Arbitration CAS 2021/A/8156 Al Shabab Football Club v. Makhete Diop, award of 17 October 2022

Panel: Mr Manfred Nan (The Netherlands), President; Mr Daniele Moro (Switzerland); Prof. Ulrich Haas (Germany)

Football
Termination of the employment contract without just cause by the club
Burden of proof
Principles regarding the variation of the financial term of an employment contract according to FIFA COVID-19 Guidelines
Force majeure as a justification to vary the financial term of an employment contract
Requirement of proportionality of a salary decrease

1. **Pursuant to Article 12(3) of the FIFA Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules"), and the subisidiarily applicable Article 8 of the Swiss Civil Code, in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof. The burden of proof to establish the existence of an alleged agreement to reduce the financial terms of a contract of employment lies with the club that alleges such an agreement. In this respect, the player's silence or failure to object to a letter dubiously received cannot reasonably be understood as his acceptance of the club's unilateral variation of the employment contract. In any event, not objecting is not the same as agreeing.**

2. **The FIFA COVID-19 Guidelines contain a set of principles and recommendations with the aim of addressing situations where employment agreements cannot be performed as originally anticipated by the parties due to the COVID-19 crisis. In principle, the FIFA COVID-19 Guidelines advocate strongly for a spirit of cooperation and consensus, encouraging the parties to reach amicable settlements. Only in case no collective agreement can be reached, they propose that unilateral contract amendments shall be upheld if recognized by national law, or, in case national law is not relevant, (i) if made in good faith; (ii) if they are reasonable; and (iii) proportionate.**

3. **For FIFA the COVID-19 pandemic is not a situation of *force majeure* in and of itself. A club cannot simply invoke the COVID-19 pandemic as a generic defence of *force majeure* or as a reason to not comply with its financial obligations as agreed upon in the employment contract, without substantiating exactly how the pandemic affected its financial situation to such extent that it had rendered the performance of the employment contract impossible. Besides, *force majeure* implies an objective (rather than a personal) impediment beyond the control of the obliged party that is**

unforeseeable, that cannot be resisted and that renders performance impossible. In addition, the conditions of *force majeure* should be interpreted strictly and narrowly, since they may introduce an exception to the binding force of an obligation. The onus of proof in this respect lies with the club that is required to show more than a general economic difficulty in abstract terms. It has to show a real disruption in its financial operation and a total lack of alternative resources that had made it impossible to fulfil its payment obligations to the player by for instance filing its financial statement.

4. **A reasonable, equitable and proportionate salary decrease would need to reflect a balanced allocation of the economic risks of the pandemic between the parties involved. In this way, the player and the club would share to some extent its adverse effects. This does not seem to be the case where it appears that the club tried to compensate its loss of revenue directly through salary cuts and to thereby transfer the economic risks of the pandemic almost entirely to its players.**

I. PARTIES

1. Al Shabab Football Club (the "Appellant" or the "Club") is a Saudi Arabian football club with its registered office in Riyadh, Kingdom of Saudi Arabia, currently competing in the Saudi Pro League (the "SPL"), i.e. the premier football league of the Kingdom of Saudi Arabia. The Club is affiliated to the Saudi Arabian Football Federation (the "SAFF"), which in turn is a member of the *Fédération Internationale de Football Association* (the "FIFA").

2. Mr Makhete Diop (the "Respondent" or the "Player") is a professional football player of Senegalese nationality, currently playing at Al Dhafra FC, competing in the premier league of the United Arab Emirates;

The Club and the Player are hereinafter jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, oral pleadings and evidence adduced during these proceedings. Additional facts and allegations 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 this award only to the submissions and evidence the Panel deems necessary to explain its reasoning.

A. Background facts

4. On 2 January 2020, the Parties entered into an employment agreement for a period of one and a half season, valid as from 3 January 2020 until 2 July 2021 (the "Employment

Contract"). In accordance with the Employment Contract, the Player was entitled to receive a signing fee of EUR 2,000,000 (EUR 500,000 on 10 July 2020; EUR 1,000,000 on 1 February 2021; and EUR 500,000 on 1 May 2021) and a monthly salary of EUR 222,223 over 18 months, for a total value of EUR 6,000,014.

5. On 6 March 2020, the acting president of the SPL issued a letter regarding *"the impact of Corona pandemic (COVID-19) to the financial position of the league and the annual provisions for the member clubs"*, which provides as follows:

"Following to the previous discussion during meeting of Board of Directors of [SPL] *which was remotely held dated 12/4/2020 around the financial obstacles faced the league and the member clubs against suspension of the League Cup competition of Prince MOHAMMED BIN SALMAN for the professionals starting from 15/3/2020 based on the decision of the ministry of sports to suspend all the sportive activities in the Kingdom of Saudi Arabia in scope of the preventative measurements imposed by the government to avoid spread of Corona Pandemic (COVID- 19).*

Accordingly, we certify that the outcomes of the process of assessment the financial position of the league after spread Corona Pandemic (COVID- 19) refers that the revenues of the annual league from the rights and trading contract will be effected by this pandemic, the matter shall lead to decrease the annual financial provisions for the member clubs and this impact is prospected to be continue to the next season 2020- 2021.

Accordingly, the league kindly request you to take the necessary precautions on light of this data, in addition to rationalism the expenses to avoid any financial obstacles or legal disputes".

6. On 7 April 2020, FIFA issued FIFA Circular no. 1714 as well as a document titled *"COVID-19 Football Regulatory Issues"* (the "FIFA COVID-19 Guidelines") whereby FIFA provided guidance on, *inter alia*, the requirements for unilateral contractual variations.

7. On 14 April 2020, the Club issued a letter, referring to FIFA Circular no. 1714, whereby it informed its players, *inter alia*, as follows:

"[The Club] *is forced to consider carefully its contractual obligations* […]. *As suggested by FIFA, we intend to work with our playing squad in order to consider any necessary amendments to contractual terms including those concerning remuneration. In line with this, we will be contacting all of our players in order to undertake discussions. We hope that we can work together on this issue in contemplation of the significant pressures on our club, as well as our society at this time".*

8. On 17 April 2020, the Club alleges to have informed the Player by email about a unilateral reduction of his monthly salaries with 50% above the amount of SAR 20,000, effective retrospectively since 15 March 2020 until sporting activity would be resumed. The Player denies having received this email. The letter attached to the Club's email provides as follows:

"Reference to the decision of the Ministry of Sports to cease the sport activity in the Kingdom, starting from 30/03/2020 until further notice, based on the recommendations of the committee assigned to follow up the developments of corona virus (COVID-19) and referring to the minutes of meeting of [SPL] *in*

12/4/2020, which included the unanimous consent of all Saudi clubs and reference to our circular No. (53/14) in 21/8/1441H corresponding to 14/4/2020 AD based on FIFA circular no. 1714 and its contents, and a reference to the phone conversation with you regarding the reduction of the monthly salary wage during the period of the stoppage of sport activity until the clearance of Corona's epidemic, and your verbal agreement on this matter.

Therefore, it is decided to:

Reducing the monthly wage during the period of stopping of sport activities due to the outbreak of Corona epidemic, which is equivalent to all professional players in the club along with the technical staff. Where, the amount of (20,000 twenty thousand Saudi riyals) from the monthly wage will be maintained fixed without any reduction, while the remaining amount of the monthly wage shall be deducted by 50%, this reduction is effective from 15/3/2020 until resuming the sport activity and training and the end of Corona epidemic outbreak.

The club will notify you with an official letter regarding the date of resuming the training, which is considered the date for ending the reduction in the monthly wage.

This notice is binding and effective from the its sending date.

Al-Shabab Club thanks you for your patience, cooperation and understanding such difficult situation".

9. On 26 April 2020, one of the sponsors of the Club, Innodev Company, terminated its sponsorship agreement with the Club.

10. On 11 June 2020, the Club issued another letter whereby it informed its players, *inter alia*, as follows:

"[…] *Reference to the letter of the Ministry of Human Resources and Social Development no. 142906 dated 13/8/1441H regarding the amendment of Saudi labor law which entitles all entities and companies to reduce the salaries of their employees.*

We received a SPL's letter no. 1440 dated 03/06/2020 stating that the annual revenues of SPL from commercial rights and contracts will be affected by such epidemic, which in turn results in reduction of the annual financial aids given to the members clubs and expected to proceed to the next season 2020/2021. Since all clubs are facing financial difficulties worldwide, in particular after (i) governmental financial aid was cut; (ii) we received official letters from some of the Club's sponsors to cancel sponsorship contracts; and (iii) we have suffered the loss of TV broadcasting income, we are very keen to find solutions to stabilize the financial situation of the Club and to maintain your salaries in the long term where possible, as well as our commitment to paying them. Set assure, we are working on a daily basis to restore Club's revenues for the continuity and progress of the Club at all levels. […]*".*

11. On 9 December 2020, the Parties concluded a supplementary agreement in order to *"reschedule the due amounts as mention* [sic] *in the article (4) of the* [Employment Contract]*"* (the "Supplementary Agreement"). In accordance with clause 1.1 of the Supplementary Agreement, the Player agreed to delay the first instalment of the signing fee in the amount of EUR 500,000 originally due on 1 July 2019, as well as the Club's contributions to the

Player's accommodation in the total amount of SAR 151,000 to no later than 5 January 2021.

12. On 18 January 2021, the Club notified the Player of the premature termination of the Employment Contract by hand, as follows:

"We refer to the above subject. The club after deliberation and numerous discussions between the management and technical team. We hereby wish to inform you that it has been agreed that you have become surplus to the playing squad and therefore hereby wish to notify you of the termination of your employment contract with the club, with immediate effect.

The club hereby wishes to acknowledge its debt to you in relation to outstanding salaries and signing fees and undertakes to make the necessary payments in due course. The club further undertakes to fulfil the financial conditions of the employment contract which are due to you until the expiration date on 2 July 2021, should you not find club in the said period. However, should you find a club during the said period, the club undertakes to pay the difference in salary so that you will not be making any financial losses during the contract period.

The conditions of the termination will be clarified in the form of a Termination Agreement, as well a copy of your clearance certificate which will be sent to you in due course allowing you to join a club of your choice".

13. On the same date, the Club sent the Player a proposal for settling the outstanding payments under the Employment Contract, informing him that the Club *"has taken some serious financial strain due to the current pandemic. However, the club has finalised and closed sponsorship deals which cash injections will be made over the next few month* [sic]*".* In this respect, the Club proposed to pay the Player the total amount of EUR 3,792,599 as follows:

"1. €300 000,00 payable by 7 February 2021
2. €400 000,00 payable by 7 March 2021
3. €400 000,00 by 7 April 2021
4. €450 000,00 by 7 May 2021
5. €450 000,00 by 7 June 2021
6. €550 000,00 by 7 July 2021
7. €600 000,00 by 7 August 2021
8. €642 599,00 by 7 September 2021".

14. Later that day, the Club informed the Player also that *"[s]hould the player find a club in the time period of the* [Employment Contract]*, the club will agree to pay the difference in salary between his Al Shabab salary and the salary of the new club".*

15. On 19 January 2021, counsel for the Player replied to the Club, indicating that the Club owed him a total amount of EUR 4,163,338:

a. overdue payables in an amount of EUR 980,000 net towards the Player (comprising the first instalment of the sell-on fee in the amount of EUR 500,000, the Player's salary over

November and December 2020 in the amount of EUR 222,223 each, and accommodation costs in the amount of SAR 151,000);

b. Partial amounts of salary in the amount of EUR 350,000 that was not paid during March, April, May and June 2020.

c. Compensation for breach of contract, equal to the remaining value of the Employment Contract in the amount of EUR 2,833,338 (6 months x EUR 222,223 and the second and third instalment of the sell-on fee of EUR 1,000,000 and EUR 500,000 respectively).

16. On 22 January 2021, the Player sent the Club another default notice, reiterating that the amounts allegedly due under the Employment Contract remained outstanding.

17. On 25 January 2021, the Club replied to the Player's notices as follows:

"The club wishes to confirm it is not disputing or refusing to pay [the Player] *his dues in respect of his contract but asking for some time to make the necessary payments. However, the proposal you have forwarded in your email dated 19 January 2021 at this point is beyond the clubs ability to fulfil and accept*.

In relation to [the Player's] *claim regarding the reduction in salary. The club has indicated that* [the Player]*, along with all the players in the squad, were issued letters during the lockdown and suspension of the league indicating the reduction in salaries as per the directive of SAFF. The letter and reduction in salary had not been opposed on receipt by the player, however the player is now claiming this amount.*

The club has requested to meet with the player in an attempt to structure a payment plan but without any success. This being said, the club would like to find an amicable solution that would be acceptable and within their financial means.

Furthermore, the club has undertaken to assist with all the necessary documentation, FIFA Transfer Matching System uploads and anything else that is required for [the Player] *to sign and register with another club. Attached hereto find clearance certificate.*

Should [the Player] *be amenable to such discussions the club would be willing to structure a plan with the player that is beneficial to all parties".*

18. On 27 January 2021, counsel for the Player replied to the Club, indicating that the Club had never contacted him in order to arrange a meeting and that the instalments mentioned in his 19 January 2021 letter mirrored the instalments of the Employment Contract.

19. On 31 January 2021, the Player signed an employment agreement with Al Dhafra Football Club ("Al Dhafra"), valid as from 1 February 2021 until 30 June 2022. In accordance with this employment contract, Al Dhafra undertook to pay the Player a monthly salary of USD 36,000, from 1 February 2021 until 30 June 2021 (total of USD 180,000).

20. On 2 February 2021, the Club provided its response to the Player's notice of 27 January 2021 and stated, *inter alia*, that the employment contract signed with Al Dhafra should be taken into consideration for the calculation of the compensation owed by the Club.

Moreover, the Club pointed out that it was acting in good faith and willing to make the first payment of EUR 300,000 immediately to the Player if he would accept a proposed structured payment plan.

B. Proceedings before the FIFA Dispute Resolution Chamber

21. On 1 February 2021, the Player filed a claim against the Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting, *inter alia*, an amount of EUR 4,332,894, divided as follows, plus interest:

a. Outstanding remuneration in the amount of EUR 1,499,561, broken down as follows:

i. EUR 77,223 as the partial salary of March 2020;
ii. EUR 120,223 as the partial salary of April 2020;
iii. EUR 192,223 as the partial salary of May 2020;
iv. EUR 115,223 as the partial salary of June 2020;
v. EUR 16,223 as the partial salary of July 2020;
vi. EUR 222,223 as the full salary of November 2020;
vii. EUR 222,223 as the full salary of December 2020;
viii. EUR 500,000 as the first instalment of the signing fee;
ix. SAR 151,000 as accommodation costs.

b. Compensation for breach of the Employment Contract in the amount of EUR 2,833,333.

22. The Club disputed only the partial salaries for the months of March, April, May, June and July 2020.

23. On 3 June 2021, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

"1. The claim of the [Player] *is partially accepted.*

2. [The Club] *has to pay to the* [Player]*, the following amounts:*

- *EUR 77,223 as outstanding remuneration plus 5% interest p.a. as from 1 April 2020 until the date of effective payment;*

- *EUR 120,223 as outstanding remuneration plus 5% interest p.a. as from 1 May 2020 until the date of effective payment;*

- *EUR 192,223 as outstanding remuneration plus 5% interest p.a. as from 1 June 2020 until the date of effective payment;*

- *EUR 115,223 as outstanding remuneration plus 5% interest p.a. as from 1 July 2020 until the date of effective payment;*

- *EUR 16,223 as outstanding remuneration plus 5% interest p.a. as from 1 August 2020 until the date of effective payment;*

- *EUR 222,223 as outstanding remuneration plus 5% interest p.a. as from 1 December 2020 until the date of effective payment;*

- *EUR 222,223 as outstanding remuneration plus 5% interest p.a. as from 1 January 2021 until the date of effective payment;*

- *EUR 222,223 as outstanding remuneration plus 5% interest p.a. as from 1 February 2021 until the date of effective payment;*

- *EUR 500,000 as outstanding remuneration plus 5% interest p.a. as from 6 January 2021 until the date of effective payment;*

- *SAR 151,000 as outstanding remuneration plus 5% interest p.a. as from 6 January 2020 until the date of effective payment; and*

- *EUR 2,463,615 as compensation for breach of contract plus 5% interest p.a. as from 30 January 2021 until the date of effective payment.*

3. *Any further claims of the* [Player] *are rejected.*

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

5. *Pursuant to article 24bis of the Regulations on the Status and Transfer of Players if full payment (including all applicable interest) is not paid* ***within 45 days*** *of notification of this decision, the following* ***consequences*** *shall apply:*

    1. [The Club] *shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration the ban shall be of three entire and consecutive registration periods.*

    2. *The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not paid by the end of the of the three entire and consecutive registration periods.*

6. *The consequences shall only be enforced at the request of the* [Player] *in accordance with article 24bis paragraphs 7 and 8 and article 24ter of the Regulations on the Status and Transfer of Players.*

7. *This decision is rendered without costs".*

24. On 21 June 2021, the grounds of the Appealed Decision were communicated to the Parties, determining as relevant, *inter alia*, as follows:

- *"*[…] *[T]he Chamber* […] *took note of the fact that it remained undisputed between the parties that the* [Employment Contract] *was prematurely terminated by* [the Club] *on 18 January 2021 on the grounds inter alia that the* [Player] *had become a "surplus" to the team.*

- *As such, the* [FIFA DRC] *confirmed, in line with its longstanding jurisprudence, that a termination of such grounds cannot be deemed as justifiable and is to be considered as a termination without just cause – something that the* [FIFA DRC] *highlighted that is also not disputed by the parties.*

- *In this context, the Chamber acknowledged that its task was only to determine the consequences that arise from such termination.*

- *To this extent, the Chamber took due note of the club's argumentation regarding the effects of the COVID-19 pandemic.*

- *Accordingly, the Chamber firstly wished to highlight that FIFA issued a set of guidelines, the COVID-19 Guidelines, which aim at providing appropriate guidance and recommendations to member associations and their stakeholders, to both mitigate the consequences of disruptions caused by COVID-19 and ensure that any response is harmonised in the common interest.*

- *Moreover, on 11 June 2020, FIFA has issued an additional document, referred to as FIFA COVID-19 FAQ, which provides clarifications on the most relevant questions in connection with the regulatory consequences of the COVID-19 outbreak and identifies solutions for new regulatory matters.*

- *The DRC also outlined that said guidelines – as per the explicit wording of FAQ no. 16, as well as pages 6 and 7 of the FIFA COVID-19 Guidelines – are only applicable to "unilateral variations to existing employment agreements".*

- *Additionally, analysing the concept of a situation of force majeure, the members of the Chamber noted that, based on the contents of the FIFA COVID-19 Guidelines and the FIFA COVID-19 FAQ, FIFA did not declare that the COVID-19 outbreak was a force majeure situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of force majeure.*

- *In other words, in any given dispute, it is for a party invoking force majeure to establish the existence of said event under the applicable law/rules as well as the consequences that derive in connection thereto. The analysis of whether a situation of force majeure existed has to be considered on a case-by-case basis, taking into account all the relevant circumstances.*

- *In this respect, the members of the Chamber agreed that the decision of the club to unilaterally reduce 50% of the player's salary payments has to be considered as a unilateral variation to the employment relationship between the parties. It was clear to the members that the club, at first, did not terminate the* [Employment Contract], *but only altered the salary payment. As a result, the members of the Chamber concluded that the FIFA COVID-19 Guidelines and the FIFA COVID-19 FAQ are applicable to the matter at hand when having to assess the legitimacy of the pertinent unilateral alteration.*

- *Nevertheless, in application of the FIFA COVID 19 Guidelines, the DRC further stressed that unilateral decisions to vary agreements will only be recognised where they are made in accordance with national law or are permissible within collective bargained agreements (CBA) structures or another collective agreement mechanism.*

- *What is more, the Chamber stressed the contents of art. 12 par. 3 of the Procedural Rules, pursuant to which any party claiming a right on the basis of an alleged fact shall carry the burden of proof. As an example, a party should provide independent legal advice from a qualified legal practitioner in the relevant jurisdiction which confirms that the unilateral variation was a valid exercise of the national law referred to in the agreement, CBA, or other collective agreement mechanism.*

- *Turning to the evidence on file as well as the submissions of the parties, the Chamber confirmed that there is no such evidence capable of demonstrating that the unilateral variation of the player's salary was made on the basis of the national law, or any collective agreement. In this regard, the Chamber was firm to determine that the pieces of evidence filed by the club only demonstrate the financial impacts of COVID in its finances, which is not sufficient to prove a situation entitling the club to unilaterally vary the terms of an employment contract.*

- *Likewise, the DRC concurred that equally nothing on file is able to demonstrate that the national law addresses the issue of force majeure.*

- *Based on the foregoing considerations, the Chamber unanimously concluded that the unilateral variation of the* [Employment Contract] *cannot be considered licit and shall be disregarded.*

- […]*".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

25. On 9 July 2021, in accordance with Article R48 of the Code of Sports-related Arbitration (edition 2020) (the "CAS Code"), the Club filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), naming the Player as the sole respondent and challenging the Appealed Decision. The Club requested to submit the matter to a sole arbitrator, suggesting the appointment of Mr Daniele Moro, Attorney-at-Law in Luzern, Switzerland.

26. On 19 July 2021, the Player requested to submit the case to a Panel of three arbitrators, nominating Mr Ulrich Haas, Attorney-at-law and Professor in Zurich, Switzerland, as arbitrator.

27. On 20 July 2021, the CAS Court Office informed the Parties that the Deputy Division President, taking into account all circumstances of the matter, had decided to submit the case to a three-member Panel.

28. On 9 August 2021, in accordance with Article R51 of the CAS Code, the Club filed its Appeal Brief.

29. On 2 September 2021, pursuant to Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the Parties were informed that the Panel appointed to decide the present matter was constituted by:

President: Mr Manfred Nan, Attorney-at-Law in Arnhem, the Netherlands;
Arbitrators: Mr Daniele Moro, Attorney-at-Law in Luzern, Switzerland;
Mr Ulrich Haas, Professor of Law in Zurich, Switzerland.

30. On 22 September 2021, in accordance with Article R55 CAS Code, the Player filed his Answer.

31. On 23 and 30 September 2021 respectively, following an enquiry from the CAS Court Office, the Player indicated that it deemed that the Panel could issue an award based solely on the Parties' written submissions, whereas the Club requested for a hearing to be held via video-conference.

32. On 12 October 2021, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing, pursuant to Article R57 of the Code.

33. On 22 October 2021, the CAS Court Office communicated to the Parties that the hearing would be held on 10 January 2022.

34. On 28 October 2021, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed and returned by the Player and the Club on 28 October 2021 and 2 November 2021 respectively.

35. On 10 January 2022, a hearing was held by video-conference. At the outset of the hearing, both Parties confirmed that they had no objection to the constitution and composition of the Panel.

36. In addition to the Panel, Mr Antonio De Quesada, Head of Arbitration to the CAS, the following persons attended the hearing:

For the Club:

1) Mr Mohamed Khalied Allie, Counsel;
2) Mr Mohamed Shata, the Club's General Director;
3) Mr Walid Mahmoud Al Badry, the Club's Financial Manager;
4) Mr Majed Al Marzoqi, the Club's Professional Manager;
5) Mr Tarik Benjdia, the Club's Translator;
6) Mr Khalid, acting as interpreter during the hearing.

For the Player:

1) Mr Makhete Diop, the Player;
2) Mr Salvatore Civale, Counsel;

3) Ms Elena Raccagni, Counsel.

37. The Panel heard evidence from the following persons, in order of appearance:

1) Mr Mohamed Shata, the Club's General Director;
2) Mr Walid Mahmoud Al Badry, the Club's Financial Manager;
3) Mr Majed Al Marzoqi, the Club's Professional Manager;
4) Mr Tarik Benjdia, the Club's Translator;
5) Mr Makhete Diop, the Player.

38. All witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. The Parties and the Panel had the opportunity to examine and cross-examine the witnesses.

39. The Parties then had full opportunity to present their case, submit their arguments and answer the questions posed by the members of the Panel.

40. Before the hearing was concluded, both Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.

41. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

A. The Club

42. The Club's submissions, in essence, may be summarised as follows:

- Following the termination and a proposal of a payment plan issued by the Club to the Player, the Player approached the FIFA DRC and the SAFF DRC without any notice and without attempting to find an amicable solution.

- The Club acknowledges that the Player is entitled to overdue payables and compensation for breach of contract in a total amount of EUR 3,811,784. It only disputes that the unilateral variation of the Employment Contract concerning the salary of the months March, April, May, June and July 2020 was not valid.

- The Club disputes numerous facts of the claim brought forward by the Player which grossly exaggerate the overdue payables due to the Player.

- In light of the Player's attitude and lack of flexibility in terms of trying to find an amicable solution to the matter, it seems that there was never an intention from the Player to do so.

- The Club followed the indications provided by the SPL and reduced the salaries of all of its players, including the Player, based on the fact that it did so in terms of the FIFA Circular no. 1714.

- Following the suspension of all sporting activities in the Kingdom of Saudi Arabia, the letter sent to all players on 14 April 2020, and the consultation with players and staff, the Club informed all its players via email of the Club's position and the restructuring and/or reduction in salaries for the duration of the footballing suspension for all players and staff. The Player was informed by email on 17 April 2020 with the notice of reduction of his salaries, as well as being telephonically informed by the Club's translator Mr Tarik Benjdia, and he did not object to the reduction.

- The COVID-19 pandemic had severe financial impact on the Club's cash flow, which included the reduction of monthly payment from SAFF, the loss of sponsors and loss in revenue from ticket sales for matches, which is estimated to be in the region of SAR 1,000,000 per match. The Club refers to a letter of termination dated 26 April 2020 of one of its sponsors, Innodev Company.

- Nevertheless, the Club in good faith paid the reduced salaries during the suspension of football, without any complaints or objections by any player.

- The Club informed the Player by letter dated 11 June 2020, that the Saudi Arabian Ministry of Human Resources and Social Development made amendments to the Saudi Labour Law, enabling businesses to reduce the salaries of employees with a limited reduction not exceeding 40%.

- The Club *"understands that it has the burden of proof that (i) the* [Player] *is not due the claimed compensation; (ii) the* [Club] *did sufficiently inform and engage with the* [Player] *in respect of the reduction; Subsidiarily, (iii) in the event that the* [Club] *is found liable to pay compensation to the* [Player] *to establish that the relevant grounds for such payment*".

- However, the Player failed to discharge its burden *"of proving, inter alia, that (i) the* [Player] *is entitled to the claimed compensation (ii) that the* [Player] *did in fact reject and/or object to the proposed reduction in salary payments during the Covid-19 suspension of the football"*.

- The Player failed to submit proper submissions as to (i) the Club's proposal to the reduction in salary due to the COVID-19 pandemic (ii) the correspondence in respect of the reduction in salary due to COVID-19; and (iii) whether the Player had agreed or objected to the reductions due to the COVID-19 pandemic.

- The Club respectfully pleads that the CAS takes into consideration in their assessment of the legal and factual issues under dispute, whether each of the Parties has properly structured their arguments and corroborated the same with material evidence, bearing in mind that it is for the alleging party to bear the risk if a certain fact cannot be proven.

43. On this basis, the Club submits the following requests for relief:

"a) Admit the present appeal;

b) Uphold the present appeal and set aside the Appealed Decision, replacing it by an Arbitral Award which:

i. Dismisses all allegations put forward by the Respondent; and

ii. Dismisses the Respondent's claim of outstanding salary payments during the suspension of football period between March 2021 to July 2021; or

iii. In any case, declare that Al-Shabab Football Club pay only the overdue payables (excluding alleged shortfall between March 2021 to July 2021) and compensation due in relation to the unilateral early termination of the contract by the Appellant; or

In any event:

iv. Order the respondent to bear any and all costs and fees of the present appeal;

v. Order the respondent to pay Al Shabab Football Club a contribution towards legal fees and other expenses incurred in connection with the proceedings, pursuant to article 64.5 of the CAS Code, in an amount to be fixed by the Panel at its own discretion".

B. The Player

44. The Player's submissions, in essence, may be summarised as follows:

- Although the Player always fulfilled his contractual obligations, the Club did not respect its financial obligations by paying his salary with significant delays and by never paying the signing fees.
- The Player always showed good faith in helping the Club by being cooperative in finding solutions. In fact, on 9 December 2020, the Player accepted to sign the Supplementary Agreement, whereby the signing fee due for 10 July 2020 was postponed until 5 January 2021, as well as the payment of the accommodation fees.
- The Club still owes the Player an amount of EUR 521,115 as partial payments of the salaries for the period of March, April, May, June and July 2020.
- The Club's reduction of the salary cannot find any ground in the current COVID-19 pandemic.
- In the proceedings before the FIFA DRC, the Club i) confirmed to have terminated the Employment Contract without just cause; ii) confirmed its obligation to pay the overdue payables claimed by the Player; and iii) did not object to its obligation to pay compensation for breach of contract.

- Actually, the only matter on which the Club disagreed with the Player concerns the Club's unilateral decision to reduce the Player's salary for the period March, April, May, June and July 2020, which argument was rejected by the FIFA DRC in the Appealed Decision.

- The Club has not acted in compliance with the applicable FIFA COVID-19 Guidelines and therefore the unilateral deductions on the monthly salaries for the period March, April, May, June and July 2020 applied by the Club represent a further breach of contract.

- The Player never accepted a reduction or signed an agreement in this respect with the Club.

- The Club has not provided any evidence demonstrating that all the other players of the Club's first team signed an agreement with the Club to accept such reduction and that such reduction was applied to them.

- The Club has also failed to fulfil its burden of proof that the reduction was made in accordance with the local applicable laws and regulations or on the basis of a collective agreement signed by the local players' and coaches' unions with the SPL and the guarantee of the SAFF.

- The Club has also not showed any relevant data concerning the loss of income, the decrease of its budget by offering a comparing analysis of a multi-year period before the COVID-19 pandemic outbreak, and after it.

- The only piece of paper filed by the Club is the termination notice of Innodev Company, but in the absence of the contract allegedly signed in this respect, it is not possible to establish the relevant loss of income. Furthermore, the contract was allegedly signed on 24 January 2020, i.e. after the signature of the Employment Contract. Accordingly, the Club was not counting on the budget offered by the contract and therefore its termination cannot have any relevance for the Employment Contract. The Player was not able to find any link between Innodev Company and the Club, before or after the alleged termination.

- The jurisprudence of the FIFA DRC is consistent in saying that unilateral reductions of salary are not valid without the agreement of the players and, especially, in the absence of fair proceedings or discussions, also involving the players' union.

- Consequently, the Club's reduction of salaries was illegally adopted and the missing amounts of the salaries for the period of March, April, May, June and July 2020 in the amount of EUR 521,125 must be awarded in favour of the Player, as also decided in the Appealed Decision.

- The same counts for the undisputed outstanding salaries as specified in the Appealed Decision as well as the compensation due for the breach, as these elements of the Appealed Decision remained undisputed by the Club.

45. On this basis, the Player submits the following requests for relief:

"I. Dismiss the appeal brought by Al Shabab Football Club;

II. Confirm in full the FIFA DRC Decision ref. nr. FPSD-708;

III. Order the Appellant to bear the entire amount of the procedural costs of this arbitration procedure;

IV. Order the Appellant to pay a contribution of the legal expenses afforded by the Respondent in light of these appeal proceedings to be established by Panel;

V. Grant any other relief or orders it deems reasonable and fit to the case at stake".

V. JURISDICTION

46. Article R47 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 statues 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".

47. Article 58(1) FIFA Statutes (May 2021 edition) provides as follows:

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

48. The jurisdiction of CAS in the present case derives from Article 58(1) FIFA Statutes and Article R47 CAS Code and it is further confirmed by the Order of Procedure duly signed by the Parties. It follows that CAS has jurisdiction to adjudicate and decide on the present appeal.

VI. ADMISSIBILITY

49. The appeal was filed within the deadline of 21 days set by Article 58(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

50. It follows that the appeal is admissible.

VII. APPLICABLE LAW

51. The Club argues that pursuant to Article R58 CAS Code and Article 57(2) FIFA Statutes, the FIFA regulations and alternatively Swiss law applies. The Player did not provide any position on the applicable law.

52. Article R58 CAS Code provides as follows:

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

53. Article 57(2) 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".

54. The Panel notes that clause 3 of the Employment Contract provides as follows:

"The two parties shall comply with and implement the laws, circulars and regulations issued by SAFF, FIFA, the Confederation and Saudi professional league".

55. In addition, clause 13(1) and (4) of the Employment Contract provide as follows:

> *"1. The two parties declare that they have taken note of SAFF and FIFA regulations and circulars before signing this contract, and that they are obliged to implement them.*
>
> *4. The provisions of Professional Player's status and transfer regulations shall apply to all matters not provided for in this contract".*

56. In light of the above-mentioned provisions and given that neither of the Parties relies on any regulations issued by SAFF, the Panel finds that the various regulations of FIFA are applicable in the present dispute and that Swiss law shall be applied subsidiarily, should the need arise to fill a possible gap in the various rules and regulations of FIFA. More specifically, and also considering that the case concerns a dispute concerning the performance of an employment contract under the circumstances of the COVID-19 pandemic, the Panel applies the relevant provisions of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") in conjunction with the FIFA COVID-19 Guidelines and the COVID-19 Frequently Asked Questions document issued by FIFA on 11 June 2020 (the "FIFA FAQ COVID-19 Document").

VIII. MERITS

A. The Main Issues

57. The Club expressly confirmed that its appeal only relates to the alleged outstanding remuneration during the COVID-19 period, more precisely the alleged outstanding remuneration for the months of March, April, May, June and July 2020, concerning a total amount of EUR 521,115.

58. The other amounts awarded to the Player by the FIFA DRC in the Appealed Decision are not disputed by the Club and are therefore not specifically addressed in this award.

59. As such, the central issue of contention in this dispute is whether the Club was entitled to unilaterally temporarily vary the financial terms of the Employment Contract, and effectively pay the Player reduced monthly salaries in the relevant period, as a result of the outbreak of the COVID-19 pandemic and the subsequent shutdown of all football activities in the Kingdom of Saudi Arabia.

60. In this respect, the arguments submitted by the Club are that (i) the Player agreed to the reduction, or at least did not object to it, and (ii) that the payment of reduced salaries during the COVID-19 pandemic was legally permitted even without the Player's prior agreement or consent.

(i) Did the Player agree to the salary reduction?

61. The Club argues that the Player – as all players of the Club – agreed to reduce his salary, as he received the Club's correspondence related to the Club's intention to reduce his salaries, that he was not willing to negotiate with the Club, that he did not contact the Club, that he agreed with the reduction as he never objected to it, but only objected to the applied reduction after the termination of the Employment Contract.

62. To support its stance, the Club relied on the testimonies of four witnesses.

63. Mr Mohamed Shata, the Club's General Director, *inter alia,* explained that as from 14 March to 21 June 2020 all training sessions and matches of the Club were suspended, and that the Player remained in the Kingdom of Saudi Arabia, receiving video-trainings. The normal trainings resumed on 21 June 2020 and the football season restarted in August 2020. During this period, the Club lost income (SAR 1,000,000 per suspended match, no government support). He confirmed that only the contract with Innodev Company with a value of SAR 2,000,000 – corresponding to approximately EUR 500,000 – was terminated due to the COVID-19 pandemic. On 17 April 2020, the Club wrote a letter to the Player to negotiate about the FIFA COVID-19 Guidelines, but the Player did not reply. The Club tried to arrange a video-conference between the Club's President, the Club's Translator, and the Player, but the latter did not accept. Mr Shata further stated that 75% of the players accepted the 50% salary reduction by signing an agreement, and that 25% accepted the salary reduction by not

objecting against it. He argued that the Player was the only employee filing a claim against the Club, and only after the termination of the Employment Contract by the Club.

64. Mr Tarik Benjdia, the Club's Translator, *inter alia*, stated that the salary reduction was applied to all players, staff, coaches and other employees, and that he contacted all (foreign) players by phone and by email on this issue. He stated that all players accepted the reduction. More specifically, he stated that he attended a video-conference with the Club's President and the Player, which meeting was held after 17 April 2020, during which the Player agreed to a 50% reduction of his salaries for about 3 months (March, April, May 2020). He indicated that, in his view, the Player agreed because he did not object.

65. Mr Majed Al Marzoqi, the Club's Professional Manager, *inter alia*, confirmed that the salary reduction was applied to all players, coaching staff, administrative personal and all other employees, and that nobody objected to it or presented concerns. He did not talk with the Player himself, but the captain of the Club's first team informed him by telephone that all players accepted the reduction. From the total of 30 players (of which 6 or 7 were foreign players), 23 players (most local, 2 foreign players) signed the reduction agreement.

66. Mr Walid Mahmoud Al Badry, the Club's Financial Manager, *inter alia*, confirmed that the Club's financial position before COVID-19 was stable and that the Club was committed to paying the salaries in time. There were 7 foreign players in the squad taking 65% of the total budget during the relevant period. He stated that the salary reduction was applied to all employees of the Club, that each player (and each employee) was paid SAR 20,000 and that the rest of their salary was deducted by 50%. Furthermore, he explained the negative impact of the COVID-19 pandemic on the Club's revenues, providing the following breakdown of loss of income in the amount of SAR 37,000,000:

- loss of one sponsor (Innodev Company): SAR 2,000,000;
- loss of income tickets/fans: SAR 8,000,000;
- loss of government support: SAR 20,000,000;
- loss of SPL support: 7,000,000.

67. The Player testified that he participated in a video-conference and that afterwards he received the Club's letter dated 14 April 2020. He stated that he did not sign the reduction agreement, because he did not agree with the reduction, and that he never spoke with the Club about money, always referring the Club to his agent to discuss monetary business. He stated that, to his knowledge, also other foreign players did not agree with the reduction.

68. Whereas the Player denies having agreed with the reduction, the Club argues that he did.

69. Entering into this analysis, the Panel first of all considers it necessary to determine who bears the burden of proof.

70. Article 12(3) of the FIFA Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules") provides as follows:

"Any party claiming a right on the basis of an alleged fact shall carry the burden of proof".

71. Furthermore, also the subisidiarily applicable Article 8 of the Swiss Civil Code provides as follows:

"Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact".

72. The Panel reaffirms the principle established by CAS jurisprudence that "*in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence*" (CAS 2014/A/3546, para. 7.3 and references).

73. In general, the burden of proof is satisfied whenever the judge is convinced of the truthfulness of a factual allegation based on objective grounds. Absolute certainty is not required. It is sufficient if the judge has no serious doubt about the existence of the alleged facts or if any remaining doubt appears to be tenuous (ATF 130 III 321, consid. 3.3).

74. As such, the Panel finds that the burden of proof to establish the alleged agreement lies with the Club, since the Club is the party claiming that – because of this alleged agreement – it is not obliged to pay the Player's full salaries as defined in the Employment Contract.

75. The main evidence relied on by the Club in this respect is its letter dated 17 April 2020 in which the Player's verbal agreement is allegedly confirmed, in conjunction with the witness statements, in particular of the Club's Translator and the Club's Professional Manager.

76. By its letter dated 17 April 2020, the Club maintains to have informed the Player of its decision to temporarily reduce his salaries by, *inter alia*, referring to *"the phone conversation with you regarding the reduction of the monthly salary wage during the period of the stoppage of sport activity until the clearance of Corona's epidemic, and your verbal agreement on this matter".*

77. The Player denies the existence of any verbal agreement and did not confirm receipt of this letter, but stated at the hearing that during the video-conference with the Club, he referred the Club to his agent to discuss monetary issues.

78. The Panel notes that it is dubious whether the Player received the Club's letter dated 17 April 2020. The Club issued an email to the Player on this date, but whereas the attachment to the email is titled *"Notice 0001"*, the letter allegedly attached contains the reference number *"1455"*. The letter is also not countersigned by the Player, nor was the Player requested to countersign the letter or to acknowledge receipt.

79. The Panel further finds that, even if the Player had received the Club's letter dated 17 April 2020, the Player's silence or failure to object can still not reasonably be understood as his acceptance of the Club's unilateral variation of the Employment Contract.

80. The Player testified that he informed the Club that any financial matters should primarily be addressed to his agent, which the Panel considers to be a credible and reasonable position, but that there is no evidence on file that the Club ever contacted the Player's agent with respect to the unilateral contractual variation.

81. Furthermore, also the factual circumstances concerning the telephone conversation referred to in the Club's letter dated 17 April 2020 are unclear.

82. The only witness presented by the Club who had direct contact with the Player on the issue of the salary reduction was the Club's Translator, Mr Benjdia, who stated that during a video-conference with the Club's President, held after 17 April 2020, the Player did not object to a 50% reduction of his salaries for about 3 months (March, April, May) and by not objecting, in his view verbally agreed with the reduction. This timing is not consistent with the reference in the Club's letter dated 17 April 2020.

83. The Panel finds that Mr Benjda's testimony falls short of proving the Player's consent, as *not objecting* is not the same as *agreeing*.

84. The Panel finds that the Club cannot rely on Mr Majed Al Marzoqi's statement at the hearing that the reduction was applied to all players, coaching staff, administrative personal and all other employees, and that nobody objected to it or presented concerns, and that the captain of the Club's first team informed him by telephone that all players accepted the reduction, because such allegation is not corroborated by any documentary evidence. Mr Al Marzoqi confirmed that he did not personally speak with the Player and the Club did not call the captain of the Club's first team as a witness, despite his alleged knowledge of the Player's consent to the salary reduction, which undermines the Club's reasoning.

85. Further, Mr Benjdia referred specifically to a video-conference held after 17 April 2020, which video-conference does not appear to make sense if the relevant telephone call had taken place on or before 17 April 2020 and taking into account the content of the notice, nothing was left to be negotiated.

86. The Panel observes that it is undisputed that the Player did not sign any reduction agreement. There is no credible evidence of a telephone call and/or video-conference between Mr Benjdia (or any other Club representative) with the Player in which the Player expressly gave his consent to the salary reduction. Further, the fact that the Club did not call its President as a witness despite his alleged involvement in the video-conference with the Player (and the Club's first team captain as explained *supra*) undermines the Club's case.

87. Taking into account all facts and circumstances, the Panel is not convinced to any level of satisfaction that the Player consented to the salary reduction.

(ii) Was the Club entitled to vary unilaterally the financial terms of the Employment Contract

88. In the absence of the Player's consent to temporarily vary the terms of the Employment Contract, the remaining question to be addressed by the Panel is whether the Club was entitled under the circumstances to unilaterally vary the terms of the Employment Contract.

89. In this respect, the Club argues that the FIFA DRC *"erred in its application of the FIFA Circular 1714"* and the FIFA COVID-19 Guidelines enclosed thereto. The Club submits that the reduction was applied to all players and staff, and that all players were *"updated via circular no. 173 on 11 June 2020, which included the amendments made by the Saudi Arabian Ministry of Human Resources and Social Development, which made amendments to the Saudi Labour Law, enabling businesses to reduce the salaries of employees with a limited reduction not exceeding 40%* […]*"*.

90. As mentioned above, Mr Walid Mahmoud Al Badry, the Club's Financial Manager, explained the negative impact of the COVID-19 pandemic on the Club's revenues, providing the following breakdown of loss of income in the amount of SAR 37,000,000:

- loss of one sponsor (Innodev Company): SAR 2,000,000;
- loss of income tickets/fans: SAR 8,000,000;
- loss of government support: SAR 20,000,000;
- loss of SPL support: 7,000,000.

91. At the hearing, Mr Mohamed Shata, the Club's General Director, explained that during the relevant period the Club lost income (SAR 1,000,000 per suspended match and loss of government support), and confirmed that only the contract with Innodev Company with a value of SAR 2,000,000 – corresponding to approximately EUR 500,000 – was terminated due to the COVID-19 pandemic.

92. For these reasons, on 17 April 2020 the Club notified the Player of its decision to implement salary cuts effective from 15 March 2020 until *"resuming the sport activity and training and the end of Corona epidemic outbreak"*. The Club maintains that this decision was made in accordance with all requirements set forth in FIFA Circular no. 1714, that allowed it to unilaterally vary the Employment Contract as a result of the pandemic, and was thus binding on the Player. It therefore argues that by paying the reduced amounts it had duly discharged its financial obligations *vis-à-vis* the Player regarding the relevant period. The Club stresses that it was a chaotic period in which it did its utmost to keep everybody employed, staying within the applicable rules and regulations.

93. The Player, on the other hand, argues that the Club up until now not even paid him the undisputed amounts granted by the FIFA DRC and therefore is not acting in good faith. The Player maintains that he did not accept the salary reduction and that the Club did not fulfil the conditions provided in the FIFA COVID-19 Guidelines that could allow it to amend unilaterally the Employment Contract. As such, the Club still owes him all the amounts due,

including part of his salary for March, April, May, June and July 2020 as granted by the FIFA DRC.

94. As already pointed out, the Panel primarily decides this case on the basis of the FIFA RSTP and the guiding principles set forth in the FIFA COVID-19 Guidelines and the FIFA COVID-19 FAQ Document.

95. The FIFA RSTP are silent with respect to contractual variation, but the topic is addressed in the FIFA COVID-19 Guidelines and the FIFA COVID-19 FAQ Document. The FIFA COVID-19 Guidelines in turn refer to national law, i.e. *"[u]nilateral decisions to vary agreements will only be recognised where they are made in accordance with national law or are permissible within CBA structures or another collective agreement mechanism"*.

96. However, the key rationale of the guidance provided by FIFA is that clubs and players first seek to find a collective agreement on contractual variation. As set forth in the FIFA COVID-19 Guidelines, *"[c]lubs and employees (players and coaches) be strongly encouraged to work together to find appropriate collective agreements on a club or league basis regarding employment conditions for any period where the competition is suspended due to the COVID-19 outbreak"*.

97. The FIFA COVID-19 Guidelines contain a set of principles and recommendations with the aim of addressing situations where employment agreements cannot be performed as originally anticipated by the parties due to the COVID-19 crisis. In principle, the FIFA COVID-19 Guidelines advocate strongly for a spirit of cooperation and consensus, encouraging the parties to reach amicable settlements. Only in case no collective agreement can be reached, they propose that unilateral contract amendments shall be upheld if recognized by national law, or, in case national law is not relevant, (i) if made in good faith; (ii) if they are reasonable; and (iii) proportionate.

98. In view thereof, the Panel shall review whether in the specific circumstances of this case, the Club's decision to temporarily reduce the Player's monthly salary instalments by 50% or by any percentage was actually made in *good faith*, namely in a spirit of honesty and fairness, and also whether it was *reasonable* and *proportionate*, namely whether it was dictated by a sound economic rationale. For this purpose, and in line with the indicative criteria set out in FIFA COVID-19 Guidelines, the Panel shall examine the following set of issues:

- the steps taken by the Club with a view to reach an agreement with the Player before applying unilateral salary cuts;

- the consequences of the COVID-19 pandemic on the Club's financial situation in the period from March until July 2020 and the degree of disruption caused to contract performance;

- the size of the salary reduction and the economic purpose served thereby;

- the Player's overall economic situation, and,

- the uniform application of similar pay cuts on the entire squad.

99. On the first point, the Panel observes that the Club had informed the Player via a letter dated 14 April 2020 that *"as suggested by FIFA, we intend to work with our playing squad in order to consider any necessary amendments to contractual terms including those concerning remuneration. In line with this, we will be contacting all of our players in order to undertake discussions"*.

100. There is no evidence that the Club conducted or tried to conduct any negotiations with the players collectively to come to a wholesale agreement.

101. There is also no evidence on file that the Club contacted the Player or tried to negotiate with the Player before sending him a notice on 17 April 2020, in which notice the Club informed the Player of its decision to reduce his salary, referring to a phone call with the Player in which he had allegedly agreed with the reduction. Although the Club submits that the Player was also informed of the Club's decision by the Club's Translator *"on or about the same date"*, the Club's Translator at the hearing confirmed that he attended a video-conference between the Club's President and the Player, which meeting was only held after 17 April 2020.

102. On this basis, the Panel is not satisfied that the Club was clear and straightforward in its intentions to negotiate with the Player or that it had taken all the necessary steps to initiate some sort of negotiations in good faith in the hope to reach a mutual agreement on the matter prior to unilaterally deciding to cut the Player's wages.

103. In the absence of a good faith attempt from the Club to reach a collective agreement with its players, the Panel finds that national law does not come into play.

104. However, even presuming that the Club had engaged in a good faith discussion with its players to reach a collective agreement but that this turned out to be unsuccessful and that therefore national law does came into play, *quod non*, the Panel finds that the Club failed to establish that the unilateral variation of the Employment Contract was in accordance with Saudi Labour Law.

105. On the Club's limited submissions under domestic law, it maintains that the Saudi Arabian Ministry of Human Resources and Social Development made amendments to the Saudi Labour Law, enabling businesses to reduce the salaries of employees with a limited reduction not exceeding 40%.

106. First of all, the Player's salary above SAF 20,000 (approximately EUR 5,000) was reduced with 50%, which clearly exceeds the discretion allegedly afforded to the Club by the Saudi Arabian Ministry of Human Resources and Social Development, given that the Player was entitled to a monthly salary of EUR 222,223.

107. Second, the potential reduction of salary may not exceed 40%. The reference to 40% is therefore not to be interpreted as a right of the Club that can be exercised at will, but it is an absolute maximum that may be applied if the circumstances so warrant. Any reduction unilaterally applied therefore requires a justification, because, for example, it would be unfair if the Club's income was reduced with only 10%, but if it would nonetheless apply a 40% reduction of the players' salaries.

108. The Club however did not provide any evidence justifying the reduction applied, not at the time of the unilateral variation and not in the present proceedings.

109. As to the consequences of the first outbreak of COVID-19 in March 2020 and the restrictions imposed in each country on almost all economic activities for the protection of public health created an unforeseen and extraordinary situation that affected the performance of employment contracts in many sectors of the economy worldwide, including the football industry. Having said so, the Panel is mindful that in the introduction of its FIFA COVID-19 FAQ Document, FIFA clarified that the pandemic should not be considered by clubs and employers in football as a *force majeure* situation in general, but that the situation is rather to be assessed on a case-by-case basis, in light of the particular circumstances of each individual employment relation, and, each country. Consequently, for FIFA the COVID-19 pandemic is not a situation of *force majeure* in and of itself.

110. Although the Club did not explicitly invoke a situation of *force majeure* in its submissions, it referred to FIFA Circular no. 1714, by means of which FIFA informed its members that the Bureau of its Council recognised that the disruption to football caused by COVID-19 was a case of *force majeure* and declared *"[t]he COVID-19 situation is, per se, a case of force majeure for FIFA and football"*.

111. The Panel finds that the Club cannot rely on the afore-mentioned circular, as the ambiguity that arose from that document was quickly addressed by FIFA with FIFA Circular no. 1720, as in the attached FIFA COVID-19 FAQ Document, it was made clear that *"clubs or employees cannot rely on the Bureau decision to assert a force majeure situation (or its equivalent)"* (emphasis added by FIFA) and that each situation in each country had to be assessed separately, on a case-by-case basis.

112. Therefore, the Panel holds that the Club cannot simply invoke the COVID-19 pandemic as a generic defence of *force majeure* or as a reason to not comply with its financial obligations as agreed upon in the Employment Contract, without substantiating exactly how the pandemic affected its financial situation to such extent that it had rendered the performance of the Employment Contract impossible.

113. Besides, according to a general and well accepted definition formulated by previous CAS Panels *"force majeure implies an objective (rather than a personal) impediment beyond the control of the obliged party that is unforeseeable, that cannot be resisted and that renders performance impossible"* (CAS 2013/A/3471, para. 49). In addition, according to a consistent approach taken by CAS case law, the conditions of *force majeure* should be interpreted strictly and narrowly, since they may introduce an exception to the binding force of an obligation (CAS 2013/A/3471, para. 50; CAS 2015/A/3909, para. 74). The onus of proof in this respect lies with the Club.

114. The Club submitted a termination letter dated 24 April 2020 of Innodev Company, one of its sponsors, and referred to the witness statements of its General Director and its Financial Manager, suggesting that the Club's loss of income due to the COVID-19 pandemic amounted to SAR 37,000,000.

115. As to the alleged loss of income of SAR 37,000,000, the Panel finds that the Club failed to corroborate such statements with any evidence besides the testimonies of its General Director and Financial Manager.

116. As to the termination of the Innodev Company sponsorship agreement, the Club did not submit the sponsor agreement with Innodev Company into evidence. While the Panel considers the information presented by the Club to be credible and reasonable and finds that this probably had a negative impact on the Club's financial situation, it failed to prove what impact the termination of the Innodev Company sponsorship agreement had on the Club's overall financial situation. The Club may have had several more important revenue streams that remained unaffected, or it may have received support from the Government of the Kingdom of Saudi Arabia.

117. Notwithstanding these considerations and some financial hardship encountered by the Club, the Club failed to prove how the drop in revenues as a consequence of Innodev Company's termination had derailed the Club's financial planning to such an extent that the performance of the Employment Contract was no longer possible in the way originally envisaged or otherwise justified a variation of the Employment Contract. In other words, the Club is required to show more than a general economic difficulty in abstract terms. It has to show a real disruption in its financial operation and a total lack of alternative resources that had made it impossible to fulfil its payment obligations to the Player by for instance filing its financial statement for 2020, which could be a fundamental piece of evidence to establish whether or not it was objectively impossible for the Club to fully comply with its financial obligations towards the Player. In addition, for the players to know whether a 50% reduction was justified or needed, and how the Club arrived at such a reduction percentage, the Club should have produced a report at the time of sending the first letter on 14 April 2020, predicting the expected effects of the pandemic and showing why the players needed to accept such a reduction (i.e. the Club would fall into insolvency otherwise, as there was no other alternative funding available etc). The Panel could understand that an arbitrary cut, without any financial report justifying the same, could be difficult to accept for the players.

118. In the absence of more specific information or data, other than the temporary drop in its revenues, the Club did not prove sufficiently that the COVID-19 pandemic had put such a tremendous strain on its finances that it threatened its solvency and its financial viability. In this respect, it is worth noting that, at the hearing, Mr Walid Mahmoud Al Badry, the Club's Financial Manager, confirmed that the Club's financial position before COVID-19 was stable, and that the Club, in its email to the Player dated 18 January 2021, wrote that *"the club has finalised and closed sponsorship deals which cash injections will be made over the next few month"*. Similarly, the Panel finds no evidence to suggest that during the lockdown period the Club was essentially deprived of any access to alternative sources of liquidity, either via bank lending, or state aids, or through private and public financing, or through the use of contingency funds. Hence, in the circumstances invoked, the Panel finds that the financial operation of the Club was not shown to have been disrupted to an extreme effect.

119. As a matter of fact, it remained undisputed that during the period between 14 March 2020 (start suspension) and 21 June 2020 (restart training on the pitch) the Player remained in the

Kingdom of Saudi Arabia providing his services by following video trainings. Accordingly, the Player complied with his obligations under the Employment Contract.

120. Further, as to the afore-mentioned proportionality requirement, namely the size of the decrease in the Player's monthly salary and the economic purpose served thereby. The Club continued paying salary in an amount of SAR 20,000 without reduction, but deducted the remaining amount of the monthly salary by 50%, which effectively resulted in a total reduction amount of EUR 521,115 for the period March – July 2020.

121. Yet, it did so without explaining why this precise percentage was deemed appropriate or necessary at the time of the unilateral contractual variation, during the proceedings before the FIFA DRC, or during the present proceedings before CAS. Indeed, the Panel is unable to discern the economic rationale behind these numbers. A reasonable, equitable and proportionate decrease would need to reflect a balanced allocation of the economic risks of the pandemic between the parties involved. In this way, the Player and the Club would share to some extent its adverse effects. This does not seem to be the case in the present dispute. Taking into account that – as testified by the Club's Financial Manager – there were 7 foreign players in the squad taking 65% of the total budget during the relevant period, it appears that the Club tried to compensate its loss of revenue directly through salary cuts and to thereby transfer the economic risks of the pandemic almost entirely to its players.

122. Therefore, the Panel concludes that the Club's decision to reduce the Player's monthly salary as effectively applied for the period March – July 2020 is excessive and disproportionate as it does not reflect a fair and balanced risk allocation between the parties.

123. As a final point, the Panel finds it important to stress that there also needs to be an element of equal treatment amongst all players.

124. According to the Club's General Director, 75% of the players accepted the 50% salary reduction by signing an agreement, and 25% accepted the salary reduction by not objecting against it. The Club's Professional Manager testified that from the total of 30 players (of which 6 or 7 foreign), 23 players (most local, 2 foreign) signed the reduction agreement. The Club maintains that the salary reductions were applied to all its employees and that the Player is the only one claiming his full salaries. Yet, the Club did not present written evidence that players indeed agreed to the reduction applied. Against this background, the Club failed to convince the Panel that the Club followed a consistent and coherent policy of salary reductions to all its players, which leaves open the possibility that the Club's conduct towards the Player has been grossly discriminatory.

125. In light of the foregoing analysis, and after reviewing carefully the facts of the case, the Panel concludes that the Club's decision of 17 April 2020 by means of which it purported to unilaterally vary clause 4 of the Employment Contract and to thereby pay the Player reduced monthly salaries in the period from 15 March 2020 *"until resuming the sport activity and training"* was not in compliance with the requirements set by FIFA COVID-19 Guidelines, as it was in breach of the proportionality requirement and possibly also in breach of the principle of equal

treatment and non-discrimination. Consequently, this decision is devoid of legal effects and it is not binding on the Player.

126. In view of the particular facts of this case, the Panel considers that the Player cannot be subject to any reduction in his salaries.

127. As a result, the Panel confirms that the Player has a legal entitlement to receive his contractually agreed monthly salaries over the period from March - July 2020, in their entirety, in accordance with clause 4 of the Employment Contract without any reduction whatsoever.

128. The remaining elements of the Appealed Decision were not contested by the Club and the Panel sees no reason to deviate therefrom.

129. Consequently, the Panel confirms the Appealed Decision in full.

B. Conclusion

130. Based on the foregoing, the Panel holds that:

i. The Player did not agree to the salary reduction;

ii. The Club was not entitled to unilaterally vary the financial terms of the Employment Contract;

iii. The Appealed Decision is confirmed in full.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 9 July 2021 by Al Shabab Football Club against the decision issued on 3 June 2021 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is dismissed.

2. The decision issued on 3 June 2021 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed.

3. (…).

4. (…).

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