurisprudence (based on the comparison with Article R39 of the CAS Code and the interpretive principle *inclusio unius est exclusio alterius*), counterclaims are inadmissible in CAS appeal procedures. Instead, a respondent needs to file an independent appeal within the applicable time limit. If it fails to do so, i.e. if the answer including the request is filed after the time limit for the appeal has expired, the counterclaim is inadmissible (see MAVROMATI/REEB, R55 para. 14; CAS 2010/A/2252, para. 40 [obiter dictum]; CAS 2010/A/2098, para. 5-7, 43 [counterclaim inadmissible]).

60. Bearing this in mind, the Panel notes that the Player's Answer was filed on 22 December 2016, i.e. after expiration of the 21-day time limit to file an appeal as of notification of the Appealed Decision. Therefore, the Panel considers the above mentioned prayer for relief inadmissible.

C. Compensation for the termination of the Agreement

61. The present dispute is primarily governed by the RSTP, which provide that in cases of breach of a contract, financial compensation, as well as sporting sanctions, may be applicable (Article 17 RSTP). Therefore, the Panel will establish whether there was a breach of contract without just cause or not. Furthermore, it will determine if any compensation according to Article 17 RSTP has to be paid.

a. Did the parties enter into a mutual termination agreement?

62. The Club claimed that the parties entered into a mutual termination agreement on 18 May 2012. The letter reads, i.a., as follows:

> *"… In light of the concern of the club on the application of the regulations and laws of the Egyptian FA related to the necessity to notify players with non-continuation of the concluded contract between us within 15 days before the date of last match in season 2011/2012. As last match was on 10/5/2012 and accordingly the notification period ends on 25/5/2012 based on the letter of the Egyptian FA. In this regard, we hereby notify you that we don't wish to continue the concluded contract between us without bearing any penalty clauses or compensational fines by any party and the contract endorsed between us is considered cancelled from the date of this notification according to the previously mentioned clause.*
>
> *We would like to take this opportunity to thank you again and wish you the best of luck in your future endeavours, since you will a new and strong value added to your new club.*
>
> *Please accept our sincere respect".*

63. The Club produced a copy of the said letter with the following handwritten sentence allegedly added by the Player along with his signature:

> *"I confirm receipt and accept for termination".*

64. For his part, the Player denied adding the handwritten sentence, but acknowledged signing a copy of the letter (which he stated was only produced to him in Egyptian).

65. Turning to the question whether this letter qualifies as termination agreement, the Panel considers that several elements in the letter suggest that it reflects a unilateral termination of the Agreement by the Club. First, the one-sided wording of the letter, where the Club states that *"we hereby notify you"* and that *"we don't wish to continue the concluded contract"*, clearly suggests a unilateral termination. Second, the fact that the letter very closely follows the terms of Clause 5.10 of the Agreement (which provides the Club with a right to unilaterally terminate the Agreement by paying a certain amount), refers to the *"laws of the Egyptian FA"* and indeed concludes by stating that the Agreement was deemed cancelled *"according to the previously mentioned clause",* further reinforce the conclusion that the Club was indeed unilaterally terminating the Agreement.

66. The Panel therefore concludes that the parties did not enter into a mutual termination agreement, rather this letter was the Club effectively giving notice to the Player to terminate the Agreement pursuant to Article 5.10.

67. The Panel further notes that even if the signature and the alleged statement *"I confirm receipt and accept for termination"* were to be interpreted as an agreement (which was denied by the Player), the termination agreement would be deemed null and void: according to Article 341 of the Swiss Code of Obligations ("CO") pursuant to which an employee may not validly waive any claims arising from mandatory law during and for 30 days after termination of the employment agreement. Considering the terms mentioned in the letter, the Panel notes that a termination without any financial obligation must be deemed unbalanced. The Player may not waive his right for compensation. Therefore, even if the letter qualified as mutual agreement, it would be null and void in terms of Article 341 CO. Considering this outcome, the Panel deems it obsolete to examine the validity of the adding the handwritten sentence *"I confirm receipt and accept for termination"*.

b. Was the termination of the Agreement without just cause?

68. The Panel further establishes whether the Club could rely on Article 5.10 of the Agreement in order to terminate the Agreement unilaterally.

69. Article 5.10 of the Agreement states as follows:

> *"The club has the right to inform the player in writing to terminate the contract between them at the end of the season during its validity within fifteen days after last national official match for the club. In this case the player does not deserve any compensation for the rest of the period of the contract the player will receive his financial dues up to the end of the contract"*.

70. Bearing in mind the purpose of Article 17 RSTP, the Panel considers the clause to be unilateral and potestative, for the benefit of the Appellant only and is therefore contrary to the regulations of FIFA. The Appellant is not at liberty to unilaterally terminate the Agreement at will and can only do so without consequence if there is just cause. This finding is in line with the established jurisprudence of the CAS (see CAS 2014/A/3675, para. 57, CAS 2005/A/983 & 984 and CAS 2008/A/1517). The Panel therefore fully accepts the finding of the FIFA DRC which deemed Article 5.10 of the Agreement null and void. Hence, Article 5.10 cannot be arbitrarily or validly invoked as a legal basis for a unilateral termination of the Agreement.

71. The Panel further notes that the Club did not claim any circumstances caused by the Player that would justify a unilateral termination by the Club.

72. In view of the above and of the evidence presented by the parties, the Panel concludes that the Appellant unilaterally terminated the Agreement without just cause and that the Respondent is therefore entitled to a financial compensation in accordance with Article 17 para. 1 RSTP.

c. What compensation is the Player entitled to?

73. The Panel notes the Appellant's argument that no compensation should be awarded because over the relevant period of time it should be considered that the Club was released from performing its obligations under the Agreement due to a *force majeure* event. The Panel notes that the Appellant failed to provide enough evidence that a *force majeure* event occurred. Furthermore, it failed to establish the reasons why under such circumstances, it was not bearable for the Club to fulfil the Agreement any longer. The Panel notes that the League was suspended, but it was not clear that the Club terminated all its other players' contracts, nor knew at the termination date, how long such suspension might last. Therefore, the Appellant's arguments relating to *force majeure* are dismissed.

74. Since it is established that the Club terminated the Agreement without just cause, the Panel turns its attention to Article 17 para. 1 RSTP:

> *"In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".*

75. In the application of this provision, the Panel concludes that the parties did not agree on a specific sum to be paid in the event of breach of contract by either party. In this respect, the Panel turns its attention to Clause 5.11 of the Agreement which holds that *"if the Player has not been informed of termination of the contract during fifteen days from last official match for the club the player will receive 50% of the amounts mentioned on the contract until the beginning of second entry period if he has not transferred to another club […]".* Turning to the question whether this provision indicates a valid liquidated damage clause, the Panel emphasizes that Clause 5.11 is directly linked to Clause 5.10 (unilateral termination by the Club) which the Panel deemed null and void. The Panel therefore considers that the clause is applied in case the Club misses the time limit to terminate the Contract unilaterally at the end of the season. It shall compensate the Player for any damages related to a belated termination. It does – however – not cover the case where one party breaches the Agreement without just cause. The Panel concludes that Clause 5.11 of the Agreement does not qualify as clause regarding liquidated damages in case of a breach of contract without just cause. Therefore, Clause 5.11 does not apply in the matter at hand.

76. The Panel notes that – absent any provision to the contrary – in case of unlawful termination of the contract by the Club the Player is entitled to all the salaries agreed under the contract until the termination date (CAS 2015/A/3910, para. 170; CAS 2012/A/2874, para. 97).

77. In the Appealed Decision, the FIFA DRC held that the Player would have been entitled to a salary of USD 1'282'500.00 until the end of the Agreement:

- Season 2011/2012: USD 82'500.00 (Salary June 2012: USD 7'500.00 and USD 75'000.00 which were due 1 July 2012)
- Season 2012/2013: USD 300'000.00
- Season 2013/2014: USD 300'000.00
- Season 2014/2015: USD 300'000.00
- Season 2015/2016: USD 300'000.00.

78. First, the Panel confirms that the FIFA DRC was correct to assume a gross income of USD 300'000.00 per season and USD 82'500.00 for the season 2011/2012 which fell due after termination of the Agreement.

79. In its submission dated 2 June 2017, the Appellant alleged that several factors would have to be taken into account when calculating the hypothetical income of the Player until the end of the Agreement:

- Article 4 of the Agreement holds that the amounts payable to the Player are gross and therefore subject to tax. Under Egyptian tax law, the Club will deduct 20% from salary for tax purposes in Egypt.
- According to the internal regulations which were signed by the Player and agreed on in Article 6.6 of the Agreement state that the Player is only entitled to the last instalment per year (USD 75'000.00) if he played 80% of all matches of the respective season.

80. In his submission dated 8 June 2017, the Respondent did not dispute the deductibles described by the Appellant.

81. Turning its attention to the Club's argument that the variable amount of USD 75'000.00 at the end of each season shall be deducted, the Panel considers the Appellant's argument that, since the Player was not engaged with the Club anymore, he did not meet the sporting conditions for the payment. In this respect, the panel notes Article 156 CO which reads as follows:

"A condition is deemed to be fulfilled if its occurrence has been prevented by one party acting in bad faith".

82. It is undisputed that the Player was fielded on a regular basis. Should the Club not have terminated the Agreement, the Player would likely have played 80% of matches in the following seasons. The Club does not provide evidence, which would lead to another conclusion. By breaching the agreement, the Club clearly acted in bad faith towards the Player. Therefore, the Panel considers it obvious that should the breach not have occurred, the Player would have likely fulfilled the condition for receiving the payment of USD 75'000.00 at the end of each season. Therefore, the Panel concludes that this amount shall be included in the hypothetical income (see also CAS 2012/A/2874, para. 155 et seq.).

83. Examining the alleged deductibles of 20% for tax purposes, the Panel considers Article 4 of the Agreement which provides as follows:

> *"The player will incur the taxes of the total amount of the contract according to law. The club will settle the taxes to the concerned tax administration and inform the player for the document of paying after the end of the season and before the beginning of the next season".*

84. Considering this clause, the Panel deems it necessary to stress that the Player shall be put in the position he would have been in had the Agreement not been breached (positive interest; cf. para. 7). The Panel concludes from Article 4 of the Agreement that the Player was paid net. The Panel further notes that the Appellant provided sufficient proof that the net amount paid to the Player amounted up to 80% of the gross amount. Therefore, the Panel assumes that the Player would have earned a net salary of USD 1'026'000.00 (USD 1'282'500.00 - 20% taxes) if the Agreement had remained in force.

85. The Player did not dispute such findings. He did also not provide arguments or evidence as to why any damages or compensation should be "grossed up". He did not claim that the calculation of his loss shall take into consideration any taxes to be paid (in Egypt or where he currently resides for tax purposes) with respect to any such compensation. Taking the system described in Article 4 of the Agreement into account, the Panel is therefore of the opinion that the Player's hypothetical income (and therefore his loss) until the end of the contract (end of season 2015/2016) amounts up to USD 1'026'000.00. If the compensation triggers a charge to tax in Egypt, then pursuant to Article 4 of the Agreement, it will be for the Club to settle it. Without a request from the Player to gross the compensation up, with the appropriate supporting evidence that tax will be deducted from such compensation in another jurisdiction, the Panel is unable to go beyond the net sums due under the Agreement.

d. Mitigation of damages by the Player

86. In the Appealed Decision, the FIFA DRC considered that the Player's compensation shall be reduced by the amount he earned with other clubs during the agreed course of the Agreement. It thereby pointed out that the Player signed a contract with Adana Demirspor Kulübü ("Adana") until 31 May 2014, which was mutually terminated on 9 January 2013.

87. The Appellant claims that – if a compensation was justified – the amount to be deducted from the hypothetical income should be much higher as the Player did not fulfil his duty to mitigate his damage.

88. With regard to this question, the Panel observes Article 337c para. 2 of the CO, which provides as follows:

> *"The employee must permit a set-off against this amount for what he saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn".*

89. In the opinion of the Panel, such a rule implies that, in accordance with the general principle of fairness, the Player must act in good faith after a breach by the Club and seek for other

employment, showing diligence and seriousness. The Panel considers that this principle aims at limiting the damages deriving from breach and at avoiding that a possible breach committed by the Club could turn into an unjust enrichment for the injured party. Furthermore, the duty to mitigate should not be considered satisfied when, for example, the Player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign a contract with worse financial conditions, in the absence of any valid reason to do so (see CAS 2015/A/4346). The duty to mitigate according to Article 337c para. 2 CO in case of a termination by the club without just cause is acknowledged in case law (see e.g. CAS 2006/A/1062).

90. In the case at hand, the Panel considers that despite the Panel's order to produce the relevant documents regarding his subsequent engagements, the Player failed to submit a clear documentation on his further engagements. From the files, the Panel notes the following:

- Employment contract with Adana: USD 46'000.00 upfront plus USD 6'500.00 per month from 24 August 2012 until 31 May 2014; termination by agreement on 9 January 2013 as of 24 August 2012 without any apparent reason and without any financial obligations on both sides.

- FK Radnicki 1923: Termination agreement dated 18 February 2014 because Player failed to provide Radnicki with prior employment contract with Adana. The terms of employment with Radnicki are unknown.

- Liberty Professional FC: GHC 30'000.00 (allegedly corresponding to USD 7'000.00) sign-on plus GHC 300 (allegedly corresponding to USD 70.00) per month for time period 29 August 2014 until 28 August 2017.

91. Considering the Player's duty to mitigate the damage, the Panel holds that the Player made an effort by signing a contract with Adana on 24 August 2012. However, the Player did not provide for any valid reasons why he entered into a termination agreement with Adana. The same applies for the Player's further behaviour, as he terminated the contract with Radnicki as well and finally entered into a contract with worse financial conditions without giving reasons for it. The Panel therefore holds that the Player mainly failed to comply with his duty to mitigate the damage in the light of Article 337c para. 2 CO.

92. As the terms of the subsequent contracts are unknown, the Panel deems it appropriate to assume that the Player would have been able to achieve the same earnings as with Adana. It follows that it is proportionate to deduct a (partially hypothetical) salary which would have been possible to earn by the Player as follows:

- Season 2012/2013: USD 124'000.00 (signing bonus of USD 46'000.00 and USD 6'500.00 per month).

- Season 2013/2014: USD 78'000.00 (12 x USD 6'500.00).

- Season 2014/2015: USD 78'000.00 (12 x USD 6'500.00).

- Season 2015/2016: USD 78'000.00 (12 x USD 6'500.00).

93. The Panel therefore concludes that USD 358'000.00 shall be deducted from the hypothetical income of USD 1'026'000.00. To conclude, the Club is obliged to pay to the Player a compensation of USD 668'000.00.

D. Did the Club meet all of its financial obligations until the effective termination date?

94. The Appealed Decision partially upheld the Player's claim for outstanding salary due until the effective termination date (18 May 2012). The FIFA DRC considered that the Player did not receive USD 7'500.00 for May 2012.

95. The Appellant objected to this, alleging to have paid all remuneration due until the date of termination. It emphasises that it paid USD 15'000.00 to the EFA in the Player's name in order to pay his share of the registration fee. Regardless the question if this was the case or not, the Panel notes that the Club does not provide evidence that it paid the salary for May 2012. It therefore cannot follow the Club's allegation to have paid all salaries due until the termination of the agreement. However, considering the fact that the salary would have been paid "net" (cf. para. 84 above), the Panel concludes that the amount to be paid to the Player as unpaid salary is USD 6'000.00 (7'500.00 – 20%) for the salary May 2012.

E. Conclusion

96. To summarise, the Panel comes to the following conclusions:

- The Panel has full power to review all the arguments and evidences presented by the parties.

- The Respondent's claim for moral damages is inadmissible.

- The Appellant shall pay to Player USD 6'000.00 as outstanding salary until the date of termination.

- The Appellant terminated the Agreement without just cause.

- The Player is entitled to a compensation in terms of Article 17 RSTP of USD 668'000.00.

- The appeal is therefore partially upheld, with all other prayers for relief being dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 7 November 2016 by Zamalek Sporting Club against the decision rendered on 17 June 2016 by the FIFA Dispute Resolution Chamber is partially upheld.

2. The decision rendered on 17 June 2016 by the FIFA Dispute Resolution Chamber is modified as follows:

    - Zamalek Sporting Club is ordered to pay to Mr Karim Alhassan USD 6'000.00 as outstanding remuneration;

    - Zamalek Sporting Club is ordered to pay to Mr Karim Alhassan USD 668'000.00 as compensation for termination of the Agreement without just cause.

(…)

5. All other or further motions or prayers for relief are rejected.