Arbitration CAS 2016/A/4846 Amazulu FC v. Jacob Pinehas Nambandi & FIFA & National Soccer League South Africa, award of 13 September 2017

Panel: Prof. Martin Schimke (Germany), President; Judge Rauf Soulio (Australia); Mr Manfred Nan (The Netherlands)

Football
Termination of the employment contract without just cause by the club
Determination of the lex causae
Law applicable to whether unilaterally and prematurely terminate an employment contract is allowed
International nature of the dispute
National arbitration tribunal in the sense of Article 22(b) RSTP
Poor performance of the player as just cause for termination

1. **A distinction should be made between the *lex arbitri* and the *lex causae*. Whereas procedural issues are governed by the law of the seat of the arbitration, i.e. Switzerland, the law applicable to the merits of the dispute depends on the applicable conflict of law rules. The starting point for determining the applicable law to the merits in football-related disputes is firstly the *lex arbitri*. Article 187(1) of the Swiss Private International Law Statute (PILS) determines that the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected. By submitting their dispute to CAS, the parties elect to subject themselves to the more specific conflict of law rule of Article R58 of the CAS Code. Because its intention is to mandatorily restrict the parties' freedom of choice of law, Art. R58 always takes precedence over any explicit (direct or indirect) choice of law by the parties. Hence any choice of law made by the parties does not prevail over Art. R58, but is to be considered only within the framework of Art. R58 and consequently affects only the subsidiarily applicable law.**

2. **The concept of "just cause" and thus the question of whether a club is entitled to unilaterally and prematurely terminate an employment contract with a player is addressed in article 14 of the FIFA Regulations on the Status and Transfer of Players (RSTP) and is thus subject to the additional application of Swiss law, and not the law chosen by the parties in the employment contract. This is the only way in which a uniform interpretation and application of the provision can be ensured.**

3. **The international dimension of a dispute is represented by the fact that the player concerned is a foreigner in the country concerned. It clearly derives from this definition that the international dimension is related to the national status of the *parties* and not to the national status of the *dispute*. A clear distinction must be made between having a residence permit (which is not sufficient to determine the national status of a player) and being a citizen of the country concerned. The domicile of the player is also not**

decisive, as if it was, employment-related disputes in football would lack an international dimension, for a player who is registered with a certain club is almost always domiciled in the country of the club.

4. **Article 3(1) of the FIFA National Dispute Resolution Chamber (NDRC) Standard Regulations provides that the chairman and a deputy chairman of a NDRC must be appointed by consensus between the player and club representatives. If this is not the case, the national arbitration committee established by the national federation cannot be considered compliant with the requirements of FIFA in respect of fair proceedings and equal representation of players and clubs, as set out in Article 22(b) RSTP, and the FIFA DRC is therefore competent for the employment-related dispute of an international dimension.**

5. **The concept of "poor performance" is principally a subjective concept and a clause entitling a club to terminate a contract for "continued poor performance" is therefore in principle potestative and would constitute an unacceptable disparity between the termination rights of the player and the club. However, if a club is somehow able to establish in an objective fashion that a player continuously performed poorly, this may indeed potentially lead to a lawful application of said clause. An evaluation by the technical staff of the club can hardly be considered objective as it is conducted by employees of the club. In any case, without document or evidence suggesting that the player was made aware of what standard was expected of him, it is difficult to determine whether the player indeed performed so poorly that a termination of the employment contract should be permitted, particularly if such subjective assessment is made by employees of the club. The circumstances under which such a termination can be upheld are therefore extremely limited, if not only theoretical.**

I. PARTIES

1. Amazulu FC (the "Appellant" or the "Club") is a football club with its registered office in Durban, South Africa. The Club is registered with the South African Football Association ("SAFA"), which in turn is affiliated to the *Fédération Internationale de Football Association*.

2. Mr Jacob Pinehas Nambandi (the "First Respondent" or the "Player") is a professional football player of Namibian nationality.

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

4. The National Soccer League South Africa (the "Third Respondent" or the "League") has its registered office in Doornfontein, South Africa. The League is a special member of SAFA and promotes, administers and controls all professional football in South Africa within the confines of the Statutes of SAFA, the Confederation of African Football (the "CAF") and FIFA, and the Handbook of the League (the "NSL Handbook").

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeal arbitration proceedings and at the hearing. This background is set out for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be referred to, where relevant, in connection with the legal discussion.

A. Background Facts

6. On 24 July 2013, Mr Jacob Pinehas Nambandi (the "Player"), a football player of Namibian nationality, and the Club concluded an employment contract (the "Employment Contract"), valid from 10 July 2013 until 30 June 2016.

7. Pursuant to the addendum to the Employment Contract, the Player is entitled to the following gross remuneration, image rights fees and appearance fees, respectively:

"Description	*2013/14*	*2014/15*	*2015/16*
Salary pm	*35000.00 gross*	*40000.00 gross*	*45000.00 gross*
Image Rights fee	*110000.00 gross*	*120000.00 gross*	*130000.00 gross*
Appearance Fee	*3000.00 gross*	*3000.00 gross*	*3500.00 gross*

(5) The player will receive two (2) economy class air tickets per season – Windhoek to Durban return.

(7) The player confirms that he will be registered as a South African at the PSL".

8. The Employment Contract itself contains the following relevant terms:

"12.4 DISMISSAL

12.4.1 A footballer may be dismissed or suspended without pay with or without notice (or payment in lieu thereof) for serious misconduct on the first occurrence thereof, repeated misconduct, continued poor performance or otherwise for any misconduct in respect of which the footballer has received a written warning during the preceding 12 (twelve) months.

15. POOR WORK PERFORMANCE

15.1 If a footballer does not perform to the standard expected of a professional football player, then the coach or technical team shall:

15.1.1 Make the footballer aware of the shortcomings in his performance.

15.1.2 Give the footballer an opportunity to be heard, with the assistance of a fellow footballer or their club employee, should the footballer so desire.

15.1.3 Give the footballer the appropriate instruction, training, guidance or counselling to enable him to attain a satisfactory standard.

15.1.4 Allow the footballer a reasonable time within which to improve to this required standard.

15.2 If a footballer continues to perform unsatisfactorily after the Club has complied with the steps set out above, then the Club shall give the footballer written notice to attend a meeting to investigate the reasons for the footballer's continued poor performance. The Club shall inform the footballer of his right to be assisted by a fellow footballer or other club employee at this meeting.

15.3 During this meeting the Club shall provide the footballer with an opportunity to state a case. After hearing the footballer, the Club will decide on appropriate action and when doing so will consider ways, short of dismissal, to remedy the matter. However, disciplinary action taken may include dismissal, if no alternative can be found.

15.4 The Club shall provide the footballer with written notice of the decision reached and the reasons therefor whatever the outcome.

18. TERMINATION OF EMPLOYMENT

Notwithstanding the fact that this is a fixed term contract, the Club may terminate this agreement by the giving of 1 (one) month's written notice prior to its expiry if:

18.1 The footballer is found guilty of misconduct justifying dismissal.

18.2 The footballer is found to be incapable of competently fulfilling the job for which he has been employed".

9. On 12 September 2013, the Club evaluated the Player's performance for the first time.

10. On 17 January 2014, the Player attended a hearing in respect of *"Section 15 of your Contract relating to poor performance"* and *"The Coach's assessment of your performance"*, of which the following minutes (signed by the Player) were communicated by the Club to the Player on 21 January 2014, with reference to previous evaluations carried out by the coach of the Club on 12 September 2013 and 18 December 2013:

"The following weaknesses need to be addressed:

1. *Technically*

   both your crossing of the ball and passing of the ball need to show a big improvement. You need to spend extra time practicing the skill.

2. *Mentally*

   your communication skills on the field are poor, and need to be improved.

3. *Physically*

   There is a big problem with your physical endurance and flexibility. Speak to Burger to give you a Gym program for Prime.

There was a problem with your registration due to a delay at Home Affairs resulting in missing a large number of matches at the start of the season. After 16 matches in the season to date you have only played in 2 matches, and both received poor ratings. Currently you are rated 22 out of a squad of 25 (you should be in the top 6).

You need to engage the Technical team to assist you with your performance. Your performance will be monitored on a daily basis with another evaluation in March 2014.

Please note that if there is not a marked improvement in your performance, you may be called to another Hearing in terms of Sec 15 of your contract, and your contract may be terminated".

11. On 7 April 2014, a second hearing took place of which the following minutes (not signed by the Player) were made:

"Points raised:

[Peter O'Connor, General Manager of the Club]*:*

1. *Highlighted recommendations on consulting with technical team about shortcomings and addressing those. It was found this was not done as per previous DC.*

[Player]*:*

1. *Argues that he has a gym program given by Burger. This however did not comply with recommendations from last hearing. An individual program had to be done which it didn't.*

[Peter O'Connor]*:*

1. *Highlighted latest evaluation. 12 matches played and player only came on once as a substitute*
2. *Most attributed in evaluation are weak to average as per ANNEXURE A*

3. [Peter O'Connor] *summarized player evaluation*

[Player]*:*

1. *Argued he doesn't understand issues such as game plan*

[Peter O'Connor]*:*

1. *Highlighted that player needs to take responsibility for downfalls and interact with the different people in technical team such as Burger V d Merwe*

[Japhet Zwane, Team Manager of the Club]*:*

1. *Very rarely see players full potential*
2. [Player] *needs to sit with coach and work on individual problems*

[Lunga Sokhela, Chair of the Hearing]*:*

1. *Player was instructed to meet with technical team and address shortfalls*
2. *If there is no marked improvement before next hearing contract will be terminated*
3. *This hearing will take place at the end of the year"*

12. On 15 May 2014, a third hearing took place of which the following minutes (not signed by the Player) were made:

"[Peter O'Connor]*:*

1. *Alerted player of shortcomings in attached hearings on 17/1, 7/4*
2. *Went through attached evaluations with coach Annexure B*
3. *No improvement thus contract to be terminated as per Clause 15*

[Player]*:*

1. *Asked for agent consultation*

[Lunga Sokhela]*:*

1. *Refused as it was player responsibility to bring agent to meeting*

[Lunga Sokhela]*:*

It was found that player has not taken recommendations to assist in improving their game. Club thus terminates contract & pay him till end of June".

13. Also on 15 May 2014, the Club informed the Player that his Employment Contract was terminated:

"[The Club] *hereby confirms the termination of your* [Employment Contract] *with effect from 15 May 2014.*

You will be paid up until 30 June 2014.

The termination is as a result of the findings of the Hearing held on Thursday 15th May 2014 which was attended by yourself. A copy of the findings of the hearing are attached. The termination decision was based on Clause 15 of your contract, which relates to Poor Work Performance.

You have attended two (2) previous Hearings relating to poor performance on 17 January 2014 and 7 April 2014.

Please note that in terms of your contract, should you not agree with the outcome of the Hearing, this matter may be referred to the Dispute Resolution Chamber of the National Soccer League.

B. Proceedings before the Dispute Resolution Chamber of FIFA

14. On 25 July 2014, the Player lodged a claim against the Club with the FIFA Dispute Resolution Chamber (the "FIFA DRC"), claiming compensation for breach of contract in the total amount of South African Rand ("ZAR") 1,270,000, plus interest. The Player also requested to be compensated for two economy class return flight tickets per season for the 2014/2015 and 2015/2016 sporting season from Windhoek to Durban and for sporting sanctions to be imposed on the Club. The amount of ZAR 1,270,000 can be broken down as follows:

    i. ZAR 480,000 pertaining to the monthly salary of ZAR 40,000 between 1 July 2014 and 30 June 2015;
    ii. ZAR 540,000 pertaining to the monthly salary of ZAR 45,000 between 1 July 2015 and 30 June 2016;
    iii. ZAR 120,000 pertaining to the *"image rights fee"* payments due for the 2014/2015 sporting season;
    iv. ZAR 130,000 pertaining to the *"image rights fee"* payments due for the 2015/2016 sporting season.

15. The Club requested the Player's claim to be dismissed and disputed the jurisdiction of the FIFA DRC.

16. On 17 June 2016, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

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

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

3. *The* [Club] *is ordered to pay to the* [Player] *the amount of* [ZAR] *1,086,000 as compensation for breach of contract within 30 days from the date of notification of this decision plus 5% interest p.a. from 25 July 2014 until the date of effective payment.*

4. *In the event that the amount and interest due to the* [Player] *in accordance with the aforementioned point 3. is not paid by the* [Club] *within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

5. *The* [Club] *is ordered to pay to the* [Player] *the amount of USD 160 as flight tickets within 30 days from the notification of this decision.*

6. *If the amount indicated in point 5. above is not paid within the aforementioned time limit, an interest rate of 5% p.a. will apply on said amount as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for its consideration and a formal decision.*

7. *Any further claim lodged by the* [Player] *is rejected.*

8. *The* [Player] *is directed to inform the* [Club] *immediately and directly of the account number to which the entire remittance is to be made and to notify the DRC of every payment received".*

17. On 12 October 2016, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *"With regard to the argument of the* [Club] *that the present matter was not one of an international dimension, the Chamber underlined that in accordance with the documentation on file and statements provided by both parties, the* [Player] *is a Namibian citizen, holder of a Namibian passport. In absence of any objective evidence that the* [Player] *had a South African passport or that he was registered as a South African national* […]*, the international dimension is established by means of the player's Namibian passport. The fact that the player concluded a contract with a South African club, was the holder of a South African resident's permit, and that he played in South Africa does not change the conclusion of the Chamber. Thus, the Chamber concluded that the present dispute had an international dimension and the DRC is in principle competent to deal with it in accordance with art. 22 lit. b) of the Regulations on the Status and Transfer of Players* [the "FIFA RSTP"]*".*

- In respect of the Club's argument that the FIFA DRC was not competent as the Player should have addressed his claim to the National Soccer League Dispute Resolution Chamber (the "South African NDRC"), the FIFA DRC *"sought to emphasise that in accordance with art. 22 lit. b) of the* [FIFA RSTP] *(2012, 2014 and 2016 editions) it is competent to deal with a matter such as the one at hand between a South African club and a Namibian player, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement. With regard to the standards to be imposed on an independent arbitration tribunal guaranteeing fair proceedings, the Chamber referred to the FIFA Circular n° 1010 dated 20 December 2005. Equally, the members of the Chamber referred*

to the principles contained in the FIFA National Dispute Resolution Chamber […] *Standard Regulations* [the "FIFA NDRC Standard Regulations"]*, which came into force on 1 January 2008".*

- In respect of the principle of equal representation of players and clubs, *"the Chamber went on to examine the documentation presented by the* [Club] *and noted that the chairperson of the* [NDRC] *is appointed by the Executive Committee of the* [League]. *Equally, the Chamber noted that it can be established from the documentation provided by the parties that the* [League] *is an organisation consisting exclusively of clubs. As such, the members of the Chamber concluded that the chairperson of the* [NDRC] *is effectively appointed by the clubs and thus not by consensus by player and club representatives. The Chamber, therefore, was unanimous in its conclusion that the* [NDRC] *does not respect the principle of equal representation of players and clubs.*

- *In addition, the Chamber noted that it is acknowledged by both parties that for proceedings to be conducted in front of the* [NDRC]*, SAFA Appeals Board and the SAFA Arbitration Tribunal, costs apply varying between ZAR 1,000 and ZAR 30,000. The Chamber determined that the imposition of these costs does not comply with art. 32 of the* [FIFA NDRC Standard Regulations].

- […] *On account of all the above, the Chamber established that the* [Club's] *objection to the competence of FIFA to deal with the present matter has to be rejected, and that the* [FIFA DRC] *is competent on the basis of art. 22 lit. b) of the* [FIFA RSTP]*, to consider the present matter as to the substance".*

- In examining whether the reasons put forward by the Club could justify the termination of the Employment Contract, and more specifically whether the Club could invoke Article 15 of the Employment Contract, *"the Chamber held that such clause could not be deemed applicable since it allows for the unilateral termination of the contract based exclusively on the club's evaluation of the player's performance. The player's poor performance, in accordance with the Chamber's constant jurisprudence, in itself cannot be considered a valid reason to terminate an employment contract as it is the result of a subjective perception of an employee of the club, not measurable and not based on clear, objective criteria.*

- *The Chamber, therefore, decided that the* [Club] *could not legitimately terminate the contractual relationship with the* [Player] *on the basis of the relevant clause. Consequently, the Chamber rejected the* [Club's] *argument in this respect, as in accordance with the well-established jurisprudence of the Chamber, poor performance of a player cannot be considered as a just cause for a club to unilaterally terminate the employment contract.*

- *With regard to the* [Club's] *allegation that the termination was with just cause in light of the national laws of South Africa, the Chamber deemed it important to point out that when deciding a dispute before the* [FIFA DRC]*, FIFA's Regulations prevail over any national law chosen by the parties. In this regard, the Chamber emphasised that the main objective of the FIFA Regulations is to create a standard set of rules to which all actors within the football community are subject to and can rely on. This objective would not be achievable if the* [FIFA DRC] *would have to apply the national law*

of a specific party on every dispute brought to it. This should apply, in particular, also to the termination of a contract. In this respect, the DRC wished to point out that it is in the interest of football that the termination of contract is based on uniform criteria rather than on provisions of national law that may vary considerably from country to country. Therefore, the Chamber deems that it is not appropriate to apply the principles of a particular national law to the termination of the contract but rather the Regulations, general principles of law and, where existing, the Chamber's well-established jurisprudence and therefore rejected the arguments of the [Club] *in this respect.*

- *In light of all of the above, the Chamber concluded that the* [Club] *did not have just cause to unilaterally terminate the employment relationship between the* [Player] *and the* [Club] *and, therefore, concluded that the* [Club] *had terminated the employment contract without just cause on 30 June 2014, in accordance with the declaration of the* [Club] *and the acknowledgement of the* [Player] […] *and that consequently, the* [Club] *is to be held liable for the early termination of the employment contract without just cause".*

- In view of the fact that no outstanding remuneration was claimed by the Player and that no compensation clause was included in the Employment Contract, the FIFA DRC applied article 17(1) of the FIFA RSTP in determining the compensation for breach of contract to be paid by the Club to the Player. In this respect, *"the Chamber noted that the contract was signed by the* [Player] *and the* [Club] *was set to run for two more seasons after the effective time of termination, i.e. until 30 June 2016 and provided that the* [Player] *would be entitled to a monthly salary of ZAR 40,000 for the 2014/15 season and ZAR 45,000 for the 2015/16 season. In addition, the members of the Chamber noted that the player would be entitled to ZAR 250,000 in four instalments due during the period running from the effective breach of contract until 30 June 2014* [sic] *as "image rights fee"".*

- In respect of the image rights fee, *"[t]he members of the Chamber noted that if there are separate agreements relating to employment and image rights, it tends to consider the agreement on image rights as such and therefore considers it has no competence to deal with it. Such a conclusion might be different, however, if specific elements of the agreement appear to suggest that payments relating to image rights were to be part of the employment relationship. In casu, the fact that the payments are provided for in the employment contract alongside the provisions relating to other remuneration and also appear to be annual bonuses, led the Chamber to decide not to consider the "image rights" payment clause as such, but determined that said payments were provided for as remuneration.*

- *In light of the above considerations, the Chamber deemed that the "image rights fee" can be taken into consideration when determining the amount of compensation due to the* [Player] *by the* [Club].

- *The members of the Chamber, therefore, deemed that in light of the claim of the* [Player] *and all of the above,* […]*, the total residual value of the employment contract of ZAR 1,270,000 shall serve as a basis for the final determination of the amount of compensation due for breach of contract".*

- In respect of any possible mitigation of damages, *"[t]he members of the Chamber recalled that on 1 August 2014, the* [Player] *had signed an employment contract with the Namibian club*

Black Africa SC and was entitled to receive Namibian Dollars (NAD) 8,000 until 31 July 2016. The [Player] *was able to earn income of NAD 184,000 during the relevant period of time.*

- *Consequently, on account of all the aforementioned considerations and the specificities of the case at hand as well as the general legal obligation to mitigate his damages, the Chamber decided that the* [Club] *must pay the amount of ZAR 1,086,000, which is considered reasonable and proportionate as compensation for breach of contract in the case at hand.*

- *In addition, taking into account the* [Player's] *request, the Chamber decided that the* [Club] *must pay to the* [Player] *interest of 5% interest p.a. on the amount of compensation from the date on which the claim was lodged, i.e. 25 July 2014, until the date of effective payment.*

- *In continuation, regarding the* [Player's] *claim pertaining to flight tickets, referring to the relevant terms of the employment contract* […] *and the information provided by FIFA Travel, the Chamber decided that the* [Club] *must pay to the* [Player] *the amount of USD 160 for the* [Player's] *return to his home country".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 1 November 2016, the Club lodged a Statement of Appeal with the Court of Arbitration for Sport ("CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (2016 edition) (the "CAS Code"), challenging the Appealed Decision. The Club nominated Judge Rauf Soulio, Judge in Adelaide, Australia, as arbitrator.

19. On 16 November 2016, the Club filed its Appeal Brief in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments. The Club submitted the following requests for relief:

"83.1. Main relief

83.1.1. The dispute between the First Respondent and the Appellant is not a dispute of international dimension.

83.1.2. The Dispute Resolution Chamber of the Third Respondent is an independent arbitration tribunal guaranteeing fair proceedings, respects principles of equal representation of players and clubs and complies with the principles of FIFA Circular 1010 and the principles contained in the FIFA National Dispute Resolution Chamber (NDRC) Standard Regulations.

83.1.3. First Respondent should have referred his claim to the Dispute Resolution Chamber of the Third Respondent as expressly agreed in the employment contract between the Appellant and the First Respondent and undertaken by the Appellant and the First Respondent in terms of the Constitution and Rules of the Third Respondent.

83.1.4. The Dispute Resolution Chamber of the Second Respondent did not have jurisdiction to deal with the First Respondent's claim.

83.1.5. The decision of the Dispute Resolution Chamber of the Second Respondent is set aside.

83.1.6. The First Respondent's claim is remitted to the Dispute Resolution Chamber of the Third Respondent for determination.

83.1.7. Any Respondent opposing this appeal be ordered to pay the costs of the proceedings and the Appellant's legal costs.

83.2. Alternative relief:

83.2.1. If the CAS finds that the Dispute Resolution Chamber of the Second Respondent had jurisdiction to deal with the First Respondent's claim, the Appellant requests an order that:

83.2.1.1. The Dispute Resolution Chamber of the Third Respondent is an independent arbitration tribunal guaranteeing fair proceedings, respects principles of equal representation of players and clubs and complies with the principles of FIFA Circular 1010 and the principles contained in the FIFA National Dispute Resolution Chamber (NDRC) Standard Regulations.

83.2.1.2. The applicable law in this matter is South African law, the law governing the employment contract between Appellant and the First Respondent as agreed by the parties in the employment contract and required by the laws of the country the employment contract was to be carried out.

83.2.1.3. The Appellant complied with the prescripts of the employment contract and South African law in terminating the employment contract and thus terminated the employment contract for a just cause.

83.2.1.4. The decision of the Dispute Resolution Chamber of the Second Respondent is set aside.

83.2.1.5. The First Respondent's claim is rejected in its entirety.

83.2.1.6. Any Respondent opposing this appeal be ordered to pay the costs of the proceedings and the Appellant's legal costs".

20. On 22 November 2016 FIFA informed the CAS Court Office that it had been informed by the First Respondent that the latter intended to nominate Mr Manfred Nan, Attorney-at-Law in Arnhem, the Netherlands, as arbitrator and that it did not object to such a nomination.

21. On 23 November 2016, the First Respondent stated its agreement to the nomination of Mr Manfred Nan as Respondents' joint nomination.

22. On 25 November 2017, the CAS Court Office invited the Third Respondent to state, by 28 November 2017, whether it agreed with the nomination of Mr Manfred Nan as arbitrator and indicated that silence would be deemed as acceptance of said nomination.

23. On 30 November 2016 and in the absence of any objection in that regard, the CAS Court Office confirmed the Respondents' joint nomination of Mr Manfred Nan.

24. On 4 January 2017, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

- Prof Dr Martin Schimke, Attorney-at-Law in Dusseldorf, Germany, as President;
- Judge Rauf Soulio, Judge in Adelaide, Australia; and
- Mr Manfred Nan, Attorney-at-Law in Arnhem, the Netherlands, as arbitrators.

25. On 24 January 2017, FIFA filed its Answer, in accordance with Article R55 of the CAS Code. FIFA submitted the following requests for relief:

"1. That the CAS rejects the present appeal against the decision of the Dispute Resolution Chamber (hereinafter also referred to as the DRC or the Chamber) dated 17 June 2016 and to confirm the relevant decision in its entirety.

2. That the CAS orders the Appellant to bear all the costs of the present procedure.

3. That the CAS orders the Appellant to cover all legal expenses of FIFA related to the proceedings at hand".

26. On 25 January 2017, the Player filed his Answer, in accordance with Article R55 of the CAS Code. The Player submitted the following requests for relief:

"8.1.1 The appeal of the Appellant be dismissed with cost;

8.1.2 An order in that the Appellant / Club shall be liable for all costs and expenses incurred by the Player in opposing this appeal, including his legal costs and the costs and expenses of CAS".

27. On 30 January 2017, the League filed its Answer, in accordance with Article R55 of the CAS Code. The League did not submit any requests for relief and states in its Answer that it *"does not seek to defend this matter. It raises the matters that concern it and which make the regulation of South African football impossible if they are not addressed".*

28. On 13 and 14 February 2017 respectively, FIFA informed the CAS Court Office that it did not consider a hearing necessary and that the League's Answer contained an inadmissible counterclaim, the Club informed the CAS Court Office that a hearing was necessary and inevitable, the League informed the CAS Court Office that it required a hearing, and the Player

informed the CAS Court Office that he preferred a hearing to be held and that the League's Answer was not filed in time.

29. On 21 February 2017, the CAS Court Office informed the parties that the Panel had decided to hold a hearing. The parties were also invited to provide their comments on FIFA's objection to the admissibility of the counterclaim in the League's Answer. Furthermore, in view of the fact that the League alluded to calling an expert witness to testify about South African labour law should CAS find that the dispute was not to be referred to the South African NDRC, the parties were invited to comment on such implicit request for bifurcation of the proceedings.

30. On 24 February 2017, the Player indicated that he agreed with FIFA that the League's Answer is effectively a counterclaim and should be dismissed. The Player argued that the League's Answer was defective in that no names of witnesses were provided in its Answer. The Player submitted that the CAS Code does not provide for a bifurcation of the proceedings and argued that this would prejudice his position as the matter would be postponed and/or delayed.

31. On 27 February 2016, the League denied that it filed a counterclaim, as *"[t]here is no relief sought by our client in this matter except to raise issues which are of concern to it which "relate to the South African DRC and the applicability of South African law"*. The League further advised that the view taken by the Panel in respect of the separation of the issue of jurisdiction and the merits of this matter, was incorrect.

32. Also on 27 February 2017, FIFA informed the CAS Court Office that it had no objection with the rendering of an interim award regarding the competence of the FIFA DRC.

33. Also on 27 February 2017, the Club submitted that there is no merit in the claim made by FIFA that the League's Answer is a counterclaim and is inadmissible. Although the Club considered the League's request for bifurcation sensible, it expressed its concern with respect to the costs and delay that may be necessitated by the splitting of the proceedings. The Club thus concluded that the proceedings should not be split.

34. On 10 March 2017, the CAS Court Office informed the parties that the Panel decided that the League's Answer shall not be considered as a counterclaim and that the reasons for this decision would be developed in the arbitral award. The parties were also informed that, in view of the League's correspondence dated 27 February 2017 from which it appeared that it was not requesting for a bifurcation of the proceedings after all, the proceedings would not be bifurcated. The Panel further noted that the League, in its letter dated 27 February 2017, appeared to have developed new submissions concerning the merits of the dispute and invited the other parties to comment in this respect.

35. On 15 March 2017, FIFA, with reference to Article R56 of the CAS Code, objected to the new submissions of the League. The Club did not object to the League's submissions being taken into consideration in these proceedings. The League disagreed with the *"apparent ruling of the Panel"* that its letter dated 27 February 2017 contained new submissions and argued that

this ruling was made without the League being requested to motivate why the alleged new submissions should be considered. The Player objected to the new submissions of the League.

36. On 24 March 2017, the CAS Court Office informed the parties that the Panel wished to emphasise that up until that time it had not made a ruling regarding the nature or the admissibility of the submissions made by the League, but that, having analysed the relevant correspondences and submissions, it decided that the submissions filed by the League in its letter dated 27 February 2017 concerning the merits of this dispute were inadmissible and would not be taken into consideration and that the reasons for this decision would be developed in the arbitral award.

37. On 31 March 2017, the CAS Court Office informed the parties that the Panel had decided to hold a two-day hearing, starting on 30 May 2017 at 13:00 hour.

38. On 19 April 2017, FIFA and the Player returned duly signed copies of the Order of Procedure to the CAS Court Office.

39. Also on 19 April 2017, the Club and the League filed several objections in respect of the Order of Procedure, mainly in respect of the applicable law[1].

40. On 24 April 2017, the CAS Court Office, on behalf of the Panel, addressed the comments of the Club and the League in respect of the Order of Procedure.

41. On 28 April 2017, the League filed additional objections in respect of the Order of Procedure, mainly in respect of the applicable law, and refused to sign it.

42. Also on 28 April 2017, the Club returned a duly signed copy of the Order of Procedure to the CAS Court Office, striking out a part of a sentence in the introduction section as follows: *"Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute (PILS) shall apply, ~~to the exclusion of any other procedural law~~"*.

43. On 5 May 2017, the CAS Court Office, on behalf of the Panel, informed the parties that the remarks/objections of the Club and the League would be discussed at the hearing.

44. On 24 May 2017, the League filed a document referred to as "Skeleton Heads", adding that this document remained within the ambit of what had been previously presented.

45. On 30 and 31 May 2017, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the Panel.

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[1] The arguments of the Club and the League in respect of the Order of Procedure are addressed in more detail in the section of this arbitral award dedicated to the applicable law.

46. In addition to the Panel, Mr José Luis Andrade, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

For the Club:

- Mr Farai Razano, Counsel;
- Mr Peter O'Connor, General Manager of the Club at the time when the Player was employed by the Club;
- Mr Lunga Sokhela, General Manager of the Club.

For the Player:

- Mr Corne Goosen, Counsel;
- Mr Thulaganyo Gaoshubelwe, General Secretary of SAFPU.

For FIFA:

- Mr Mario Flores Chemor, Legal Counsel FIFA Players' Status Department;
- Mr Gauthier Bouchat, Legal Counsel FIFA Players' Status Department.

For the League:

- Mr Martin Severn Maxwell Brassey QC, Counsel;
- Mrs Motlalepule Rahab Rantho, Counsel;
- Mr Pumzo Mbana, Counsel.

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

- Mr Lunga Sokhela, General Manager of the Club, witness called by the Club;
- Mr Peter O'Connor, General Manager of the Club at the time when the Player was employed by the Club, witness called by the Club;
- Mr Thulaganyo Gaoshubelwe, General Secretary of SAFPU, witness called by the Player.

48. All witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. Each party and the Panel had the opportunity to examine and cross-examine the witnesses in person.

49. The parties were afforded full opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

50. Before the hearing was concluded, each party 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.

51. On 19 July 2017, FIFA called the Panel's attention to certain paragraphs in an arbitral award rendered by CAS on 29 June 2017.

52. On 30 July 2017, upon being invited to provide their comments on the admissibility of FIFA's letter dated 19 July 2017, the League indicated that it was of the view that such submission should not be countenanced and the Club argued that FIFA relied on Article R56 of the CAS Code on numerous occasions in these proceedings and that raising new arguments and submitting new documents, after the close of pleadings, is unacceptable and should not be condoned. The Club also requested that, regardless of the outcome of the proceedings, FIFA be ordered to pay costs incurred by the parties in addressing its 19 July 2017 letter as it was an abuse of process.

53. On 11 August 2017, the CAS Court Office informed the parties that the Panel had decided not to admit FIFA's letter dated 19 July 2017 and its enclosure to the file for these proceedings and that the reasons for such decision would be set out in the final award.

54. 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

55. The Club's submissions in respect of the merits of the case, in essence, may be summarised as follows (the Club's position in respect of the jurisdiction of the FIFA DRC is set out separately below):

- The Club submits that it was entitled to dismiss the Player for poor performance in terms of the Employment Contract and South African law; the Club exercised its rights because of the Player's unwillingness or incapability to improve his performance following guidance and counselling that had been provided to him by the Club for some time.

- According to the Club, the reason for the FIFA DRC's ruling that the Club dismissed the Player without just cause is that the "general rule" is that an employment contract cannot be terminated for poor performance, the general rule takes precedence over the employment contract and South African law, the Employment Contract could not be terminated for the poor performance of the Player. The Club submitted that in an attempt to support this unfounded conclusion, the FIFA DRC concluded that, an employment contract cannot be terminated due to poor performance, as performance is a subjective factor and cannot be held to be just cause for terminating a contract. Further the FIFA DRC came to this conclusion notwithstanding its acceptance that the parties had agreed that poor performance would be one of the material terms of the Employment Contract and South African law permits dismissal for poor performance. Such an arrangement is not illegal or *contra bonos mores*.

- Pursuant to South African law the assessment of misconduct and poor performance is subjective. One measures the conduct or performance of the employee against an established standard or a set target. If the employee falls short of the established standard or set target, they can – subject to a fair procedure being followed – be dismissed.

- With reference to article 12(4) and 18 of the Employment Contract, the Club argues that there was no basis for the FIFA DRC to find that the Club could not invoke poor performance as a valid reason for terminating the Employment Contract. The enquiry conducted by the Club showed that the Player was indeed neither willing to, nor capable of, competently fulfilling the job for which he was employed and the Player was justifiably dismissed.

56. The Player's submissions in respect of the merits of the case, in essence, may be summarised as follows (the Player's position in respect of the jurisdiction of the FIFA DRC is set out separately below):

- The Player submits that national associations and/or national leagues cannot insert/apply clauses which are *contra bonos mores* nor against the main objectives of FIFA and the FIFA rules, regulations and decisions of its bodies. The entitlement to terminate a football contract of employment for reasons of poor performance is subjective, unfair and unjust.

- Without admitting that the Player's Employment Contract may have been terminated for poor performance, the Player was not repeatedly warned in accordance with article 12.3.2 of the Employment Contract. The Club did not submit any proof or evidence as to what standards it relied upon to determine that the Player performed poorly. Incapacity can never be regarded as poor performance. The Player furthermore only had two opportunities during the 2013/2014 sporting season to represent the Club and to prove his quality and ability.

57. FIFA's submissions in respect of the merits of the case, in essence, may be summarised as follows (FIFA's position in respect of the jurisdiction of the FIFA DRC is set out separately below):

- FIFA endorsed the content of the Appealed Decision in its entirety and argues that one of the main purposes of the FIFA RSTP is to create a standard set of rules to which all football stakeholders are subject and are able to rely on, which, as a consequence shall prevail over national law as soon as an international dimension is at stake.

- FIFA submits that article 15 of the Employment Contract is invalid and that the dismissal of the Player by the Club therefore occurred without just cause. With reference to CAS jurisprudence, FIFA maintains that poor performance could only be contemplated in a case where a player deliberately decided to play below his potential.

In this respect, FIFA argues that it must be noted that none of the evaluations made by the Club refer to the fact that the Player would have willingly decreased the level of his performance. Conversely, the Club's evaluations actually stress on the Player's lack of improvement, which is a completely subjective criterion.

- FIFA finally argues that, since the Club does not challenge the calculation of the compensation, in accordance with the principle of *non ultra petita*, in the event the Panel concludes that the FIFA DRC was correct in determining that the Club terminated the Employment Contract without just cause, this part of the Appealed Decision cannot be amended.

58. The League submits that it does not intend engaging with the merits of the matter. However, according to the League, the issues that concern it deeply relate to the South African NDRC and the applicability of South African law (the League's arguments in respect of these issues are set out separately below). The League argues that it does not seek to defend this matter, but that it raises the matters that concern it and which make the regulation of South African football impossible if they are not addressed.

V. JURISDICTION

59. The jurisdiction of CAS, which is not disputed, derives from article 58(1) of the FIFA Statutes (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"* and Article R47 of the CAS Code.

60. It follows that CAS has jurisdiction to adjudicate on and decide the present dispute.

VI. ADMISSIBILITY

61. The Player initially argued that the Club's Statement of Appeal and Appeal Brief were filed late and that the Club's appeal shall therefore be declared inadmissible. However, at the occasion of the hearing, the Player informed the Panel that he no longer pursued this issue.

62. In any event, the Panel finds that the appeal was filed within the deadline of 21 days set by article 58(1) of the FIFA Statutes. The appeal complies with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

63. It follows that the appeal is admissible.

VII. APPLICABLE LAW

64. The Club maintains that the FIFA DRC premises the Appealed Decision on what it calls a well-established principle that an employment contract cannot be terminated for poor

performance. The FIFA DRC adds that this is because the assessment will be subjective and not objective. It then, despite accepting that the parties had agreed that poor performance would be one of the material terms of the Employment Contract and South African law permits dismissal for poor performance, finds that the Club was not entitled to dismiss the Player. The Club however submits that it was entitled to dismiss the Player in terms of the applicable South African labour laws. Employment contracts in South Africa are governed by the Labour Relations Act 56 of 1995 (the "LRA").

65. On 19 April 2017, the Club requested the CAS Court Office to amend the Order of Procedure circulated because it considered that *"[i]t appears that the exclusion of the application of any other procedural law* [than the PILS] *in the present proceedings is one of the matters that the PILS specifically leaves to the parties to decide. In other words, the exclusion of any other procedural laws is not mandatory in terms of the PILS"* and that *"there should not be an exclusion of other procedural laws in these proceedings"*. The Club finally signed the Order of Procedure, striking out a part of a sentence in the introduction section as follows: *"Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute (PILS) shall apply, ~~to the exclusion of any other procedural law~~"*.

66. The Player argues that in accordance with article 13 of the FIFA Statutes 2015 (identical with article 14 of the FIFA Statutes 2016), all members of FIFA, including the SAFA and the League, must fully comply with the FIFA Circulars no. 1010, 1129 and 1171. The Player further maintains that it is constant CAS and FIFA DRC jurisprudence that national provisions can only be taken into account if the parties adopted an express choice-of-law in the contract and if a *lacuna* in the FIFA regulations exists. In the Employment Contract reference is made to the "football rules", which is defined in the Employment Contract as to include the Constitution, Statutes, Rules and Regulations of FIFA. The Player submits that by accepting the jurisdiction of CAS as established in the FIFA Statutes, the parties accept that, pursuant to Article R58 of the CAS Code and Article 66(2) of the FIFA Statutes 2015 (identical with article 57(2) of the FIFA Statutes 2016), that the CAS Panel must decide the dispute in accordance with the rules, regulations, directives, circulars and jurisprudence of FIFA, with, if necessary, the additional application of Swiss law on a subsidiary basis. National associations cannot insert / apply clauses which are *contra bonos mores* nor against the main objectives of FIFA and the FIFA rules, regulations and decisions. The entitlement to terminate a football contract of employment for reasons of poor performance, is subjective, unfair and unjust.

67. FIFA challenges the relevance of South African law to the present dispute. FIFA submits that it is clear from the wording of the Employment Contract that the parties have not agreed on the exclusive application of the South African law but have established that their contractual relationship shall also be governed by the FIFA regulations. With reference to CAS jurisprudence, FIFA argues that one of the main purposes of the FIFA regulations is to create a standard set of rules to which all football stakeholders are subject, and able to rely on. By acting in a different way, *i.e.* in the present situation by being constrained to apply national laws of specific parties involved in disputes, the FIFA deciding bodies, including the FIFA DRC, would not be able to pursue its goal. The FIFA regulations need to prevail over national

law as soon as an international dimension is at stake. The FIFA regulations are therefore primarily applicable and, subsidiarily, Swiss law to the extent applicable.

68. The League submits that law and conduct in South Africa is subject to the Constitution of the Republic of South Africa and in particular the Bill of Rights. Law or conduct that is inconsistent with the Constitution is invalid. The League must meet the obligations imposed upon it by national law. It is not correct that sporting rules override national laws, as suggested in the Appealed Decision. The League argues that the FIFA RSTP set out a framework but that the interpretation of just cause is a matter that can only be determined in a South African context by applying the employment law principles that apply here. The LRA recognises three (misconduct, incapacity (which allegedly includes poor performance), and operational requirements) fair grounds for dismissal. Employees are permitted to secure better rights for themselves in contracts, but employers cannot.

69. On 19 April 2017, the League also objected to the content of the Order of Procedure circulated. The League, *inter alia*, argued that the Employment Contract concluded by the Player and the Club specifically states that the laws of the Republic of South Africa apply and that therefore the Arbitration Act 42 of 1965 of South Africa is applicable to the dispute. The League also confirmed that Article R58 of the CAS Code is applicable and that the parties agreed that the laws of the Republic of South Africa should apply on disputes arising out of their agreement. The League argued that there was therefore no need for the Panel to decide on the appropriate rules of law as this issue does not even arise.

70. On 28 April 2017, the League informed the CAS Court Office that it elected not to sign the Order of Procedure because the issue of procedural law and the applicable law were to be decided by the Panel after hearing evidence and legal argument. The League reiterated that it was of the view that the Arbitration Act 42 of 1965 of South Africa and South African law is applicable and not the PILS. The League also stated that the CAS Code and FIFA Statutes are irrelevant for determining the applicable law in this matter and that *"South Africa remains the place of the arbitration"* and that *"Lausanne is merely a venue for the hearing"*.

Discussion as to Applicable Law

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

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

72. Article 57(2) of the FIFA Statutes (2016) states 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"*.

73. The Employment Contract states, *inter alia*, the following:

> *"2.2.8 "Football rules" shall mean the Constitution, Statutes and Rules and Regulations of the* [League]*; SAFA; CAF and/or FIFA as amended from time to time.*
>
> *2.3 This agreement will be construed according to the laws of the Republic of South Africa, applicable to agreements that are signed and performed within the Republic of South Africa but in light of and in accordance with the football rules generally and* [League] *rules specifically.*
>
> *19.2 The parties warrant that, in accordance with the football rules, any and all disputes of whatsoever shall be determined in accordance with the* [League] *rules and in the Dispute Resolution Tribunals of the* [League] *rather than before any court or other tribunal insofar as it is a requirement of FIFA and other footballing rules that the internal dispute resolution mechanisms available in football should be utilised by participants in the game save where the football rules do not provide an appropriate tribunal to determine the dispute".*

74. Insofar the League argues that the seat of the arbitration is South Africa and not Switzerland, the Panel finds that this argument must be dismissed as Article R28 of the CAS Code determines as follows:

> *"The seat of CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing".*

75. Article 176(1) PILS determines as follows:

> *"The provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland".*

76. Since neither the Club nor the Player is based in Switzerland, chapter 12 of the PILS is applicable.

77. The Panel finds that a distinction should however be made between the *lex arbitri* and the *lex causae*. Whereas procedural issues are governed by the law of the seat of the arbitration, *i.e.* Switzerland, the law applicable to the merits of the dispute depends on the applicable conflict of law rules.

78. The starting point for determining the applicable law to the merits in football-related disputes is firstly the *lex arbitri*, *i.e.* the arbitration law at the seat of arbitration.

79. Article 187(1) PILS determines the following:

> *"The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected".*

80. The Panel finds that, by submitting their dispute to CAS, the parties elected to subject themselves to the more specific conflict of law rule of Article R58 of the CAS Code. As indicated in this provision, the Panel shall decide the dispute according to the applicable regulations.

81. An issue that frequently occurs in proceedings before CAS is that parties on the one hand make an implicit (and indirect) choice of law, but also an explicit choice of law at the same time. This issue has been addressed in legal literature:

> *"The latter situation arises if the parties agree not only on the jurisdiction of the CAS as the arbitral tribunal to decide on the case, and thus implicitly also agree on the application of the CAS Code, but also – for example in the contract – directly and explicitly specify the law that applies to the case. In such a case the question then arises as to the nature of the relationship between the implicit choice of law on the one hand and the explicit choice of law on the other. In particular the question is raised as to whether in such a case any room at all is left for the application of Art. R58 of the CAS Code"* (HAAS U., Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, CAS Bulletin, 2/2015, p. 10)

82. As to how this apparent contradiction is to be resolved, the Panel fully subscribes to the views expressed by Professor Haas:

> *"To summarise, it must therefore be concluded that Art. R58 of the CAS Code – because its intention is to mandatorily restrict the parties' freedom of choice of law – always takes precedence over any explicit (direct or indirect) choice of law by the parties. Hence any choice of law made by the parties does not prevail over Art. R58 of the CAS Code, but is to be considered only within the framework of Art. R58 of the CAS Code and consequently affects only the subsidiarily applicable law"* (HAAS U., Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, CAS Bulletin, 2/2015, p. 13).

83. Since the applicable regulations in the matter at hand are the regulations of FIFA, a second apparent contradiction arises, as article 57(2) of the FIFA Statutes 2016 dictates that Swiss law shall be additionally applied, whereas the parties have made a direct choice for South African law.

84. This issue was also addressed by Professor Haas:

> *"The RSTP lay down uniform standards for these questions of law at global level. Where Art. 66 (2) of the FIFA Statutes "additionally" refers to Swiss law, such a reference only serves the purpose of making the RSTP more specific. In no way is the reference to Swiss law intended to mean that in the event of a conflict between the RSTP and Swiss law, priority must be given to the latter. Rather, the reference to the "additionally" applicable Swiss law is merely intended to clarify that the RSTP are based on a normatively shaped preconception, which derives from having a look at Swiss law. Consequently the purpose of the reference to Swiss law in Art. 66 (2) of the FIFA Statutes is to ensure the uniform*

interpretation of the standards of the industry. Under Art. 66 (2) of the FIFA Statutes, however, issues that are not governed by the RSTP should not be subject to Swiss law" (HAAS U., Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, CAS Bulletin, 2/2015, p. 15)

85. The Panel agrees with the view set out above and notes that the Club exclusively relies on the application of South African law in respect of the question whether the Club was entitled to prematurely terminate the Player's Employment Contract with just cause.

86. The Panel notes that article 14 FIFA RSTP determines as follows:

> *"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause".*

87. The Panel finds that the concept of "just cause" and thus the question of whether a club was entitled to unilaterally and prematurely terminate an employment contract with a player is addressed in the FIFA RSTP and is thus subject to the additional application of Swiss law, and not the law chosen by the parties in the Employment Contract:

> *"By way of another example, Art. 14 of the RSTP specifies that "a contract may be terminated by either party without consequences of any kind … where there is just cause". But for the question of under what conditions a "just cause" can be assumed, the Panel must then refer to Swiss law. This is the only way in which a uniform interpretation and application of the provision can be ensured"* (HAAS U., Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, CAS Bulletin, 2/2015, p. 16)

88. Consequently, the Panel is satisfied that in determining the issues the applicable law is the various regulations of FIFA primarily, in particular the FIFA RSTP, and subsidiarily Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. PRELIMINARY ISSUES

A. Grounds for the Panel's decision dated 10 March 2017 that the League's Answer shall not be considered as a counterclaim

89. The Panel observed that the Club called the League as a respondent from the outset of the proceedings before CAS, *i.e.* on 1 November 2016. On 13 February 2017, after having received the Answer filed by League, FIFA argued that *"rather than constituting a mere statement of defence,* [the League] *seeks exclusively to overturn the challenged decision, thereby having the effect of prejudicing the position of the party against whom they have been raised".*

90. The Panel observed that FIFA, at this stage, did not object to the participation in the proceedings by the League as such, but that the League's Answer was to be considered as a counterclaim.

91. The Panel further noted that the position set out by the League in its Answer aligns with the position of the Club in respect of the competence of the FIFA DRC.

92. The Panel found that the League's Answer does not constitute a counterclaim because the League, in fact, did not submit any prayers or requests for relief. Insofar the League seeks to challenge the Appealed Decision, such request cannot be taken into account by the Panel. However, the Panel found that insofar the position of the League corroborates the position of the Club, the position of the League can be taken into consideration by the Panel.

93. In respect of the costs of the proceedings, the Panel will take into account that the League supported the Club's position.

94. Consequently, the Panel found that the League's Answer does not include an actual counterclaim.

B. Grounds for the Panel's decision dated 24 March 2017 that the submissions filed by the League in its letter dated 27 February 2017 concerning the merits of this dispute are inadmissible and shall not be taken into consideration

95. Article R56 of the CAS Code provides the following:

> *"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer. […]"*.

96. As communicated to the parties by letter of the CAS Court Office dated 10 March 2017, the Panel noted that, rather than commenting exclusively on the counterclaim issue raised by FIFA and clarifying its position regarding the bifurcation, the League appeared to have developed new submissions concerning the merits of the dispute and, in particular, in relation to the alleged lack of jurisdiction of the FIFA DRC to have heard the dispute.

97. Upon having informed the parties of this observation, the parties were invited to comment. FIFA and the Player subsequently objected to the new submissions of the League, whereas the Club did not object.

98. The Panel found that there is no doubt that the League in its submission dated 27 February 2017 went beyond the scope of the Panel's request dated 21 February 2017. More specifically, while the parties were invited to only comment on FIFA's request that the League's Answer be considered inadmissible, adding that *"[t]he parties are requested to exclusively address this specific issue raised by FIFA"*, and on the League's perceived procedural request to bifurcate the

proceedings, the Panel found that the League went beyond the Panel's request by arguing why the Panel could not endorse the Appealed Decision.

99. As referred to above, after the filing of the Appeal Brief and of the Answer, new submissions can only be filed in case of agreement among the parties or if authorized by the Panel on the basis of the existence of exceptional circumstances. In the present case, there was no agreement among the parties and the League did not establish the existence of any exceptional circumstances.

100. Consequently, the Panel found that the submissions of the League in its letter dated 27 February 2017 concerning the merits of the dispute are, in light of Article R56 of the CAS Code, inadmissible and would not be taken into consideration.

C. The admissibility of the "Skeleton Heads" submitted by the League shortly before the hearing

101. On 24 May 2017, the League filed a document referred to as "Skeleton Heads", adding that this document remained within the ambit of what had been previously presented.

102. At the start of the hearing, FIFA requested the Panel to declare this document inadmissible, just as the Panel had declared the League's letter dated 27 February 2017 to be inadmissible.

103. During the hearing, the Panel informed the parties that FIFA's objection was duly noted.

104. When counsel for the League indicated at the hearing that he orally adopted the "Skeleton Heads" word by word, neither of the other parties objected thereto.

105. As previously mentioned, Article R56 of the CAS Code determines as follows:

> *"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer"*.

106. The Panel finds that in the absence of consent of the other parties and of any exceptional circumstances, the "Skeleton Heads" cannot be admitted into evidence.

107. However, in view of the fact that the "Skeleton Heads" did not raise any new issues, but merely expanded on arguments that had already been advanced by the League before and that the other parties did not object to the remark of counsel for the League that he adopted the "Skeleton Heads" word by word, the Panel takes note thereof as if pleaded at the hearing.

108. Consequently, the "Skeleton Heads" are not admitted to the file, but are taken into account by the Panel as if literally read out by counsel for the League during the hearing.

D. FIFA's objection against the participation of the League as a party in the present proceedings

109. In its opening statements at the hearing, FIFA argued that the League did not have standing to be sued as the Club is not seeking anything from the League and that, as a consequence thereof, the submissions of the League should not be taken into consideration. In his pleadings, counsel for the Player subscribed to FIFA's argument in this respect.

110. The League argued that if it has no standing to be sued, also FIFA does not have standing to be sued. Just like FIFA is concerned by the question of jurisdiction, also the League is concerned. The mere fact that FIFA issued the Appealed Decision is not decisive, because the League is of the view that the FIFA DRC should have declined jurisdiction and that the South African NDRC was competent.

111. The Panel finds that this argument was submitted late on the basis of the already mentioned Article R56 of the CAS Code.

112. The Panel finds that no exceptional circumstances are present, nor has FIFA contended that there are. Nothing prevented FIFA from objecting to the participation of the League as a party in this arbitration already in its Answer.

113. Consequently, the Panel finds that FIFA's objection to the participation of the League in the present procedure was raised late and can therefore not be addressed.

E. The admissibility of FIFA's letter dated 19 July 2017 and enclosure

114. On 11 August 2017, the CAS Court Office informed the parties that the Panel had decided not to admit FIFA's letter dated 19 July 2017 (and its enclosure) to the file for these proceedings and that the reasons for such decision would be set out in the final award.

115. Although the submission of jurisprudence is not necessarily new evidence, the Panel finds that FIFA's letter and enclosure should nonetheless not be admitted because the CAS award referred to was issued at a time when the parties had already pleaded their case at the hearing and that the CAS award was not publicly available at the time and because the evidentiary phase of the proceedings had already been closed.

IX. MERITS

A. The Main Issues

116. The main issues to be resolved by the Panel are:

   i) Was the FIFA DRC competent to adjudicate and decide on the proceedings leading to the Appealed Decision?

ii) Did the Club have just cause to terminate the Player's Employment Contract prematurely?
iii) If the Club did not have just cause, is the Player entitled to any outstanding salary or compensation for breach of contract?

i) Was the FIFA DRC competent to adjudicate and decide on the proceedings leading to the Appealed Decision?

a. The positions of the parties

i. The Club's position

117. The Club submits that the FIFA DRC lacked competence to adjudicate and decide the present matter as the dispute is not of an international dimension. The nationality of the parties does not accord a dispute the status of a dispute of international dimension. This is a dispute between a professional footballer and a club that contracted in terms of the laws of South Africa, both submitted themselves to the Constitution and Rules of the League and SAFA. The Player was employed in South Africa, rendered his services in South Africa, is a permanent resident of South Africa and enjoys all rights, privileges and protection in terms of South African law except those specifically ascribed to citizenship. If the FIFA DRC's reasoning were to be maintained, it would mean that each time a club is involved in a dispute with an employee who is a foreigner in that country, the dispute would have to be referred to FIFA.

118. Furthermore, the Club maintains that it agreed with the Player to refer all disputes or differences as between them to the South African NDRC for determination. In addition, it agreed with the Player that they were obliged to refer any disputes or differences to the South African NDRC for adjudication in terms of the Constitution and Rules of the League.

119. Second, as to whether or not *"(…) an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level"* the Club submits that in the present matter, there is an independent arbitration tribunal guaranteeing fair proceedings and respecting equal representation at national level; the South African NDRC. The Club submits that the FIFA DRC erred in that despite the clear provisions of the Constitution of the League and the fact that the Player had undertaken (by registering with the League) to refer all disputes to the South African NDRC, the FIFA DRC found that the Player could not be compelled to refer his claim to the South African NDRC. The Club finally also refers to a collective bargaining agreement between the League and elected representatives of the South African Football Players' Union ("SAFPU"), which enjoins parties to refer disputes to the South African NDRC.

ii. The Player's position

120. With reference to an agreement between FIFA and FIFPro, the sole organisation representing professional footballers' unions around the world, the Player argues that one of the conditions

that needs to be fulfilled in order for an NDRC to be recognised is that it needs to respect the principle of equal representation of players and clubs. The Player also refers to CAS jurisprudence in this respect. The Player further submits that it was agreed that, with regard to the conclusion of player contracts, global minimum contract conditions shall apply. The reason behind this is to establish contractual stability around the world and in order to ensure that all players and clubs are treated equally in a fair manner. As a result, any clauses of abusive nature and not able to be applied reciprocally shall be regarded as invalid.

121. The Player submits that the South African NDRC does not comply with the FIFA RSTP. The South African NDRC cannot guarantee a fair hearing wherein the Player will not be prejudiced and/or a dispute resolution process representing equal representation. Neither the South African NDRC, SAFA's Appeals Board, nor the SAFA Arbitration Tribunal complies with the criteria set by FIFA.

122. The Player argues that the dispute is of an international dimension as the Player is a Namibian citizen. The nationality of the Player vs. the country where the Club is based is decisive.

123. The Player argues, with reference to CAS jurisprudence, that the FIFA DRC was correct in stating that the chairperson of the South African NDRC is effectively appointed by the clubs and thus not by consensus by the player and club representatives. Furthermore, the imposition of costs does not comply with Article 32 of the FIFA NDRC Standard Regulations.

iii. FIFA's position

124. FIFA submits that, in accordance with Article 22(b) in conjunction with Article 24(1) of the FIFA RSTP, the FIFA DRC is, as a general rule, competent to deal with employment-related disputes of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement. As such, in cases where, despite the parties' choice of forum in favour of a national decision-making body, one of the parties nevertheless refers a dispute to the FIFA DRC and the counterparty contests the competence of said FIFA deciding body, the FIFA DRC would examine if the relevant national body is an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs. If the relevant criteria are not met, the FIFA DRC will not recognise the jurisdiction of such body and consequently accept its competence to adjudicate in the matter as to the substance.

125. As to the Club's argument that the present dispute lacks an international dimension, FIFA submits that it is undisputed that the Player holds Namibian nationality and that the Club is located in South Africa. The fact that the Player is a South African permanent resident as well as the fact that the Employment Contract was concluded in South Africa is completely irrelevant, which is corroborated by the Commentary on the FIFA RSTP as well as by jurisprudence of FIFA and CAS. As a result, FIFA concludes that the present dispute is of an international dimension.

126. As to whether the South African NDRC is an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs, FIFA focuses on five points: i) the composition of the South African NDRC; ii) the impossibility to challenge an arbitrator; iii) the non-existence of a proper appeal proceedings; iv) subsidiarily to point iii), the composition of the National Appeals Board and the SAFA Arbitration Tribunal; and v) the procedural costs in relation to proceedings in front of the South African NDRC.

127. More specifically, in respect of the first point, FIFA argues that the Constitution of the League only states that the chairman of the South African is independent, but it does not contain any article regarding the procedure of appointment of the latter. It cannot be established that he is appointed by consensus between the players and clubs representatives as required by Circular letter no. 1010 and the NDRC Standard Regulations. From the information provided by the Club, FIFA concludes that the chairperson of the South African NDRC is not appointed by consensus as he is appointed by the Executive Committee of the League on behalf of all registered players and clubs, particularly since *"the Executive Committee (…) is constituted by the following persons: 7.1 the Chairperson of the League; 7.2 seven (7) additional persons elected by the clubs; 7.3 the Chief Executive Officer"*. FIFA refers to CAS jurisprudence in this respect.

128. As to the second point, FIFA submits that, with reference to Circular no. 1010, as the parties do not have the possibility to challenge an arbitrator in the proceedings before the South African NDRC, the latter deciding body clearly fails to meet another essential requirement in order to be considered as an independent and impartial tribunal.

129. As to the third point, FIFA maintains that a proper appeal procedure against decisions of the South African NDRC is non-existent. The Club failed to submit any relevant documentation regarding the constitution of the National Appeals Board and the SAFA Arbitration Tribunal. From the Statutes of the SAFA it appears that the competence of these bodies is limited to disciplinary matters. Any appeal filed against a decision of the South African NDRC would therefore be inadmissible.

130. As to the fourth point, FIFA argues that the Club failed to establish that the aforementioned appeal bodies comply with the principle of equal representation. Even if the Panel were to find that the South African NDRC complies with the relevant criteria, this would become completely irrelevant if it cannot be determined that the appeal bodies do not also constitute independent and impartial tribunals guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs. In this respect, the members of the Appeal Committee are appointed by the Executive Committee of the League. Furthermore, FIFA submits that the deadline of 72 hours to appeal cannot be deemed as a reasonable time-limit to lodge an appeal.

131. As to the fifth point, pursuant to Article 31 of the NDRC Standard Regulations, proceedings before NDRCs are free of charge. FIFA maintains that it can be noted from Article 41(1) and (8) of the 2012 edition of the League Rules, that procedural costs are charged, which is thus in contradiction with the NDRC Standards Regulations.

iv. The League's position

132. The League maintains that the Appealed Decision concerning the South African NDRC is not correct and that the South African NDRC has an enviable history of independent dispute resolution. The League submits that SAFPU was engaged in the process of establishing an independent and impartial dispute resolution system in South African football and confirmed its support for the South African NDRC by agreeing to an independent chairperson and proposing a list of panellists, which agreement has never been withdrawn. According to the League, two panellists were proposed, by SAFPU and the clubs. Furthermore, an independent chairperson all parties agreed to, was appointed.

133. The League refers to section 34 of the South African Constitution in arguing that if a party contends that a body such as the South African NDRC is not independent and impartial, South African Courts, and the CCMA, will deal with the matter. Where parties agree to refer a dispute to an alternative mechanism, they will be required to comply with their agreement as a first step unless there are compelling reasons for them to proceed elsewhere despite their agreement. Put differently, in addition to FIFA and CAS oversight, South African Courts and tribunals enjoy oversight and ensure independence and impartiality. The League submits that, in truth, it does not appear to be the parties' contention that there is any lack of independence or impartiality, but rather that such contention is made by SAFPU.

134. The League submits that three elements of the Appealed Decision require its reassessment.

135. First of all, the League submits that the issue of international dimension is not simply one of a passport. That may be the way certain arbitral decisions have interpreted it but it is not what the words mean, it is not what they can be interpreted to mean, and in this instance the assessment by the FIFA DRC failed to have regard to the facts and circumstances.

136. Second, the South African NDRC is independent in any true sense of that term. It not only guarantees fair proceedings in theory, but in practice. Panels that hear disputes respect the equal representation principle, not only as regards the panellists but also the chairman whose appointment was agreed with SAFPU at the outset.

137. Third, the South African NDRC is clearly established within the framework of the national association and in agreement with SAFPU at the outset. That agreement has not been withdrawn – and if SAFPU wants to do so there is a process available to it in a current collective bargaining agreement.

138. Furthermore, the League maintains that FIFA Circulars are important guidelines, but they do not answer the question whether a particular tribunal meets the requirements of article 22(b) FIFA RSTP. In particular where the tribunal has been established by agreement, where the affected parties expressly agree to its jurisdiction, and where the tribunal is in fact independent and impartial, the circular supports rather than detracts from an argument that the South African NDRC is not independent.

139. The League maintains that it is simply not true that the chairman of the South African NDRC is effectively appointed by the clubs. A particular person was agreed to, and if SAFPU are no longer happy with him there is no reason changes cannot be made.

140. Finally, the League argues that the payment of fees (in a very small amount in respect of the South African NDRC) was agreed at the outset. There was no prejudice in that for a professional player and it is remarkable that ZAR 1,000 was considered to have that effect. The intention was rather to limit completely frivolous claims.

b. The findings of the Panel

141. The Panel observes that article 22(b) FIFA RSTP determines as follows:

> *"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:*
>
> […]
>
> *b) employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable on the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs;"*

142. The Panel observes that it remained undisputed that the dispute between the Club and the Player is an employment-related dispute. It is however disputed whether the employment-related dispute is of an international dimension. The Panel will therefore first address this issue.

143. The Panel further observes that the FIFA Commentary on the Regulations for the Status and Transfer of Players (the "FIFA Commentary"), determines the following in respect of the international dimension of an employment-related dispute:

> *"FIFA is competent for:*
>
> […]
>
> *Employment-related disputes between a club and a player that have an international dimension, unless an independent arbitration tribunal has been established at national level. The international dimension is represented by the fact that the player concerned is a foreigner in the country concerned".*

144. The Panel finds that it clearly derives from this definition that the international dimension is related to the national status of the *parties* and not to the national status of the *dispute*, as

contended by the League. Also common sense leads to this conclusion, for if the national status of the *dispute* and not of the *parties* were to be decisive, employment-related disputes in football could hardly have an international dimension because employment contracts in football are usually concluded and enforced in the country of the club and are therefore governed by the rules and regulations of the national association concerned and do not have any international dimension.

145. Since it is clear that the Club has its registered office in South Africa, the decisive question in order to determine whether the dispute is of an international dimension is therefore whether the Player is a foreigner in South Africa.

146. The Panel feels comforted in this conclusion by the reasoning of another CAS panel in this respect:

> *"While the Appellant contended that the present dispute did not have an international dimension, but was rather a contractual dispute involving a contract concluded in South Africa, and subject to South African law, the Panel finds, consistent with the commentary referred to in the preceding paragraph, that the international dimension is represented by the fact that the First Respondent is a foreigner in the country concerned. To find otherwise would undermine the entire rationale of the FIFA PSC affording to itself jurisdiction, and affording protection to the parties, in employment contracts involving foreign nationals"* (CAS 2014/A/3682, para. 59 of the abstract published on the CAS website).

147. The Panel has no doubt that the Player, being a Namibian national without a South African passport is a foreigner in South Africa. The Panel finds that a clear distinction must be made between having a residence permit (which the Player has) and being a citizen of the country concerned (which the Player is not). The undisputed fact that the Player had a permanent residence permit, but no South African passport was further confirmed by Mr O'Connor during the hearing.

148. As to the League's argument that the domicile of the Player is decisive, the Panel finds that there is no basis in the FIFA RSTP or the FIFA Commentary to draw this conclusion. Also in this respect, common sense plays a role, for if the domicile of a player would be decisive, all employment-related disputes in football would lack an international dimension for a player who is registered with a certain club is almost always domiciled in the country of the club. The fact that the Player had a permanent residence permit, while other foreign players may not have had such permit does not have any bearing on the Player's status as a foreigner in South Africa.

149. The League argued during the cross-examination of Mr O'Connor that Namibians are treated as nationals in South Africa, even though they are not citizens. It remained undisputed that Namibian citizens can apparently be registered as if they were nationals by South African clubs as opposed to foreign players from other countries (Namibian players do not fall under the quota of foreign players in the South African League), even though the Player concerned does not hold a South African passport.

150. However, besides lacking a South African passport, the Panel also establishes that the Club recruited the Player when he was still playing in Namibia and that the Player represented the Namibian national team on several occasions. The Player was internationally transferred from Namibia to South Africa and the Player does not appear to have lived in South Africa before. This corroborates the proposition that the Player was indeed a foreigner in South Africa, despite his residence permit.

151. The mere fact that the Player agreed that he would be registered as a South African in the Employment Contract does not make this any different.

152. Consequently, the Panel finds that the employment-related dispute between the Club and the Player is of an international dimension.

153. Having established the international nature of the dispute, the Panel finds that article 22(b) FIFA RSTP is applicable and that the FIFA DRC was, in principle, competent to adjudicate and decide the dispute.

154. In this respect, the Panel observes that the FIFA Commentary determines that in case there is an employment-related dispute of an international dimension, "[t]he jurisdiction of FIFA is automatically established".

155. There is however an exception to the general rule that the FIFA DRC is competent in employment-related disputes of an international dimension. Namely, if the parties concerned agreed to refer their disputes to a national arbitration committee established by a national federation, compliant with the requirements of FIFA in respect of fair proceedings and the principle of equal representation of players and clubs, as set out in article 22(b) FIFA RSTP.

156. In the matter at hand, it remained undisputed that the Player's Employment Contract contains a clear dispute resolution clause in favour of the South African NDRC. The only question to be answered is therefore whether the South African NDRC complies with the requirements set by FIFA.

157. The minimum requirements of FIFA are set out in the undisputed FIFA Circular letter no. 1010 (dated 20 December 2005):

> *"This minimum procedural standard comprises the following conditions and principles:*
>
> - ***Principle of parity when constituting the arbitral tribunal***
> *The parties must have equal influence over the appointment of arbitrators. This means for example that every party shall have the right to appoint an arbitrator and the two appointed arbitrators appoint the chairman of the arbitration tribunal. The parties concerned may also agree to appoint jointly one single arbitrator. Where arbitrators are to be selected from a predetermined list, every interest group that is represented must be able to exercise equal influence over the compilation of the arbitrator list.*

- ***Right to an independent and impartial tribunal***
  To observe this right, arbitrators (or the arbitration tribunal) must be rejected if there is any legitimate doubt about their independence. The option to reject an arbitrator also requires that the ensuing rejection and replacement procedure be regulated by agreement, rules of arbitration or state rules of procedure.

- ***Principle of a fair hearing***
  Each party must be granted the right to speak on all facts essential to the ruling, represent its legal points of view, file relevant motions to take evidence and participate in the proceedings. Every party has the right to be represented by a lawyer or other expert.

- ***Right to contentious proceedings***
  Each party must be entitled to examine and comment on the allegations filed by the other party and attempt to rebut and disprove them with its own allegations and evidence.

- ***Principle of equal treatment***
  The arbitration tribunal must ensure that the parties are treated equally. Equal treatment requires that identical issues are always dealt with in the same way vis-à-vis the parties".

158. Furthermore, by means of FIFA circular letter no. 1129, dated 28 December 2007, FIFA's National Dispute Resolution Chamber (NDRC) Standard Regulations (the "FIFA NDRC Standard Regulations") were implemented, which is of relevance in determining whether the South African NDRC was in compliance with FIFA's requirements.

159. Commencing with the first objection against the compliance of the South African NDRC, the Panel observes that the Player and FIFA are of the view that it cannot be established that the chairman of the South African NDRC is appointed by consensus between the players and clubs in accordance with FIFA Circular letter no. 1010 and the FIFA NDRC Standard Regulations.

160. The Panel notes that it remained undisputed at the hearing that the chairman of the South African NDRC was indeed appointed by the Executive Committee of the League and that the Executive Committee is comprised of the chairperson of the League, seven additional persons elected by the clubs and the Chief Executive Officer of the League.

161. The Panel observes that article 3(1) of the FIFA NDRC Standard Regulations determines the following:

> *"The NDRC shall be composed of the following members, who shall serve a four-year renewable mandate:*
>
> *a) A chairman and a deputy chairman chosen by consensus by the player and club representatives from a list of at least five persons drawn up by the association's executive committee;"*

162. The Panel observes that the South African NDRC is non-compliant with this provision, as the chairman was not chosen by consensus by the player and club representatives. From the testimony of Mr Gaoshubelwe it appeared that SAFPU had been invited to submit a list of names of persons that could sit in the South African NDRC. Although some of these persons did indeed deal with a number of cases, SAFPU did not have any influence on the appointment of the chairman.

163. It should be added that SAFPU did not object to the chairman elected by the Executive Committee of the League at the relevant time. This notwithstanding, the fact remains that the player representatives had less influence on the appointment of the chairman than the club representatives and that this is not in accordance with FIFA's requirements. Mr Sokhela confirmed during his testimony that the chairman of the South African NDRC was indeed effectively appointed by the Executive Board of the League.

164. The arguments submitted by the Club and the League that the South African NDRC has always acted in a neutral way, decided in favour of players several times and that the chairperson is a highly qualified person are considered to be of limited value, since the fact remains that the chairman was not appointed in line with FIFA's requirements.

165. The Panel considers that the procedure for appointing the chairman of an NDRC is important, as the chairman usually, as is indeed the case in respect of the South African NDRC, has a casting vote where the other members of the tribunal do not reach a majority. The Panel therefore finds that the club representatives had an undue advantage in comparison with the player representatives in appointing the chairman of the South African NDRC.

166. Having established the above, the Panel finds that the South African NDRC cannot be qualified as a national arbitration tribunal that respects the principle of equal representation of players and clubs, as is required by article 22(b) FIFA RSTP. The Panel does not suggest that the proceedings before the South African NDRC are not fair or lack the desired quality (indeed, the Player argued that the quality of the chairman was not disputed), but rather that the appointment of the chairman of the South African NDRC was not in line with the minimum prescripts of FIFA. No evidence to the contrary was presented to the Panel. It remained undisputed between the parties that the burden of proof was on the Club to establish that the South African NDRC complied with FIFA's requirements. Although Mr Sokhela, during his testimony before the Panel, referred to minutes from which the influence of the players representatives in appointing the chairman should derive, such minutes were not presented as evidence.

167. In view of the conclusion that already for this reason the South African NDRC does not comply with FIFA's minimum standards, the Panel does not deem it necessary to address the other alleged flaws of the South African NDRC asserted by the Player and FIFA.

168. Since the preconditions for complying with the exception to the general rule that the FIFA DRC is competent in respect of employment-related disputes of an international dimension are not complied with, the Panel finds that the FIFA DRC rightly accepted jurisdiction.

169. The Panel feels comforted by the reasoning of another CAS panel in respect of the conclusion that if the relevant NDRC does not comply with FIFA's requirements, the FIFA DRC is competent:

> *"Consequently, in view of all the above, the Panel finds that the FIFA DRC was competent to deal with the matter at hand since the Club failed to establish that in this case an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement pursuant to article 22(b) of the FIFA Regulations, which would require the FIFA DRC to deny jurisdiction".* (CAS 2014/A/3656, para. 202)

170. The Panel finds that the consequence of the finding above is not that the matter should be referred back to the South African NDRC in order to resolve the non-compliance with FIFA's minimum requirements, as argued by the League, but that the FIFA DRC becomes competent.

171. Consequently, the Panel finds that the FIFA DRC was indeed competent to adjudicate and decide on the proceedings leading to the Appealed Decision.

ii) Did the Club have just cause to terminate the Player's Employment Contract prematurely?

172. Having determined that the FIFA DRC was competent to decide the present dispute, the Panel is required to look at the Club's subsidiary argument that the Club validly terminated the Player's Employment Contract prematurely.

173. The Panel observes that it remained undisputed that the Club proceeded with the termination of the Player's Employment Contract because of the Player's alleged poor performance.

174. The Panel considers that the FIFA Commentary provides guidance as to when an employment contract is terminated with just cause:

> *"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally".*

175. In this regard, the Panel notes that in CAS 2006/A/1180, a CAS panel stated the following:

> *"The RSTP 2001 do not define when there is "just cause" to terminate a contract. In its established legal practice, CAS has therefore referred to Swiss law in order to determine the purport of the term "just cause". Pursuant to this, an employment contract which has been concluded for a fixed term, can only be terminated prior to expiry of the term of the contract if there are "valid reasons" or if the parties reach mutual agreement on the end of the contract (see also ATF 110 I 167; WYLER R., Droit du travail,*

Berne 2002, p. 323 and STAEHELIN/VISCHER, Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht, Teilband V 2c, Der Arbeitsvertrag, Art. 319-362 OR, Zurich 1996, marg. no. 17 ad Art. 334, p. 479). In this regard Art. 337 para. 2 of the Code of Obligations (CO) states – according to the translation into English by the Swiss-American Chamber of Commerce: "A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship". According to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446; ATF 2 February 2001, 4C.240/2000 no. 3 b aa). Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545). In other words, it may be deemed to be a case for applying the clausula rebus sic stantibus (ATF 5 May 2003, 4C.67/2003 no. 2). According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 5 May 2003, 4C.67/2003 no. 2; WYLER R., op. cit., p. 364 and TERCIER P., Les contrats spéciaux, Zurich et al. 2003, no. 3402, p. 496). Pursuant to the established case law of the Swiss Federal Supreme Court, early termination for valid reasons must, however, be restrictively admitted (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 127 III 351; WYLER R., op. cit., p. 364 and TERCIER P., op. cit., no. 3394, p. 495)" (CAS 2006/A/1180, para. 25 of the abstract published on the CAS website).

176. The Commentary to the FIFA Regulations specifically refers to the following example of a breach with just cause:

"Example 2: player A, employed by club X, has displayed an uncooperative attitude ever since his arrival at the club. He does not follow the directives given by the coach, he regularly argues with his team-mates and often fights with them. One day, after the coach informs him that he has not been called up for the next championship fixture, the player leaves the club and does not appear for training on the following days. After two weeks of unjustified absence from training, the club decides to terminate the player's contract. The player's uncooperative attitude towards the club and his team-mates would certainly justify sanctions being imposed on the player in accordance with the club's internal regulations. The sanctions should, however, (at least in the beginning) be a reprimand or a fine. The club would only be justified in terminating the contract with the player with just cause if the player's attitude continued, together with the player disappearing without a valid reason and without the express permission of the club".

177. The Panel finds that, as appears from the example set out above, the threshold for a club to terminate a player's employment contract due to his conduct is quite high, as a valid justification for an early termination is to be admitted restrictively.

178. Before evaluating the validity of clause 12.4.1 of the Employment Contract, the Panel finds that a distinction must in principle be made between a player's willingness to improve and a

player's capability of improving. In this respect, the Panel notes that the witnesses (Mr O'Connor and Mr Sokhela) in their witness statements and at the hearing consistently argued that the Player was *"either not willing to, or was not capable of, improving his performance to meet the standard required of him as a professional footballer"* without clearly distinguishing between the two.

179. Indeed, the Panel finds that it is intrinsic to sport in general, and football in particular, that competition is fierce and that athletes frequently overachieve or underachieve. This is literally and figuratively "part of the game". If clubs were permitted to terminate employment contracts of alleged underachieving players, the concept of *pacta sunt servanda*, one of the principal pillars in the FIFA RSTP, would be seriously undermined. If a player consistently does not show a preparedness to improve his performance and to comply with the club's directions, deliberately playing below his level, in other words if wilful misconduct is proven, this may well lead to a justified termination, but if a player is perceived to underachieve while showing no lack of dedication, a termination for the sole reason of poor performance cannot be considered to constitute a just cause to terminate the contract in the absence of strict contractual language, particularly so because the term of employment contracts in football are restricted to a maximum term of 5 years.

180. Putting aside these general remarks, the Panel finds that the fact that the Player consented to the adoption of clause 12.4.1 in the Employment Contract, pursuant to which the Club was granted the right to terminate the Employment Contract for *"continued poor performance"* should however also be taken into account. Indeed, the Panel finds that clause 12.4.1 of the Employment Contract is a contractual deviation from the standards set out in the FIFA RSTP.

181. The validity of such contractual deviation and the limits to the validity has been addressed in CAS jurisprudence:

> *"Furthermore, the Sole Arbitrator considers this provision to be a deviation from the general principles enshrined in the FIFA Regulations. The Sole Arbitrator finds that, in principle, nothing prevents parties from defining when and under which circumstances a party may terminate the Employment Contract with just cause. For if the parties are free to arrange in the employment contract the method of compensation for breach of contract, then, in principle, the same must apply to specifying when there is "just cause" (CAS 2006/A/1180). Such deviation may in principle not be potestative, i.e. the conditions for termination may not be unilaterally influenced by the party wishing to terminate the contract (an example of a potestative clause would be the situation where a contract provides that it can be unilaterally terminated by the club if the player does not play in a certain percentage of matches, for the decision to field the player may be influenced by the club). As maintained by a legal scholar, "[i]n relation to the substance of the unilateral option clause, parity of termination rights is no longer to be taken as a benchmark for public policy, since (as shown) a disparity of termination rights has to be accepted as such; instead the question to be answered here is how great the disparity may be. The limit of contractual freedom in this respect is formed by the prohibition of excessive self-commitment, as laid down in Swiss law, for example, at Art.27(2) of the Swiss Civil Code", adding in a footnote that "[n]o person can alienate his personal liberty nor impose any restrictions on his own enjoyment thereof which are contrary to law and morality" (PORTMANN, Unilateral option clauses in Footballer's contracts of employment: An assessment from the perspective of International Sports Arbitration, ISLR*

2007, p. 6-16)" (CAS 2015/A/4042, para. 68 of the abstract published on the CAS website).

182. The Panel is of the view that the concept of "poor performance" is principally a subjective concept and that a clause entitling a club to terminate a contract for "continued poor performance" is therefore in principle potestative and would constitute an unacceptable disparity between the termination rights of the player and the club.

183. However, in the matter at hand, the Club maintains that, through its sophisticated evaluation process of the Player as part of the entire team, the perception that the Player continuously performed poorly is not only subjective, but indeed objective.

184. The Panel finds that if the Club were somehow able to establish in an objective fashion that the Player continuously performed poorly, this may indeed potentially lead to a lawful application of clause 12.4.1 of the Employment Contract. Thus, although the Panel accepts that the concept of "poor performance" is generally a subjective concept which would be invalid, it is not maintained that an employment contract can never be terminated for "poor performance", particularly not if the parties agreed on this ground for termination in the employment contract and the continuous poor performance has somehow been objectively established in an objective fashion, *i.e.* without influence of the Club. The circumstances under which such a termination can be upheld are however extremely limited, if not only theoretical.

185. Notwithstanding the above, in the following paragraphs the Panel will examine whether the Club has been able to meet this very high threshold and/or whether the Club was able to prove that the Player misbehaved to such an extent that an unilateral termination of the Employment Contract was warranted.

186. The Panel notes that the technical staff of the Club continuously evaluated the performance of its players, which is problematic because such evaluation can hardly be considered objective as it is conducted by employees of the Club.

187. On 17 January 2014, the Player was called to a hearing in respect of *"Section 15 of your Contract relating to poor performance"* for the first time and was instructed to work on the following elements:

1. Technically

both your crossing of the ball and passing of the ball need to show a big improvement. You need to spend extra time practicing the skill.

2. Mentally

your communication skills on the field are poor, and need to be improved.

> 3. *Physically*
>
> *There is a big problem with your physical endurance and flexibility. Speak to Burger to give you a Gym program for Prime.*

188. The Panel believes that it does not appear that these features can be improved easily. While enhancing communication skills, physical endurance and flexibility and technical skills such as crossing and passing of the ball appear to possible in principle, significant time is required before results may be achieved.

189. Moreover, the Panel finds it difficult to determine whether the Player indeed underperformed because it is not clear what standard was expected from the Player. Although Mr Sokhela argued during the hearing that from a 16-year old we do not expect the same as from an international player, the Panel notes that, even though the Club argues in its Appeal Brief that *"[o]ne measures the conduct or performance of the employee against an established standard or a set target"*, no document or evidence suggests that the Player was made aware of what standard was expected of him. Without such clearly determined yardstick it is difficult to determine whether the Player indeed performed so poorly that a termination of the employment contract should be permitted, particularly if such subjective assessment is made by employees of the Club.

190. The Panel finds that in any event it cannot be demanded from the Player that these elements be improved in a timeframe of a few months. However, the Panel finds that, to a certain extent, the Player was required to follow the Club's instructions in order to try to improve these skills by spending extra time practicing the skills and by participating in a gym program.

191. From the subsequent evaluations on 7 April and 15 May 2014, it does not appear that the Player failed to comply with the Club's instructions, but rather that the Club was of the view that the extra efforts undertaken did not lead to the results desired. Without evidence to the contrary, it must be assumed that the Player made all the relevant efforts to improve his performance. The Player can however not be blamed for this as the alleged lack of improvement may also be caused by an inadequate type or insufficient quality of the training offered by the Club. The Panel also noted that the Player did improve in certain areas according to the Club's records.

192. Insofar as the Player was required to speak to "Burger" in order to be given a gym program, it appears that the Player indeed did so. The Panel finds that it cannot be held against the Player that the Club apparently wanted him to obtain an individual training program, while he was given a collective program, because it would have been for the Club to ensure that the Player was given the correct program.

193. The Panel furthermore finds that the Club cannot blame the Player for only participating in a few matches, as it is the prerogative of the Club's coach whether to field a player or not. Furthermore, it appears that in the beginning of the contractual engagement there were some delays with Home Affairs (the South African Department responsible for dealing with permanent residence issues) that apparently resulted in the Player missing a large number of

matches. The Panel finds that also this is the responsibility of the Club, or at least cannot be held against the Player.

194. Finally, the Panel also finds that the time between the different evaluations was not sufficient to give the Player a reasonable chance to improve his performance. Indeed, there were only four months between the first hearing and the Club's termination of the Employment Contract, and the Player was only employed by the Club for approximately ten months when the Club decided to terminate the Employment Contract.

195. The Panel therefore concludes that the Club failed to establish that the Player misbehaved by failing to comply with the Club's instructions to such an extent that a termination of the Employment Contract was warranted. The Club also failed to establish by means of objective evidence and against a clearly determined yardstick that the Player continuously performed poorly to such an extent that a termination of the Employment Contract was warranted.

196. Consequently, the Panel finds that the Club did not have just cause to terminate the Player's Employment Contract prematurely.

iii) If the Club did not have just cause, is the Player entitled to any outstanding salary or compensation for breach of contract?

197. The Panel observes that the FIFA DRC did not award any outstanding salary to the Player and ordered the Club to pay the Player an amount of ZAR 1,086,000 as compensation for breach of contract, as well as USD 160 for a flight ticket for the Player's return to his home country.

198. The Player did not challenge the Appealed Decision and the Club only focussed its submission on the jurisdiction of the FIFA DRC and whether it had just cause to terminate the Player's Employment Contract, but did not specifically challenge the compensation awarded or the proportionality thereof.

199. Consequently, the Panel is not required to examine these issues any further and confirms the Appealed Decision in ordering the Club to pay an amount of ZAR 1,086,000 to the Player as compensation for terminating the Player's Employment Contract without just cause as well as USD 160 for a flight ticket for the Player's return to his home country.

B. Conclusion

200. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

i) The FIFA DRC was competent to adjudicate and decide on the proceedings leading to the Appealed Decision.

ii) The Club did not have just cause to terminate the Player's Employment Contract prematurely.

iii) The Appealed Decision is confirmed in ordering the Club to pay an amount of ZAR 1,086,000 to the Player as compensation for terminating the Player's Employment Contract without just cause as well as USD 160 for a flight ticket for the Player's return to his home country.

201. 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 1 November 2016 by Amazulu FC against the decision issued on 17 June 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is dismissed.

2. The decision issued on 17 June 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed.

3. (…).

4. (…).

5. (…).

6. (…).

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