Arbitration CAS 2014/A/3682 Lamontville Golden Arrows Football FC v. Kurt Kowarz & Fédération Internationale de Football Association (FIFA), award of 14 July 2015

Panel: Mr Stuart McInnes (United Kingdom), President; Judge Rauf Soulio (Australia); Mr Goetz Eilers (Germany)

Football
Employment contract between a club and a coach
Jurisdiction of the FIFA Player's Status Committee
Requirement for a clear reference to the jurisdiction of an independent arbitration tribunal
Just cause

1. **Even in cases where the parties have made clear reference in the employment contract specifying that a national tribunal has jurisdiction to hear disputes between the parties, one of the parties may nevertheless refer the dispute to the FIFA Player's Status Committee (PSC), which would then examine whether or not the relevant national tribunal was an independent arbitration tribunal guaranteeing fair proceedings. Dependent upon the finding of the FIFA PSC on that preliminary issue, the PSC would then either decline jurisdiction and refer the parties to the national tribunal they had contractually nominated; or refuse to recognise the jurisdiction of the national body and rule that the PSC had jurisdiction to adjudicate on the substantive issue in dispute.**

2. **The requirement for a clear reference in the employment contract to the jurisdiction of an independent arbitration tribunal applies equally to Art. 22 b) of the FIFA Regulations on the Status and Transfer of Players (RSTP) in respect of players; and to Art. 22 c) RSTP in respect of coaches.**

3. **It is not tenable for a club to assert after only four months of employment that a coach has failed to fulfil the goals and objectives anticipated in the employment contract and that therefore the termination of the employment contract is with just cause.**

I. PARTIES

1. The Appellant is a South African professional football club, affiliated with the South African Football Association ('SAFA'), which in turn, is affiliated with FIFA.

2. Mr Kurt Kowarz (also referred to as the 'First Respondent') is a German Goalkeeping Coach licenced by the Deutscher Fußball-Bund ('DFB'), the governing body of football in Germany.

3. Fédération Internationale de Football Association ('FIFA') is the global governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players around the world. FIFA is an association established under Swiss law with headquarters in Zurich, Switzerland.

II. FACTUAL BACKGROUND

A. Background Facts

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

5. On 1 July 2011, the Appellant and First Respondent entered into a Fixed Term letter of Appointment (hereinafter 'the Employment Contract') valid from the date of signature until 30 June 2012, under which the First Respondent was employed as a goalkeeper coach.

6. The material terms of the Employment Contract are as follows:

> *1. Appointment*
>
> *1.4 The position of Goalkeeper-Coach is one which requires flexibility and the Goalkeeper-Coach appreciates that the nature and ambit of the position will be amplified in discussion with management and the Head Coach from time to time.*
>
> *1.5 Arrows is entitled to make changes to the Goalkeeper-Coach's responsibilities from time to time and as the requirements of the game of football and Arrows change subject to the amendments being limited to those reasonably related to the position.*
>
> *1.7 The Goalkeeper-Coach will carry out his duties in the utmost good faith and with a view to ensuring the success of Arrows and the achievement of the goals and requirement recorded hereunder. The Goalkeeper – Coach warrants that each of the goals and requirements, undertakings, options and restraints recorded herein are reasonable and necessary in consequence of the special nature of the sport of football and arrows as a club.*
>
> *3. Termination and Notice*
>
> *3.1 This contract is terminable on thirty days written notice-*
>
> *3.1.1 By either party in the event of breach of any of the terms of this contract; or*

3.1.2 By Arrows in the event that the Goalkeeper-Coach is unable to achieve the goals and objectives set out in clause 7 hereunder dealing with work performance

3.2 The parties have agreed that the special nature of professional football and the need for excellent relationships to avoid the very real risk of disaster to the entire club, team, and all its stakeholders is such that if the employment relationships breaks down for any reason but particularly if the Goalkeeper-Coach fails to secure and ensure that the goals and objectives can and will be met termination will be appropriate.

3.3 Should Arrows elect to terminate this employment contract on the basis recorded in 3.1.2 the club will make a payment to the Goalkeeper-Coach forthwith and immediately equivalent to one month's salary which the Goalkeeper-Coach will accept in full and final settlement of any and all claims of whatsoever nature he might otherwise have had against Arrows consequent upon termination of his employment.

5. Remuneration

5.1 The Goalkeeper-Coach will be paid a monthly salary of R70,000.00 per month for the contract period 01 July 2011 to 30 June 2012 equivalent to payable monthly in arrear or before the last day of each month.

6. Benefits

6.1.1 Accommodation - Arrows will provide fully furnished accommodation for the Assistant Coach to his reasonable satisfaction;

6.1.2 Air tickets – Arrows will provide four (4) economy class return tickets to Germany per season

6.1.3 The employer will make a contribution of R50,000 towards his travel to Germany to fulfil his responsibilities to German Football Association

7. Discipline and work Performance

7.1 The Goalkeeper-Coach shall be required to carry out his responsibilities with the utmost skill and enthusiasm particularly in view of his level of experience and the competitive nature of professional football and will ensure that Arrows remains competitive at times.

7.2 The Parties have agreed that a reasonable performance by Arrows expected of the Goalkeeper-Coach and reasonably achievable by him is a top six finish and a semi-final spot in at least one of the cup competitions available in each season of his employment. The failure to ensure a top six position will constitute poor performance and a breach of this employment contract as contemplated in 3.1 above.

7.3 The Goalkeeper-Coach agrees to be bound by such rules and regulations as Arrows might impose from time to time. The Goalkeeper-Coach agrees that Arrows has the right to impose supervision of his duties, if deemed necessary by Arrows.

10. General

10.2 The parties warrant each to the other that they view the terms and conditions set out herein as being reasonable and necessary in consequence of the specificity of the sport of football and that they will meet their obligations each to the other in the utmost good faith.

10.3 This employment contract and the documents referred to herein and incorporated by reference constitute the entire agreement between the parties and no alteration; amendment or consensual cancellation (including in relation to this clause) shall have any force or effect whatsoever save and unless it is reduced to writing and signed by or on behalf of the parties hereto.

7. By letter dated 1 November 2011, the Appellant, following the recommendation of an enquiry undertaken on behalf of the Appellant, held on or about 26 October 2011, terminated the Employment Contract *"summarily and with immediate effect"*. The letter informed the First Respondent that if he was *"unhappy with the termination … you are entitled to refer a dispute. In terms of the National Soccer League rules such a dispute would be referred to the Dispute Resolution Chamber of the League and the rules require any dispute of such a nature to be referred within 30 days"*.

8. On 23 January 2012, the First Respondent lodged a claim with FIFA against the Appellant for breach of contract claiming that the Appellant had terminated the Employment Contract without just cause. The First Respondent requested payment of the following sums as compensation for the breach:

- ZAR 70,000 representing his salary for October 2011;
- EUR 1,624.53 representing the cost of two return flights to Germany from South Africa;
- ZAR 560,000 representing his salary between 1 November 2011 and 30 June 2012;
- ZAR 23,224 representing the Accommodation allowance for the months of November 2011 and part December 2012;
- EUR 48,978.74 representing taxes payable in Germany on the sums claimed above.

9. The Appellant denied the claim and specifically challenged the competence of FIFA to deal with the matter, arguing *inter alia* that the Dispute Resolution Chamber of the National Soccer league of South Africa, ('NSL DRC'), as an independent tribunal contemplated in article 22(c) of the FIFA Regulations on the Status and Transfer of Players ('RSTP'), was the competent and proper forum to hear the dispute.

10. On 25 February 2014, the Single Judge of the FIFA Players' Status Committee issued the decision, the subject of this appeal (the 'Appealed Decision') declaring himself competent to hear the dispute and awarding the following sums to the First Respondent as damages for breach of contract without just cause by the Appellant:

- ZAR 70,000 plus interest at the rate of 5% from the 23 January 2012 until the date of effective payment;

- ZAR 493,224 plus interest at the rate of 5% from 23 January 2012 until the date of effective payment;

- CHF 10,000 representing the final costs of the proceedings;

- CHF 3,000 as a contribution towards legal costs.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ('CAS')

11. Following receipt of the reasoned decision on 2 July 2014, the Appellant filed a Statement of Appeal before the CAS pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration ('the Code') on 23 July 2014 and nominated His Honour Judge Rauf Soulio, as Arbitrator.

12. On 4 August 2014, the Appellant filed its Appeal Brief, in accordance with Article R51 of the Code.

13. On the same date, the First Respondent indicated his preference that the matter be determined by a Sole Arbitrator, but in the event that the Appellant did not agree to such course, nominated Mr Goetz Eilers, as Arbitrator. The CAS Court office confirmed by letter of even date, that the arbitration should be submitted to a Panel of three arbitrators.

14. On 14 August 2014, the Second Respondent requested that in accordance with Article R55 para. 3 of the Code, the time limit for filing its Answer be extended until after payment of the relevant advance of costs by the Appellant. The Second Respondent also requested that FIFA and the Single Judge of the FIFA Players' Status Committee, Mr Geoff Thompson, designated as Third Respondent to the proceedings, should properly be considered as one and the same party and that Mr Thompson should be excluded as a designated Respondent from the procedure.

15. On 18 August 2014, the Appellant agreed, without prejudice to its rights, to remove Mr Thompson as a designated Respondent from the proceedings and that its challenge and argument against Mr Thompson should be read as a challenge and argument against FIFA, the Second Respondent.

16. On 22 August 2014, a request was made by the First Respondent that in accordance with Article R55 para. 3 of the Code, the time limit for filing his answer be extended until after payment of the relevant advance of costs by the Appellant.

17. On 23 September 2014, the CAS Court Office confirmed the decision of the President of the CAS Appeal Arbitration, that the arbitration be submitted to a Panel of three arbitrators.

18. On 27 October 2014, the Parties were informed that the following persons had been appointed as Arbitrators: Mr Stuart McInnes, Solicitor, in London United Kingdom, as President of the Panel, sitting with His Honour Judge Rauf Soulio, of Adelaide, Australia and Mr Goetz Eilers, Rechtsanwalt, in Darmstadt, Germany, as members of the Panel.

19. On the same date, the CAS Court Office informed the Second Respondent to file its Answer within 20 days of the date of the letter. The CAS Court office omitted to notify the First Respondent of the time limit within which to file its Answer, however by letter dated 1 December 2014, the CAS Court Office acknowledged its omission and notified the First Respondent that he should file his Answer within 20 days of the date of the letter.

20. On 17 November 2014, the Second Respondent filed its Answer at the CAS Court Office

21. By letter dated 2 December 2014, the Appellant objected to the further extension afforded to the First Respondent and requested that the First Respondent make application to file the Answer out of time.

22. On the same date the First Respondent filed his Answer with the CAS Court Office.

23. By letter dated 5 December, the CAS Court office notified the parties that the Appellants objection should be addressed and decided upon by the Panel at the hearing or in the final award if the Panel decided to render an award based solely on the written submissions of the party

24. On 11 December 2014, the Appellant requested that a hearing be scheduled in the arbitration. On 12 December 2014, the First Respondent indicated that he left it to the discretion of the Panel whether to hold a hearing or not. On 15 December 2014, the Second Respondent indicated that in view of the detailed written submissions, it did not consider a hearing necessary.

25. On 31 December 2014, the Parties were informed that the Panel had decided to hold a hearing in the present procedure.

26. The Parties agreed that hearing would be held on 17 March 2015.

27. On 10, 12 and 13 March 2015, the First Respondent, the Second Respondent and Appellant respectively signed the Order of Procedure.

28 The following persons attended the hearing on 17 March 2015:

For the Appellant:	Mr Norman Arendse, senior counsel Mr Michael Murphy, counsel Mr Razano Farai, counsel Mrs DT-Mato Madala, chairman, Lamontville Golden Arrows FC Mr Nandé Becker, Premier Soccer League, South Africa
For the First Respondent:	Mr Dr Joachim Rain, counsel

For the Second Respondent: Mr Roy Vermeer, counsel

29. The Parties explicitly confirmed at the end of the hearing that they had no objection to the constitution of the Panel and that their right to be heard and to be treated equally in the arbitration had been fully observed.

IV. SUBMISSIONS OF THE PARTIES

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

A. Lamontville Golden Arrows FC

31. The Appellant's submissions, in essence, may be summarized as follows:

i. The Appellant and First Respondent entered into the Employment Contract in July 2011, under which the First Respondent was appointed by the Appellant as its goalkeeper coach. The Employment Contract contained the following express, tacit, implied and material terms:

a. that the Appellant was entitled to make changes to the First Respondent's responsibilities from time to time as was reasonably related to his position as goalkeeper coach.

b. that the First Respondent warranted that each of the goals and requirements and undertakings, options and restraints in the Employment Contract were reasonable and necessary in football.

c. that the Employment Contract was terminable by either party in the event of breach, specifically, if the employment relationship broke down for any reason and particularly, if the First Respondent failed to secure and ensure the goals and objectives stipulated in the Employment Contract.

d. that the First Respondent was to meet performance targets and that failure to achieve those targets would constitute breach of the Employment Contract entitling the Appellant to terminate the Employment Contract.

e. that the Appellant's Employee handbook was incorporated into the Employment Contract and that the First Respondent would comply with the National Soccer League ('NSL') Constitution, and Rules of the National South African Football

Association ('SAFA') Constitution and Regulations and the Confederation of African Football ('CAF') Statutes and Regulations and the FIFA Statutes and Regulations.

ii. On 26 October 2011, the Appellant convened a disciplinary enquiry chaired by an independent chairman which found the First Respondent guilty of failing to obey the lawful instructions of the Appellant and recommended the dismissal of the First Respondent, which recommendation was accepted by the Appellant. The Appellant subsequently lawfully dismissed the First Respondent and was accordingly required to pay no compensation to the First Respondent pursuant to the terms of the Employment Contract.

iii. That if the First Respondent was unhappy with the findings of the independent enquiry or his subsequent dismissal, he was able to lodge an appeal with the Dispute Resolution Chamber ('DRC') of SAFA, under Article 70 of the SAFA Statutes, which is an independent Arbitral Court specifically established to hear disputes pertinent to football in South Africa.

iv. That the dispute did not involve issues of an international dimension, as the Employment Contract was concluded in South Africa and, thus, governed by South African Law.

v. That the Appellant's Employee Handbook was incorporated into the Employment Contract and required the parties to refer any disputes to the NSL DRC and that accordingly the FIFA Players' Status Committee ('FIFA PSC') had no jurisdiction to hear the First Respondent's Claim or which should not have heard the claim before the claim had been referred to the NSL DRC.

vi. That by virtue of his registration with the NSL, as goalkeeper coach with the Appellant, the First Respondent had undertaken as a condition of participation of football in South Africa to refer any disputes to the NSL DRC.

vii. That the Single Judge of the FIFA PSC had erred in finding that the FIFA Players' Status Committee retained jurisdiction to deal with the First Respondent's claim, under Article 22(c) RSTP, when an independent arbitration tribunal guaranteeing fair proceedings exists at national level in South Africa.

viii. That the Single Judge of the FIFA PSC erred in finding that the lack of an express jurisdiction clause in the Employment Contract confirming the jurisdiction of the NSL DRC entitled him to assume jurisdiction to hear the First Respondent's claim.

ix. That the collective bargaining agreement between the NSL and the South African Football Players Union, 'SAFPU' requires the parties to refer disputes under South African Labour Law to the NSL DRC.

x. That the Single Judge of the FIFA PSC erred in finding that the Appellant had terminated the Employment Contract without just cause and in finding that there was no evidence

of alleged misconduct on the part of the First Respondent or that the First Respondent had been warned over his alleged breach of contract before being dismissed.

xi. That instead of considering evidence of the merits, the Single Judge of the FIFA PSC focussed on the fact that the First Respondent had not participated in electing the chairman of the disciplinary enquiry, who was paid for by the Appellant and wrongly concluded that the disciplinary enquiry was biased and therefore not fair.

xii. That the Single Judge of the FIFA PSC wrongly decided the First Respondent's claim without holding an oral hearing at which the Appellant could and should properly have been allowed to make oral representation and adduce witness evidence.

xiii. That the First Respondent failed to prove that he suffered loss and further had failed to mitigate any alleged loss by obtaining more lucrative alternative employment in Germany following the termination of the Employment Contract.

32. The Appellant made the following Requests for Relief:

The Appellant seeks the setting aside of the decision of the Third Respondent […] both on the jurisdiction point and on the merits of the First respondent's claim.

The Appellant seeks a declaration by the CAS that the FIFA Players' Status Committee and/or the Third Respondent did not have jurisdiction to deal with the First Respondent's clam. The Employment contract between the Appellant and the First Respondent provided that all disputes or difference between the Parties should be referred to the DRC of the NSL. In addition, as a condition of participation in professional football under the NSL, the Appellant and First Respondent undertook to submit all disputes or differences to the DRC of the NSL

Consequently, the Third Respondent should have held that the FIFA Players' Status of [sic] Committee did not have jurisdiction to deal with the claim. At best for the First Respondent, he should have directed that proceedings before the FIFA Players' Status Committee be pended and that the claim be referred to the DRC of the NSL first.

By doing so, declaring that the FIFA Players' Status Committee lacked jurisdiction to deal with the claim the CAS will uphold the agreement between the Appellant and the First Respondent and at the same time uphold the NSL Constitution and Rules in clear circumstances where the agreement between the Appellant and the First respondent and the NSL Constitution and Rules have been totally disregarded by the First Respondent and FIFA

Should the CAS be inclined to find that the FIFA Players Status Committee had jurisdiction to deal with the claim the Appellant seeks the setting aside of the finding of the Third Respondent on the merits and that the finding be replaced with a finding by CAS that the claim of the First Respondent is dismissed.

The claim of the First respondent should be dismissed as the Appellant was empowered on terms of clause 3.1 of the Employment Contract between the Appellant and the first respondent to terminate the Employment Contract and the Appellant did not breach the Employment Contract.

Should the CAS be inclined to find that the Appellant breached the contract (which is denied), the First respondent should not be granted any damages as he has failed to show that he suffered any damages. Alternatively, the First Respondent has failed to prove that he took reasonable steps to mitigate whatever damages he alleged to have suffered.

The Appellant further requests that the First Respondent be ordered to pay the costs of the proceedings before the FIFA Players' Status Committee and the costs of the current Appeal proceedings and the Appellants costs.

B. Kurt Kowarz

33. The First Respondent's submissions, in essence, may be summarised as follows:

i. The Single Judge of the FIFA PSC correctly adopted jurisdiction to hear the First Respondent's claim and although CAS has the power to review a case *de novo* it cannot review whether or not jurisdiction had been correctly adopted in the Appealed Decision, based on the inherent discretion of the self-governing body of FIFA which can freely decide about its jurisdiction.

ii. The dispute between the Appellant and First Respondent is of an international dimension as defined by Article 22(c) FIFA RSTP.

iii That although the wording of Article 22(c) FIFA RSTP contains an exception to the circumstances in which FIFA can accept jurisdiction, the prerequisites for such exception should be the same as for players as defined by Article 22(b) RSTP.

iv That footnote 101 on page 66 of the FIFA Commentary on the RSTP expressly provides that to invoke jurisdiction of an independent arbitration tribunal at national level, *'a clear reference to the competence of the national tribunal has to be included in the contract of employment'* and that *'at the moment of signing the contract the parties shall be submitting potential disputes related to their employment relationship to this body'*.

v. That the Employment Contract is silent about jurisdiction and did not contain a jurisdiction clause.

vi. The Employee handbook was not incorporated into the Employment Contract and was not handed over to the First Respondent before 20 October 2011, shortly before the independent enquiry.

vii. That the First Respondent was expressly advised by his agent, Mr Mike Makaab and by the head coach, Mr Ernst Middendorp, at the time of signing the Employment Contract, to avoid the inclusion of any clause invoking the jurisdiction of the national arbitration tribunal and, accordingly, the First Respondent in his negotiations with the Appellant expressly did not submit to the Jurisdiction of the NSL DRC.

viii. That even if the First Respondent was bound by the rules of the NSL Constitution, those rules do not provide for the exclusive jurisdiction of the NSL DRC, thereby barring the

jurisdiction of FIFA, but merely that it should 'prevail to courts or administrative tribunals'.

ix. That the collective bargaining agreement between the NSL and SAFPU does not require the parties to refer disputes under South African Labour Law to the NSL DRC, nor excludes the jurisdiction of the FIFA PSC of DRC and is any event irrelevant to the First Respondent as he is not a player but a goalkeeper coach.

xi. That the Appellant has failed to discharge the relevant burden of proof to prove that the jurisdiction of the NSL DRC had been accepted by the First Respondent.

xii. That so far as the merits are concerned, the Appellant has failed to discharge the relevant burden of proof to establish that the conduct of the First Respondent constituted a breach of contract justifying termination of the Employment Contract for just cause.

xiii. That the First Respondent was dismissed without just cause by the Appellant in consequence of the dismissal of Mr Ernst Middendorp, the head coach who had originally engaged the First Respondent as part of his coaching staff.

xiv. That at a meeting on 14 October 2011, attended by the First Respondent, called by the chairman of the Appellant, at which terms of termination of the Employment Contract were discussed, the First Respondent, on refusing to accept the Appellant's proposals, was ordered to undertake coaching of the Appellant's amateur youth team unrelated to his duties as a goalkeeper coach of the professional team in circumstances which could have compromised his personal safety and which were contrary to the terms of his work permit.

xv. That the unilateral attempt to alter the terms of the Employment Contract by requiring the First Respondent to coach non-professional youth players was evidence of harassment of the First Respondent and derogation from the terms of the Contract of Employment.

xvi That the independent enquiry conducted on 26 October 2011 was fundamentally biased against the First Respondent in that he was not permitted to be accompanied by a legal representative and was refused the opportunity to influence the appointment of the Chairman.

34. The First Respondent made the following Request for Relief:

1. The Appellant's appeal against the decision of the Single Judge of the Players' Status committee dated Feb.25, 2014, is dismissed.

2. The Appellant shall bear all costs before FIFA and the CAS as well as the fees of the Appellant's Counsel of at least 10,000, -CHF plus expenses.

C. FIFA

35. The Second Respondent's submissions, in essence, may be summarised as follows:

i. That in accordance with Article 22(c) and Article 23(1) and (3) RSTP, the FIFA PSC is, as a general rule, competent to deal with employment–related disputes between a club and coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level.

ii Disputes of an international dimension may be referred to an independent national arbitration tribunal only if the parties have explicitly chosen the national arbitration tribunal by express agreement on jurisdiction.

iii. In the event that there is an express jurisdiction clause nominating a national arbitral tribunal, the FIFA PSC would, in the event that one of the parties referred a case to the relevant national body, determine that it is an independent tribunal guaranteeing fair proceedings. If the relevant circumstances are not met by the national arbitral tribunal the FIFA PSC would accept competence to adjudicate the matter as to substance.

iv. The matter is of an international dimension as the Appellant is a South African Football Club and the First Respondent is a German national.

v. The jurisdiction of a relevant arbitration clause derives from a clear reference in the Employment Contract at the basis of the dispute. In the instant case, the Employment Contract does not contain an arbitration clause in favour of the NSL DRC and in such absence, the Single Judge of the FIFA PSC was competent to adjudicate on the employment-related dispute of international dimension between the parties.

vi. The Employee Handbook relied upon by the Appellant as conferring mandatory jurisdiction to the NSL DRC was not signed by the First Respondent and was not incorporated into the Employment Contract and was received by the First Respondent only 11 days before the termination of the Employment Contact.

vii. The Employment Contract makes no reference to the employee handbook and contains an entire agreement clause at Art. 10 para. 3 providing that "*no alteration ; amendment ; or consensual cancellation … shall have any force or effect whatsoever save and unless it is reduced to writing and signed by or on behalf of the parties hereto*".

viii. The First Respondent did not sign the various rules and regulations of the NSL by affiliation on registration of the Employment Contract and, therefore, did not explicitly agree to submit any dispute to the NSL DRC. Had the parties wished to depart from the general arbitration clauses contained in the Regulations of FIFA, it had to be made clear by means of an unambiguous arbitration clause in the Employment Contract.

ix. In the absence of an unequivocal arbitration clause, it is unnecessary to analyse the independence of the NSL DRC or whether it guarantees fair proceedings.

x. The Single judge of the FIFA PSC came to the conclusion that the dismissal of the First Respondent by the Appellant had occurred without just cause and that no evidence had been adduced by the Appellant in support of the allegations of misconduct or that agreement had been reached between the parties that the First Respondent would assume different responsibilities outside the ambit of his contractual duties.

xi. In the absence of an express choice of law clause in the Employment Contract, the Regulations of FIFA are primarily applicable and, subsidiarily, Swiss law.

xii. The Employment Contract was terminated without just cause on the basis of the dismissal established by the Single Judge of the FIFA PSC, who correctly concluded that the Appellant was liable for breach of contract and payment of outstanding remuneration and as well as compensation for the breach.

36. The Second Respondent made the following Request for Relief:

1. To reject the present appeal against the decision of the Single Judge of the Players' Status Committee dated 25 February 2014 and to confirm the relevant decision in its entirety.

2. To order the Appellant to cover all the costs incurred with the present procedure.

3. To order the Appellant to bear all legal expenses of the second Respondent related to the proceedings at hand.

V. JURISDICTION

37. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

38. The jurisdiction of CAS, which is not disputed by the Parties, derives from Article 67 para. 1 of the FIFA Statutes and Article 24 para. 2 RSTP (Edition 2012), which determines that a decision of FIFA maybe appealed to the Court of Arbitration for Sport in Lausanne within 21 calendar days of receipt of the reasoned decision.

39. It follows that the CAS has jurisdiction to decide on the appeal against the decision of the FIFA DRC dated 28 March 2014. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a *de novo* decision, partially or entirely, superseding the Appealed Decision.

VI. ADMISSIBILITY

40. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

41. The same general principle is contained in Article 67 of the FIFA which provides as follows:

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

42. The Decision was notified to the parties on 2 July 2014 and the Appellant filed its Statement of Appeal on 23 July 2014, *i.e.* within the deadline of 21 calendar days after receipt of the reasoned decision as set by Article 67 para.1 of the FIFA Statutes.

43. In view of the above, it follows that the appeal is admissible.

VII. APPLICABLE LAW

44. The Employment Contract, dated 1 July 2011, is silent as to the applicable law.

45. In its appeal brief, the Appellant did not address the issue of the applicable law but at the hearing submitted that it was South African law. In his answer, the First Respondent did not address the issue of the applicable law and made no submissions at the hearing. In its answer, the Second Respondent made clear that in the absence of any choice of law in the Employment Contract, the Panel shall decide the dispute according to the applicable regulations of FIFA and, subsidiarily, Swiss law.

46. Article 66 para. 2 of the FIFA Statutes provides that:

"The provisions of the CAS code of Sports-related Arbitration shall apply to proceedings. CAS shall primarily apply the various Regulations of FIFA and additionally Swiss law".

47. Article R58 of the Code provides that:

"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".

48. The Panel, therefore, decided that the various FIFA Regulations and, subsidiarily, Swiss law, shall be applied to determine this dispute. As the present matter was submitted to FIFA on 23

January 2012, the 2010 version of the FIFA RSTP are applicable. Those regulations shall apply primarily, together with the other applicable rules of FIFA and, subsidiarily, Swiss law.

VIII. THE MERITS

A. The panel's Scope of review

49. Pursuant to Article R57 of the Code, The Panel has the full power to review the facts and the law on appeal. This was also confirmed by the Parties at the hearing

B. The Main issues

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

    a. Was the Single Judge of the FIFA Player's Status Committee Competent to hear the First Respondent's claim?

    b. Was the First Respondent's employment with the Appellant terminated with or without just cause?

    c. What, if any, compensation is payable to First Respondent by the Appellant?

A. Competence of the Single Judge of the FIFA Players' Status Committee

51. The Appellant's submission as to the lack of jurisdiction of FIFA to determine the First Respondent's claim, can be simply stated. The Appellant contended that the First Respondent was obliged to appeal the decision to terminate his engagement by lodging an appeal with the DRC of SAFA under Article 70 of the SAFA Statutes.

52. The Appellant contended that such obligation derived from the asserted position: that the dispute did not have an international dimension but rather involved an agreement concluded in South Africa and governed by South African law; that the Appellant's employee handbook (which required the parties to refer disputes to the DRC) was incorporated into the Employment Contract; and that by virtue of registration with the NSL the First Respondent had undertaken to refer any disputes to the DRC of SAFA. The Appellant strongly contended that the national dispute resolution tribunal was *"an independent arbitration tribunal guaranteeing fair proceedings"*.

53. The First and Second Respondents' submissions on appeal can be summarised as follows: the dispute did have an international dimension; the Employment Contract contains no express provision as to governing law, or as to the required course of arbitration or dispute resolution and accordingly the FIFA PSC had jurisdiction; the Appellant's employee handbook cannot be regarded as having been incorporated into the Employment Contract; and the fact of registration with the NSL could not undermine the jurisdiction of the FIFA PSC even if it could

be shown that the First Respondent was registered. The Respondents further argued that there were issues as to the independence of the national tribunal.

54. It is against that background that the issue of the jurisdiction of the Single Judge of the FIFA PSC is to be considered.

55. The PSC and the Single Judge are part of a private dispute resolution system of FIFA, a Swiss Association formed in accordance with Art. 60 ff. of the Swiss Civil Code. The PSC of FIFA has *prima facie* jurisdiction to deal with employment related disputes between a club and a coach, where there is an international dimension – subject to a proviso which is referred to below.

56. Paragraph 22 of the FIFA RSTP provides that:

"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, 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;

c) employment-related disputes between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level".

57. In the commentary to the RSTP in relation to Art.22 (b) the following appears:

"b) Employment related disputes between a club and a player that have an international dimension, unless an independent arbitration tribunal has been established at a national level. The international dimension is represented by the fact that the player concerned is a foreigner in the country concerned … However, if the association where both the player and club are registered has established an arbitration tribunal composed of members chosen in equal numbers by players and clubs with an independent chairman, this tribunal is competent to decide on such disputes".

58. The commentary on the RSTP relating to jurisdiction further observes, in relation to Art.22 c):

"Employment related disputes between a club or an association and a coach have an international dimension, unless an independent arbitration tribunal exists at a national level. In this respect, it must be noted that coaches of a national team who have a different nationality from that of the team of the country they are coaching are also entitled to lodge a claim with FIFA. Such disputes are referred to the Players' Status Committee".

59. 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.

60. The footnote to the commentary on the RSTP records that *"A clear reference to the competence of the natural arbitration tribunal has to be included in the employment contract. In particular, the player needs to be aware at the moment of signing the contract that the parties shall be submitting potential disputes related to their employment relationship to this body"*.

61. The rationale behind such an approach is apparent and obvious. There may be many jurisdictions where contracted foreign players may fall into dispute with employer clubs, where the national arbitration tribunal is not independent or impartial, and the foreign employee should be in a position to make an assessment and determine whether he or she is prepared to submit contractually to any dispute being determined by the national tribunal. The inclusion in the contract of a specific reference to such jurisdiction is a simple matter.

62. Neither Article 22 b) nor Article 22 c) RSTP refer to the requirement in the employment contract for a clear reference to the competence of the national tribunal as having jurisdiction to hear any dispute between the parties, before the jurisdiction of the FIFA PSC is affected.

63. Such a requirement is derived from established jurisprudence. In CAS 2008/A/1518 the Panel held that:

"Pursuant to article 22b of the FIFA Regulations, the general rule is that all employment related disputes between a club and a player that have an international dimension have to be submitted to the DRC. Only if the following conditions are met can a specific employment related dispute of international dimensions be settled by an organisation other than the DRC:

a) There is an independent arbitration tribunal at the national level

b) The jurisdiction of this independent arbitration tribunal derives from a clear reference in the employment contract; and

c) This independent arbitration tribunal guarantees fair proceedings and respects the principle of equal representation of players and clubs".

64. The Panel notes that even in cases where the parties have made clear reference in the employment contract specifying that the national tribunal has jurisdiction to hear disputes between the parties, one of the parties may nevertheless refer the dispute to the FIFA PSC, which would then examine whether or not the relevant national tribunal was an independent arbitration tribunal guaranteeing fair proceedings. Dependent upon the finding of the FIFA PSC on that preliminary issue, the PSC would then either decline jurisdiction and refer the parties to the national tribunal they had contractually nominated; or refuse to recognise the jurisdiction of the national body and rule that the PSC had jurisdiction to adjudicate on the substantive issue in dispute (see CAS 2013/A/3172).

65. The only substantive distinction between the wording in Art. 22 b) and Art. 22 c) RSTP is the reference, in relation to disputes between clubs and players, to the independent arbitration tribunal *"respecting the principle of equal representation of players and clubs"*.

66. The Panel believes that the requirement for a clear reference in the employment contract to the jurisdiction of an independent arbitration tribunal applies equally to Art. 22 b) RSTP in respect of players; and to Art. 22 c) RSTP in respect of coaches; for the same reasons as articulated above.

67. The Panel rejects the Appellant's contention that the handbook was incorporated into the Employment Contract. On the evidence the handbook was first provided to the First Respondent at or about the time of the first hearing by the enquiry chairman appointed by the Appellant. The Employment Contract provides at para 10.3: *"This employment contract and the documents referred to herein and incorporated by reference constitute the entire agreement between the parties and no alteration; amendment; or consensual cancellation (including in relation to this clause) shall have any force or effect whatsoever save and unless it is reduced to writing and signed by or on behalf of the parties hereto"*. The handbook was never acknowledged by the First Respondent as having been incorporated into the Employment Contract. The Employment Contract does not refer to any other documents and therefore no documents are incorporated. There is no alteration or amendment signed by the parties. The Employment Contract between the Appellant and First Respondent thus constituted an "entire agreement".

68. The Panel is not satisfied that registration with the NSL would have required the First Respondent to refer a dispute of this nature to the DRC of SAFA. Were that so, it would undermine the requirement for a clear reference in the employment contract to disputes being referred to the national tribunal. In any event, no evidence was adduced that the First Respondent was so registered, and registration cannot be necessarily inferred on the basis of the evidence. The evidence of Mr Becker was to the effect that the First Respondent could indeed have carried out his duties while not registered, with the only restriction being an inability to sit in the coach's box during matches.

69. Having determined that the dispute had an international dimension; that on the face of the Employment Contract there is no reference at all to the mechanism of dispute resolution, and having found that there are no documents incorporated into the Employment Contract, nor any other basis upon which it could be said that the First Respondent agreed to submit to the jurisdiction of the SAFA DRC, the Panel finds that the First Respondent was at liberty to refer his claim to the FIFA PSC and that its Single Judge was competent to hear the dispute.

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70. Although in the light of the Panel's findings there is strictly no need to make any determination as to whether in South Africa, an "independent arbitration tribunal guaranteeing fair proceedings exists at an international level" the Panel makes clear, for the purposes of the present proceedings, that it accepts the evidence of Mr Becker to the effect that the SAFA Arbitral Tribunal is independent and guarantees fair proceedings and in making its finding does

not in any way doubt the integrity, independence or credibility of SAFA Arbitral Tribunal or of the South African Legal System.

b. Was the first respondent's employment with the Appellant terminated with or without just cause?

71. It is not in issue that the First Respondent's employment with the Appellant, was terminated by letter dated 1 November 2011, four months after commencement of his employment with the Appellant on the recommendation of the chairman of a disciplinary enquiry initiated by the Appellant.

72. The Appellant maintains that it was entitled to terminate the First Respondent's employment, as he was guilty of serious misconduct, in refusing to obey its instructions given at a meeting, on or about 14 October 2011 with the chairman of the Appellant, at which he was requested to change or vary the terms of his employment, to include coaching the Appellant's development teams. The Appellant relies on alleged breaches of clauses 1.4, 1.5 and 1.7 of the Employment Contract by the First Respondent which it claims imposed an obligation of flexibility upon him to accept changes to his responsibilities, from time to time, as the requirements of the Appellant and the game of football changed.

73. The Appellant also relied on the First Respondent's alleged breach of the provisions of clause 7.1 of the Employment Contract, requiring him to *"carry out his responsibilities with the utmost skill and enthusiasm particularly in view of his level of experience and the competitive nature of professional football"* and a further breach of clause 7.3 of the contract requiring the First Respondent, *"to be bound by such rules and regulations as Arrows might impose from time to time"*. Such breach was compounded on his refusal to attend the Appellant's premises after the meeting on 14 October 2011 and/or to complete the requisite forms to register him with the South African Football Association as an official of the development team.

74. In addition, the Appellant asserts that the First Respondent breached the warranty at paragraph 10.2 of the Employment Contract and that the terms and conditions set out therein *"were reasonable and necessary in consequence of the specificity of the sport of football"*.

75. The First Respondent, claimed that the imposed requirement to coach the Appellant's development teams materially derogated from the terms of his employment as a professional goalkeeper coach, in that he was required to coach amateurs and that the locations at which he was required to undertake such coaching, compromised his personal safety, in that the coaching was to take place in townships rather than at the Appellant's training ground. He further asserted that at no time had any agreement been reached between himself and the Appellant that he would undertake the additional training of the development team.

76. The First Respondent also claimed that the disciplinary enquiry instituted by the Appellant on 26 October 2011 was biased, in that he was not permitted legal representation at the hearing and was likewise not permitted to nominate or comment on the nomination and appointment of the chair of the enquiry.

77. Further, the First Respondent maintained that the true reason why his employment was terminated was that, on the dismissal of Ernst Middendorp, the Appellant's former head coach who had introduced the First Respondent to the Appellant, it had also decided to terminate his employment as part of an exercise in permitting the newly appointed head coach to assemble his own coaching-team.

78. The Second Respondent supported the submissions made by the First Respondent.

79. Having considered all the submissions made by the parties on the merits, the Panel is of the view that it was not open to the Appellant to unilaterally require the First Respondent to agree to vary the terms of his employment, to include coaching non-professional players and/or to sign documents to be lodged with the NSL or SAFA acknowledging his agreement to vary the terms of his employment. The Panel also does not consider there was any evidence of serious misconduct on the part of the First Respondent that justified the finding made at the independent enquiry which led to the Appellant terminating the First Respondent's employment. The Panel accordingly accepts and upholds the findings of the FIFA PSC Single Judge in the appealed decision.

80. The Panel also finds that, given the length of the First Respondent's employment with the Appellant, it is not tenable for the Appellant to assert that the First Respondent had failed to fulfil the goals and objectives anticipated in the Employment Contract and that in the absence of any evidence to the contrary, there are no grounds to make any finding that the First Respondent had not fulfilled his agreed contractual commitments prior to the meeting called by the Chairman of the Appellant on 14 October 2011 which would entitle the Appellant to assert that termination of the Employment Contract was appropriate.

81. It follows that the Panel rejects the submission that the First Respondent was lawfully dismissed and that the Appellant was required to pay no compensation to the First Respondent pursuant to the terms of the Employment Contract

82. The Panel is, however, unable to make any finding that the proposed amendment to the Employment Contract requiring his undertaking training of the development team at any location other than the Appellant's training ground would have compromised the First Respondent's personal safety. In this respect the Panel accepts the evidence of Mrs Madala and Mr Becker.

83. Based on the foregoing, and after taking into due consideration all the evidence produced and all the arguments made, the Panel finds that on 1 November 2011, the Appellant unilaterally terminated the Employment Contract without just cause.

c. What, if any, compensation is payable to the First Respondent by the Appellant

84. In the light of its findings, the Panel does not accept that the termination provisions set out in paragraph 3 of the Employment Contract are applicable to the circumstances in which the Employment Contract was terminated by the Appellant.

85. It is undisputed that the First Respondent did not receive his salary for the month of October 2011 until the date of termination on 1 November 2011 and as such the Panel concludes that the First Respondent is entitled to receive the outstanding remuneration in the sum of ZAR 70,000, together with interest at the rate of 5% per annum from 23 January 2012 as awarded by the Single Judge of the FIFA PSC.

86. In relation to the balance of the compensatory element of the award made by the Single Judge, the Panel accepts and affirms his method of calculation and considers that the First Respondent is entitled to receive the remaining salaries due under the Employment Contract as compensation from the Appellant subject to the extent of mitigation of loss applied by the Single Judge.

87. For the avoidance of doubt, the panel dismisses, in the absence of any evidence to the contrary, the assertion made by the Appellant that the First Respondent could and should have sought alternative employment at a higher salary to mitigate his loss.

IX. CONCLUSION

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

a) On 1 November 2011, the Appellant unilaterally terminated the Employment Contract without just cause.

b) The Respondent is entitled to a global amount of ZAR 563,224 as outstanding salaries and compensation for breach of contract with interest at the rate of 5% *p.a.* from 23 January 2012.

Any further claims or requests for relief shall be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Lamontville Golden Arrows FC on 3 July 2012 against the decision issued on 24 February 2014 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.

2. The decision issued on 24 February 2014 by the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

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