Arbitration CAS 2019/A/6570 Kader Georges Bidimbou v. Associação Desportiva Sanjoanense, award of 25 May 2021

Panel: Prof. Petros Mavroidis (Greece), Sole Arbitrator

Football
Termination of the employment contract without just cause
Scope of review of the CAS
Definition of just cause

1. **A CAS Panel may decide *de novo* on the object of a challenged decision. Such *de novo* power of review of the challenged decision is however not unlimited. In particular, the *de novo* power of review of a CAS panel has to be limited to the scope of the first instance judicial body that rendered the appealed decision. In other words, a CAS panel can revisit the legitimacy of the appealed decision, and go as far as to issue a new decision, without however, trespassing the scope of the matter as presented already before the first instance body. Furthermore, the CAS panel is also limited to the issues dealt with in the challenged decision.**

2. **The definition of "just cause", and whether just cause exists shall be established on a case-by-case basis. The facts relied on in support of an immediate termination must have resulted in the loss of the relationship of trust which forms the basis of the employment contract. As general rule, only a serious breach may constitute "just cause" for a termination, but other incidents may also justify termination. Furthermore, only a breach which is of a certain severity justifies termination of a contract without prior warning. In the presence of a less serious infringement, an immediate termination is possible, only if the party at fault persisted in its breach after having been warned. The judge will determine at its discretion, and in light of the circumstances of the case, whether there is good cause, in accordance with the principles of justice and equity.**

I. PARTIES

1. Mr Kader Georges Bidimbou (the "Appellant" or the "Player") is a professional football player of Congolese citizenship. He is currently registered with the Guinean football club Hafia FC.

2. Associação Desportiva Sanjoanense ("ADS" or the "Respondent") is a Portuguese football club affiliated to the Portuguese football federation ("PFF"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA"). ADS plays in the *Campeonato de Portugal*, which is the third tier of the Portuguese professional football.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' submissions and allegations. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submissions and evidence that he considers necessary to explain his reasoning.

A. Background of the dispute

4. The present dispute arises from the employment relationship between the Player and ADS. The Parties agree that they signed an employment contract on 29 January 2016. However, they disagree as to the content of their employment contract, and, therefore, on what constitutes the basis of their contractual relationship.

5. On 12 March 2016, the Player left Congo for Portugal, and participated in six matches with ADS.

6. On 28 May 2016, the Player travelled back to Congo. On 24 June 2016, the Player allegedly sent a letter to ADS and the Portuguese Football Federation (the "Termination Letter"), which provides in its relevant part as follows:

"Since the day of the signature and despite numerous reminders, I have not been paid any salary (i.e. EUR 20'000 /twenty thousand euros). This situation is totably innaceptable (sic) *and, under article 13 of the FIFA Regulations for the Status and Transfer of Players, constitutes a just cause for terminating the contract.[…] I hereby notify you the termination of the employment relationship with immediate effect".*

7. At the end of July 2016, the Player travelled back to Portugal.

8. On 19 August 2016, the Player signed the following statement (the "Statement"):

"Je déclare que je refuse de entraîner et de jouer ou effectuer quelque activité en faveur de [ADS] pour ne pas avoir des conditions psychologiques à faire ça (sic). *Je déclare également qu'à cette date, rien ne m'est dû par le Club au titre de salaires".*

[Free Translation: *"I confirm that I refuse to train and to play or to provide any service in favour of ADS as I do not have the psychological capacities to do this. I also confirm that to date the Club does not owe me any salary".*

9. On 23 August 2016, the Player travelled back to Congo, and resumed playing with his former club, the Congolese club AC Léopards. On 16 September 2016, the Player and AC Léopards signed a transfer agreement with Olympique Khourigba in Morocco ("Khourigba"). According to the letter of this agreement, the Player was transferred from AC Léopards to Krourigba.

10. On 9 October 2016, ADS sent a letter to the Player and Khourigba claiming the payment within 10 days of the amount of EUR 190,000 as compensation for the early termination of the Player's contract. On 29 October 2016, the Player replied complaining about the overall situation, the falsification of the contract submitted by ADS, as well as the failure by ADS to pay him the salaries that he was entitled to.

11. Later on, the Player moved again, this time from Khourigba to the Egyptian club, Ismaily Sporting Club ("Ismaily"). Following yet another transfer, the Player is currently playing with FC Hafia in Guinea.

B. Procedure before the FIFA Dispute Resolution Chamber

12. On 5 December 2016, the Player's mother requested, in written form, FIFA's intervention to settle the dispute between the Parties. On 8 December 2016, FIFA replied to the Player's attention granting him a deadline to complete his claim, which he did on 9 January 2016.

13. On 21 February 2017, ADS lodged a separate claim before the FIFA Dispute Resolution Chamber (the "FIFA DRC") against the Player, AC Léopards, Khourigba and Ismaily, claiming that on 19 August 2016, the Player had breached the contract by refusing to train or play with the team, and that he had subsequently signed a contract with Khourigba first, and Ismaily later on.

14. On 28 March 2017, FIFA informed the Player that, in the current state, FIFA judicial bodies could not decide on the Player's request, since (i) it did not include the specific requests made by the Player, and (ii) it was not framed as a dispute, as required under the applicable FIFA rules and regulations. In the same letter, FIFA informed the Appellant of the fact that ADS had filed a separate claim against the Player, which would be forwarded to the Player in due course.

15. On 7 March 2019, the FIFA DRC rendered its decision (the "Appealed Decision"), as follows:

> *"1. The claim of the Claimant, Associação Desportiva Sanjoanense, is partially accepted.*
>
> *2. The Respondent 1, Kader Georges Bidimbou, has to pay to the Claimant,* ***within 30 days*** *as from the date of notification of this decision, compensation for breach of contract in the amount of USD 30,000, plus 5% interest p.a. on said amount as of 21 February 2017 until the date of effective payment.*
>
> *3. The Respondent 4, AC Léopards de Dolisie, is jointly and severally liable for the payment of the aforementioned amount.*
>
> *4. In the event that the amount due to the Claimant in accordance with the abovementioned number 2. is not paid 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. Any further claim lodged by the Claimant is rejected.*

6. The Claimant is directed to inform the Respondent 1 and the Respondent 4 immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".

16. The grounds of the Appealed Decision were notified to the Player on 17 October 2019. The reasoning of the FIFA DRC in the Appealed Decision can be summarized as follows:

"From the outset, the DRC noted that […] it should first of all pronounce itself on the issue of the validity of the contract signed by the player with Sanjoanense on 29 January 2016, i.e. whether said document consists in a valid and binding employment contract between Sanjoanense and the player. […] the DRC underlined that the player did not challenge having signed the contract on 29 January 2016, but rather referred to a different contract dated 26 February 2015, he alleged having concluded with Sanjoanense […]. […] On this point, the DRC noted that Sanjoanense argued that the contract dated 29 January 2016 and signed by both parties had been registered with the Portuguese Football Federation and had been duly authenticated by a qualified lawyer in Portugal […]. […] Moreover, the members of the DRC pointed out that the copy of the alleged contract dated 26 February 2015 provided by the player lacks Sanjoanense's signature. Consequently, the Chamber decided not to take into account this document and rejected the player's argumentation in this regard. […] At this stage, the members of the Chamber deemed appropriate to remark that the validity of the contract at the basis of the present claim (i.e. the contract dated 29 January 2016) […] had never been disputed by the player. In fact, […] the player admitted having played for six months for the club without challenging the authenticity of said contract. […] On account of all of the above, the members of the Chamber unanimously concluded that a valid and binding employment contract had been entered into by and between the player and Sanjoanense on 29 January 2016. […]

Having established that a valid and legally binding employment contract had been in force between the player and Sanjoanense, the Chamber went on to analyse as to whether such contract had been breached and, in the affirmative, which party is to be held liable for such breach. […] In this context, the Chamber deemed fit to recall the legal principle of the burden of proof contained in art. 12 par. 3 of the Procedural Rules […].

[…] With the above in mind, the DRC considered that it had remained uncontested that the player was under contract with Sanjoanense and played with it for six months and that, in August 2016, he left Sanjoanense and went to AC Léopards. […] Taking all of the above into account, the Chamber held that the player had failed to prove that Sanjoanense had authorised him to definitely leave the club and subsequently sign an employment contract with a new club. As a consequence thereof, the Chamber concluded that the player had breached the employment contract without just cause in August 2016, by leaving Sanjoanense without authorisation. What is more, the Chamber deemed that the player did not provide any valid reason which could justify the termination of the contract. […] On account of the above, the DRC was of the view that the player unilaterally terminated the contract without any valid reason and, consequently, is to be held liable for the early termination of the employment contract without just cause. […]

[T]he DRC was of the firm opinion that, in the sense of art. 17 par. 2 of the Regulations and taking into account the specificity of the case at hand, the new club should be understood as the club benefitting directly from the breach of the contract by the player.[…] Consequently, […] the members of the DRC concluded that AC Léopards is to be considered the new club of the player in the sense of art. 17 par. 2 of the Regulations. […] [I]n order to estimate the amount of compensation due to Sanjoanense in the present case, the Chamber determined that an objective criteria is the market value of the player at the time of termination. In this regard,

the DRC recalled that the player terminated the contract with Sanjoanense in August 2016. The DRC further recalled that, on 16 September 2016, i.e. a month after the termination, the player was transferred from AC Léopards to Khouribga for an initial amount of USD 30,000. […] As a consequence, on account of all of the above-mentioned considerations, the Chamber decided that the player must pay the amount of USD 30,000 to the Claimant as compensation for breach of contract. Furthermore, in accordance with art. 17 par. 2 of the Regulations, AC Léopards is jointly and severally liable for the payment of the relevant compensation. […]".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 7 November 2019, in accordance with Article R47 of the Code of Sports-related Arbitration, edition in force since 1 January 2019 (the "CAS Code"), the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Respondent challenging the Appealed Decision. In its Statement of Appeal, the Appellant requested legal aid for the purpose of the present procedure and that this matter be submitted to a Sole Arbitrator.

18. On 15 November 2019, the Respondent objected to the present matter being submitted to a Sole Arbitrator, and on 20 November 2019, informed the CAS Court Office of its intention not to pay its share of the advance of costs.

19. On 9 December 2019, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the present case to a Sole Arbitrator.

20. On 22 January 2020, the CAS Court Office informed the Appellant that the Legal Aid Commission of the International Council of Arbitration for Sport had decided to grant the Appellant assistance for the costs related to the present procedure.

21. On 23 January 2020, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

    Sole Arbitrator: Petros C. Mavroidis, Professor, Commugny, Switzerland

22. On 3 February 2020, the Appellant filed his Appeal Brief with the CAS Court Office.

23. On 26 February 2020, the Respondent filed its Answer with the CAS Court Office.

24. On 2 March 2020, the CAS Court Office invited the Parties to inform the CAS Court Office whether they preferred a hearing to be held in this matter, or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

25. On 9 and 10 March 2020, the Parties requested a hearing to be held in the present proceedings.

26. On 6 April 2020, the CAS Court Office informed the Parties that Ms Stéphanie De Dycker, in-house Clerk to the CAS, had been appointed as Clerk in this matter.

27. On 20 April 2020, the CAS Court Office informed the Parties that the Sole Arbitrator had

decided to hold a hearing in this matter and consulted the Parties as a possible hearing date.

28. On 24 April 2020, the Appellant reiterated his requests for the production of documents as well as for an independent expertise made in his Appeal Brief.

29. On 28 April 2020, the CAS Court Office on behalf of the Sole Arbitrator requested the Respondent to submit several documents, the production of which was requested by the Appellant in his Appeal Brief. The CAS Court Office also consulted the Parties as to new possible hearing dates.

30. On 29 April 2020, the Appellant requested that the hearing be fixed after the requested independent expertise had been completed.

31. On 4 May 2020, the Respondent filed the documents requested by the CAS Court Office.

32. On the same day, the CAS Court Office requested, on behalf of the Sole Arbitrator, from FIFA to provide a copy of the complete case file related to the present appeal, and informed the Parties of its request.

33. On 6 May 2020, the CAS Court Office requested the Respondent to file an English translation of all exhibits, which were not in English.

34. On 26 May 2020, the Respondent filed the requested translations.

35. On 27 May 2020, the Appellant requested from the Sole Arbitrator to instruct the Respondent to provide for the English translation of an additional document.

36. On 8 June 2020, the Respondent provided for the requested additional English translation.

37. On 10 June 2020, FIFA provided to the CAS Court Office with a copy of the complete case file related to the present appeal.

38. On 17 June 2020, the Appellant informed the CAS Court Office that the Parties had entered into negotiations, and had agreed to suspend the present proceedings until 31 August 2020.

39. On 18 June 2020, the CAS Court Office confirmed that the present procedure would remain suspended until 31 August 2020, and requested from the Parties to update the CAS Court Office of the result of their negotiations.

40. On 30 September 2020, the Appellant informed the CAS Court Office that the Parties had not reached an amicable settlement of the present dispute, and therefore requested the CAS Court Office to resume the present procedure. The Appellant further requested that witnesses called by the Respondent provide a brief summary of their expected testimony and also reiterated his request that an independent expertise be conducted on the original of the alleged employment contract signed between the Player and ADS which provides for a monthly remuneration of EUR 795.

41. On the same day, the CAS Court Office informed the Parties that the present procedure resumed with immediate effect.

42. On 1 October 2020, the CAS Court Office informed again the Parties that the Sole Arbitrator had decided to hold a hearing in this matter and consulted with the Parties as to a possible new hearing date.

43. On 8 October 2020, the Appellant confirmed his availability on the proposed hearing date and reiterated its requests as to an independent expertise.

44. On 13 October 2020, the Respondent confirmed its availability on the proposed hearing date.

45. On 14 October 2020, the CAS Court Office informed the Parties that a hearing will be held in this matter on 19 November 2020 by video-conference, and invited the Parties to provide the CAS Court Office with the list of all persons who will attend the hearing, which the Parties did on 15 and 23 October 2020.

46. On 15 October 2020, the CAS Court Office issued on behalf of the Sole Arbitrator an order of procedure (the "Order of Procedure") confirming *inter alia* the jurisdiction of the CAS, and invited the Parties to return a completed and signed copy of it. On 19 and 21 October 2020, the Parties returned a signed copy of it to the CAS Court Office.

47. On 19 November 2020, a hearing was held by video-conference. In addition to the Sole Arbitrator, Ms Delphine Deschenaux-Rochat, Counsel to the CAS, and Ms Stéphanie De Dycker, Clerk to the CAS, the following persons attended the hearing:

For the Appellant: Mr Kader George Bidimbou, Player; Mr Luca Tettamanti, legal counsel, Mr Michele Spadini, legal counsel; Mr Alberto Roigé Godia, legal counsel; Mr Ludwig Conistabile, interpreter.

For the Respondent: Mr Luis Varga, President of ADS; Mr José Duarte Reis, legal counsel; Mr Luís Bettencourt de Araújo, witness; Mr Pedro Serpa Pinto, witness; Mr Ricardo Martins, interpreter.

48. At the hearing, the Parties were given a full opportunity to present their case, submit their arguments and submissions, and answer the questions posed by the Sole Arbitrator.

49. The Sole Arbitrator heard evidence from several witnesses. All witnesses were invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury under Swiss law. The Parties and the Sole Arbitrator had the opportunity to examine and cross-examine the witnesses. The Sole Arbitrator also heard the testimony of the Player and the President of ADS as Party and Party representative. Each Party thereafter had the opportunity to cross-examine the other one.

50. At the end of the hearing, the Parties' counsel confirmed that they were satisfied with the procedure throughout the hearing, and confirmed that their right to be heard had been fully respected.

IV. THE PARTIES' SUBMISSIONS

51. The following summary of the Parties' positions and submissions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all of the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Appellant

52. The Appellant's submissions may be summarized as follows:

- The employment contract signed by the Player with ADS on 29 January 2016 was valid from 29 January 2016 until 30 June 2018 and provided for a monthly remuneration of EUR 4'000. This contract was drafted in French and Portuguese and signed by the Player while he was still in Congo (the "2016 Contract 1"). The 2016 Contract 1 was not the first contract signed between the Parties: early 2015, ADS signed another contract hiring the services of the Player (the "2015 Contract"). However, the Player did not travel to Portugal in 2015.

- The employment contract signed between the Player and ADS on 29 January 2016, valid as from 2 February 2016 until 30 June 2018 and providing for a monthly remuneration of EUR 795 (the "2016 Contract 2"), must be considered as null and void: the signature on the 2016 Contract 2 is forged. Several other element about the 2016 Contract 2 are suspicious: (i) the original certification drafted by an apparently Portuguese lawyer is in Spanish when the contract was to be filed with the Portuguese football federation; (ii) the Player was not in Portugal on 1 February 2016, i.e. the date of his alleged signature in presence of the Portuguese lawyer who certified the Player's identity and presence; (iii) the 2016 Contract 2 was drafted in Portuguese only whereas previous documents exchanged were drafted in French and Portuguese; (iv) the Player's signature appears only on the last page of the 2016 Contract 2 whereas it appears on each page in other contracts on file; and (v) the Player is not even in possession of an original of the 2016 Contract 2. Before FIFA DRC, the Appellant confirmed that he signed the 2016 Contract 1, which has the same date than the 2016 Contract 2.

- ADS never paid any salary to the Appellant, whether under the 2016 Contract 1 or the 2016 Contract 2; the Respondent failed to demonstrate the contrary. As a result, the Appellant terminated the 2016 Contract 1 with just cause by means of his termination letter to ADS on 24 June 2016. Besides, ADS did not show any interest in keeping the Player.

- The Appellant was under straitened circumstances when signing the statement dated 19 August 2016 because ADS never paid any salary to the Player since the beginning of their employment relationship and the Player was faced with the confiscation of his passport by an agent acting on behalf of the Respondent. He had no other alternative to signing the statement so as to get his passport back. Such statement must be considered null and

void and cannot serve the Respondent's interests.

- The Respondent owes the Player outstanding salaries in the amount of EUR 15.200, pursuant to Article 2 of the 2016 Contract 1.

- In addition, considering the 2016 Contract 1 was valid until 30 June 2018, the Player is entitled to receive a compensation equal to the residual value of the 2016 Contract 1 for a total amount of EUR 96,800, as well as an additional compensation for the specificity of sport, equal to 6 additional monthly salaries for a total amount of EUR 24,000. The Player therefore claims a total compensation in the amount of EUR 120,800.

- On a subsidiary basis, if the Sole Arbitrator was to follow a different approach than the Appellant's, the Appellant submits that the FIFA DRC erred in concluding that the Player was to pay ADS the amount of EUR 30,000, being *"an objective criteria [of] the market value of the player at the time of termination"*, since the transfer fee eventually paid by Khourigba to AC Léopards for the Player amounted MAD 160,000, which is almost half of the amount that the Appellant was ordered to pay to ADS in the Appealed Decision.

53. In his Appeal Brief, the Appellant requested the Sole Arbitrator to decide as follows:

"i. The appeal filed by Mr Kader Georges Bidimbou is upheld;

ii. The Challenged Decision is annulled.

iii. Associação Desportiva Sanjoanense is ordered to pay Mr Kader Georges Bidimbou the amount of EUR 15,200 (FIFTEEN THOUSAND TWO HUNDRED EUROS) as outstanding amounts plus 5% interest p.a. from the effective dates until the date of effective payment.

iv. Associação Desportiva Sanjoanense is ordered to pay Mr Kader Georges Bidimbou the amount of EUR 120,800 (ONE HUNDRED TWENTY THOUSAND EIGHT HUNDRED EUROS) as compensation and specificity of sport included plus 5% interest p.a. from 25 June 2016 until the date of effective payment.

On a subsidiary basis

v. The Challenged Decision is set aside and amended.

vi. Mr Kader Georges Bidimbou does not have to pay any amount to Associação Desportiva Sanjoanense.

In any case

vii. Mr Kader Georges Bidimbou is granted any other relief or order the CAS deems reasonable and fit to the case at stake to reach the ultimate scope for which the present Appeal has been filed.

viii. Associação Desportiva Sanjoanense shall bear all the procedural costs of this arbitration procedure.

ix. Associação Desportiva Sanjoanense shall compensate Mr Kader Georges Bidimbou for all the costs

incurred in connection with this arbitration in an amount to be determined at the discretion of the Panel, considering that his legal counsels are working pro bono".

B. The Respondent

54. The Respondent's submissions may be summarized as follows:

- Before the FIFA DRC, the Appellant never claimed arrears of salary or compensation, which was raised for the first time in the Appeal Brief. As a result, the Appellant's requests as to the payment of alleged outstanding remuneration and compensation shall be dismissed in accordance with Article R57 of the CAS Code. The Appellant and the Congolese Football Federation fraudulently circumvented the RSTP Annex 3, whereby AC Léopards received a transfer fee in the amount of EUR 30,000 and a sell-on fee in the amount of 15% over any subsequent transfer of the Player. Through this fraud, the Respondent was deprived from his sporting and economic rights regarding the Appellant without any compensation.

- Alternatively, the Player signed on 29 January 2016 an employment contract with ADS valid as from 2 February 2016 until 30 June 2018 (the 2016 Contract 2). The 2016 Contract 2 was drafted in Portuguese and provided *inter alia* for the following remuneration:

  - For the 2015-2016 sporting season, the total amount of EUR 3,975, payable in *"five instalments"* of EUR 795 each, as from February 2016 until June 2016;

  - For the 2016-2017 sporting season, the total amount of EUR 9,540, payable in *"eleven instalments"* of EUR 795 each, "as from July 2016 until June 2017";

  - For the 2017-2018 sporting season, the total amount of EUR 9,540, payable in *"eleven instalments"* of EUR 795 each, "as from July 2017 until June 2018";

- The 2016 Contract 2 was signed by the Appellant on 29 January 2016 in Congo in presence of Mr Luis Bettencourt de Araújo, intermediary, and was thereafter registered with the Portuguese Football Federation. Both Parties performed the contract during the first five months of its duration. Between 14 March 2016 and 9 May 2016, the Respondent paid the Player's salary in cash as usual for the club and made several additional money transfers to the Appellant's benefit in Congo for a total amount of EUR 3,700 approximatively. The Respondent never received the termination letter allegedly sent by the Appellant on 24 June 2016.

- The 2015 Contract is false and ADS's signature thereon is falsified: no contract was signed between the Parties at that time, as a result of lack of financing.

- After his summer holidays, the Player came back to Portugal but refused to train with the team, and as a result, breached the 2016 Contract 2. The Appellant therefore owes ADS

a compensation pursuant to Article 17.1 of the RSTP, which was correctly assessed by the FIFA DRC in the Appealed Decision.

55. The Respondent requested the Sole Arbitrator to decide as follows:

"– Refusing to grant the appeal;

– Confirming the appealed decision of FIFA's Dispute Resolution Chamber, that made a correct evaluation of the evidence and decided accordingly within the legal framework applicable to this case;

– Obliging the Appellant to pay the costs of the appeal;

– Given that the Respondent was assisted in the present procedure by a professional legal adviser, to order the Appellant to contribute towards its costs".

V. HEARING

56. At the hearing, the Sole Arbitrator heard several witnesses. Their testimony may be summarised as follows:

i. Mr Luís Araújo Bettencourt: Mr Bettencourt is a former collaborator of Mr Pinto. Mr Bettencourt first entered into contact with the Player in 2015 but a transfer of the Player could not be realised at the time. At the end of January 2016, Mr Bettencourt travelled for the first time to Congo and offered a contract to the Player, with a salary of around EUR 800 per month. The low salary was compensated by the expectation that the Player would shortly after his arrival in Portugal be transferred to bigger European club. Upon signature of the contract in Congo by the Player, Mr Bettencourt paid around EUR 20-30,000 to the Player and to his intermediary, Mr Koussangata.

ii. Mr Pedro Serpa Pinto: Mr Pinto, who is a football players' intermediary, was asked by ADS in 2015 to contract the Player for ADS, with the assistance of Mr Bettencourt. In order to pay such monthly salary to the Player, ADS was relying on a third party's financial participation. The negotiations did not go through as a result of the then new FIFA rules that prohibit third party ownership of Players' economic rights. As a result, the 2015 Contract was never signed by ADS. In January 2016, Mr Bettencourt went to Congo because ADS was still interested in contracting the Player and the Player still showed interest in playing in Europe. The Player signed the contract in Congo in the presence of Mr Bettencourt. The Player accepted the salary of EUR 795 per month because Mr Bettencourt and Mr Pinto had indicated to him that they would make a good proposal to him in the summer break and that they would help the Player to support his family needs. The amount of the monthly salary offered to the Player in 2016 corresponds to the typical salary paid by ADS to its players. Mr Pinto stated that indeed during the contract, he made several payments to Congo. After the summer break, the Player returned to Portugal because Mr Pinto had presented to him an offer from another Portuguese club, which provided for a monthly salary of EUR 4,000. Such offer was made by Mr Pinto upon authorisation to do so by ADS. Upon arrival in Portugal, the Player delivered his

passport voluntarily to Mr Pinto who delivered it to ADS to arrange for the Player's residence permit. Upon request by the Consul, Mr Pinto returned said passport back to the Player.

57. The Sole Arbitrator also heard the testimony of the Player, and the President of ADS as Party. The Parties' testimonies can be summarised as follows:

iii. Mr Kader Georges Bidimbou: In 2015, the Player was playing football with AC Leopard for a monthly salary of approximatively EUR 1,200. Considering his salary in Congo as well as his family obligations towards his wife and child in Congo, he would never have accepted to join ADS for a monthly salary of EUR 795. The Player however signed a contract in Congo with ADS for the same period but for a monthly salary of approximatively EUR 4000. He signed this contract in Congo in presence of Mr Araújo Bettencourt, Mr Koussangata and a representative of AC Leopard. During the contract, the Player never received any salary from ADS, except for the reimbursement of the Player's flight ticket to Portugal. His signature on salary slips is false. He complained about the situation with Mr Pinto. On 18 May 2016, the Player travelled back to Congo. On 24 June 2016, the Player sent a termination letter by fax to ADS and to the Portuguese Football Federation. The Player however returned to Portugal in July upon invitation from Mr Pinto who told him that he would sign with another Portuguese club. Upon arrival in Portugal, the Player gave his passport to Mr Pinto for finalisation of the administrative formalities. Mr Pinto however informed the Player that he would be playing for the same club, ADS. Mr Pinto also told the Player that if he wanted to retrieve his passport, he would have to sign the Statement. At that time, the Player was in contact with the consul from Congo, who advised him to sign the Statement in order to retrieve his passport. The Player signed the Statement and left Portugal. In August-September 2016, the Player entered into contact with Olympique Khourigba and signed a contract with Olympique Khourigba. Upon signature of that contract, the Player was registered with AC Leopards. The contract with Olympique Kourigba was originally signed for a duration of 4 years; the Player left the club after one year; he did not claim the remaining part of his contract before FIFA.

iv. Mr Luis Vargas Cruz: Mr Luis Vargas Cruz is the President of ADS. In the beginning of 2015, ADS had the intention to hire the Player but the negotiations could not go through in particular because of a change in FIFA regulations. Hence, no contract was signed in 2015 with the Player. Early 2016, ADS offered an employment contract to the Player with a monthly salary of EUR 795, which is in line with the salaries that ADS usually pays to its players. The Player accepted and signed the contract because he knew he would have a chance to sign with other clubs with better conditions at the end of the sporting season. The contract was signed while the Player was in Congo in presence of Mr Bettencourt. Mr Luis Vargas Cruz was in Portugal at that time. The Player's integration in the team was easy and quick. His salary was paid every month in cash and the Player never complained to ADS about his salary. In May 2016, the Player went on holidays to Congo. ADS never received any resignation letter from the Player. In July 2016, the Player returned to Portugal. He delivered his passport voluntarily for administrative purposes. The Player then refused to practice and expressed his intention to leave ADS. On 19

August 2016, the Player signed a statement confirming that he was not in state to play with ADS and that ADS did no owe him any amount. After signing the statement, the Player left Portugal. Only later that year, ADS was informed through media that the Player had signed a contract with a Moroccan football club; after due verification, ADS realized that no international transfer certificate was requested for the Player's transfer to such Moroccan football club.

VI. JURISDICTION OF THE CAS

58. The question whether or not the CAS has jurisdiction to hear the present dispute must be assessed on the basis of the *lex arbitri*. As Switzerland is the seat of the arbitration, and none of the Parties are domiciled in Switzerland, the provisions of the Swiss Private International Law Act ("PILA") apply, pursuant to its Article 176.1. In accordance with Article 186 of PILA, the CAS has the power to decide upon its own jurisdiction (*"Kompetenz-Kompetenz"*).

59. Article R47 of the CAS Code provides as follows:

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

60. The jurisdiction of CAS in the present matter derives from Article 58 of the FIFA Statutes, which provides as follows:

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

61. There is no doubt that the Appealed Decision qualifies as a final decision passed by FIFA's legal bodies and as such shall be appealed against before the CAS. The Sole Arbitrator also notes that the jurisdiction of the CAS to hear the present appeal is not disputed, and is even confirmed by the Parties' signature of the Order of Procedure.

62. The Sole Arbitrator therefore finds that it has jurisdiction to decide on the present appeal.

VII. ADMISSIBILITY

63. Article R49 of the CAS 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders

her/his decision after considering any submission made by the other parties".

64. Article 58 of the FIFA Statutes provides as follows:

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

65. The Sole Arbitrator holds that the appeal is admissible since the Statement of Appeal was filed within the time limit provided under Article R49 of the CAS Code and Article 58 of the FIFA Statutes and that the other requirements provided under Article R48 of the CAS Code are fulfilled. The admissibility of the present appeal is further confirmed by the Parties' signature of the Order of Procedure.

VIII. APPLICABLE LAW

66. Pursuant to Article R58 of the CAS Code:

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

67. To decide on the present matter, the Sole Arbitrator shall apply primarily the relevant FIFA Statutes, and, in particular the FIFA Regulations on the Status and Transfer of Players. Considering that the Parties filed their respective claims before the FIFA DRC in January and February 2017, the Sole Arbitrator shall apply the 2016 version of the RSTP (the "RSTP"). Since the FIFA is domiciled in Switzerland, Swiss Law applies on a subsidiarily basis, as per Article 57.2 of the FIFA Statutes, as well as the consistent jurisprudence of CAS on this issue.

IX. MERITS

68. As to the merits of this case, the Player contends that he had terminated the contract that he had signed with ADS on 29 January 2016 ("2016 Contract 1") with just cause, since ADS failed to pay the agreed remuneration due for his services. The Respondent disputes owing any salary to the Player, and contends that the Player received the agreed salaries under the "2016 Contract 2" in cash in addition to other payments made to the benefit of his family in Congo. The Respondent also submits that the "2016 Contract 2" was terminated by the Player without just cause since during the summer 2016, the Player clearly expressed his intention to leave ADS and refused to resume training.

In light of the Parties' submissions, the Sole Arbitrator shall examine whether or not the employment relationship between the Parties had been terminated with just cause, as well as the consequences of termination. Before delving into this issue, the Sole Arbitrator however noted that the Respondent had argued that the Appellant's claim as to outstanding salaries

and compensation falls out of the scope of review of the present appeals procedure and should for this reason already be dismissed or declared inadmissible.

A. The scope of review of CAS in the present proceedings

69. In the Appeal Brief, the Player requested from the Sole Arbitrator, *inter alia*, to decide that ADS pays to the Player outstanding salaries in the amount of EUR 15,200, as well as compensation for breach of contract in the amount of EUR 120,800. The Respondent argues that this specific claim falls outside of the scope of review of the CAS since it was not brought nor discussed before the FIFA DRC.

70. The scope of review of a CAS Panel is defined as follows under Article R57 of the CAS Code: *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".*

71. A CAS Panel may therefore decide *de novo* on the object of a challenged decision: *"The Panel is thus not limited in merely reviewing the legality of the decision challenged, but can issue a new decision on the basis of the applicable rules"* (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, p. 507, N 12).

72. Such *de novo* power of review of the challenged decision is however not unlimited. In particular, the *de novo* power of review of a CAS Panel has to be limited to the scope of the first instance judicial body that rendered the appealed decision (cf. MAVROMATI/REEB, op. cit., p. 522, N 54). In other words, a CAS Panel can revisit the legitimacy of the appealed decision, and go as far as to issue a new decision, without however, trespassing the scope of the matter as presented already before the first instance body. Furthermore, the CAS Panel is also limited to the issues dealt with in the challenged decision (ibid., N 55; RIGOZZI/HASSLER, op. cit., n° 19 ad art. R57 CAS Code).

73. In the present matter, the Sole Arbitrator noted that, even assuming *arguendo* that the Player's specific claim as to outstanding salaries and compensation for breach of the employment relationship has been properly placed before him, they would have been anyway dismissed for the reasons explained hereafter.

B. Termination of the employment relationship by the Appellant

74. The Sole Arbitrator recalled that, in the present matter, the Appellant's quintessential claim was that he had a just cause to unilaterally terminate the employment contract, since ADS had failed to pay any salary to him (from the beginning of his employment relationship with ADS until the day when he left ADS). Moreover, the Player argued that, according to CAS case law, he did not need to send a prior warning to ADS, since the breach by ADS was persistent and of high severity, causing the definitive loss of confidence and trust between the Player and ADS (CAS 2017/A/5092; CAS 2014/A/3684 & 3693; CAS 2014/A/3706). The Player finally, argued that ADS did not show any further interest in keeping the Player in its ranks, after he left Portugal in August 2016.

75. Pursuant to Article 14 of the FIFA RSTP:

"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".

76. The FIFA RSTP does not define what constitutes "just cause". According to the FIFA RSTP Commentary (No 2 to Art. 14), *"[t]he definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. 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 over 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".*

77. The definition of "just cause", and whether just cause exists shall thus be established on a case-by-case basis. This does not mean, of course, that the Sole Arbitrator was bereft of guidance, when examining the merits of this claim. He could rely on the existing case law developed by previous CAS panels on this score, as well as on relevant provisions of the applicable Swiss law. The Sole Arbitrator wanted to recall at this stage that, when deciding on the applicable law, he had decided to apply the relevant FIFA Statutes, and to the extent necessary and warranted, have recourse to Swiss law to fill in the gaps.

78. The Sole Arbitrator, consequently, first refers to the long-standing jurisprudence of the CAS concerning "just cause" to terminate an employment contract, in particular CAS 2006/A/1180, where the Panel had held that: *"[t]he only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be 'insubstantial' or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract"* (CAS 2006/A/1180, para. 26; see also: CAS 2013/A/3237; CAS 2013/A/3091, 3092 & 3093). The Sole Arbitrator further notes that the CAS cases referred to by the Appellant refer to specific circumstances which are not comparable to the present matter and are therefore irrelevant.

79. Second, because of the subsidiary application of Swiss law when interpreting the RSTP, the Sole Arbitrator also refers to Art. 337 para. 2 of the Swiss Code of Obligations ("SCO"), which provides that: *"[…] good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice".*

80. According to the jurisprudence of the Swiss Federal Tribunal, the facts relied on in support of an immediate termination must have resulted in the loss of the relationship of trust which forms the basis of the employment contract. As general rule, only a serious breach may constitute "just cause" for a termination, but other incidents may also justify termination (see ATF 137 III 303, par. 2.1.1). Furthermore, 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 the presence of a less serious infringement, an immediate termination is possible, only if the party at fault persisted in its breach after having been warned (ATF 129 III 380, para 2.2). The judge will determine at its discretion, and in light of the circumstances of the case, whether there is good cause (Art. 337 para. 3 SCO), in accordance with the principles of justice and equity (Art. 4 of the Swiss Civil Code).

81. The Sole Arbitrator now turns to the facts of the case. As a preliminary matter, the Sole Arbitrator notes that the Player accepts that he did not put ADS in default for the latter's failure to pay the agreed salaries prior to him sending to ADS his termination letter. In the Player's view, such prior warning was not necessary in light of the severity of the breach by ADS and its persistent character. The Respondent argues that it did pay the Player's salaries as well as other payments and that a prior warning was indeed justified in light of the circumstances of the present case. Since it is the Player that has invoked just cause to justify his termination of the employment relationship linking him to ADS, and since it is him as well that has argued that the breach was so severe as to alleviate him from the obligation to put ADS at default, it is for him to prove his claim (*actori incumbit probatio*).

82. Based on the record before him, the Sole Arbitrator agrees with the Respondent. The evidence on file – in particular the salary receipts signed by the Player and the transfers of money for the benefit of the Player's family in Congo – shows that the Player had received at least several payments from ADS, or on its behalf, in the course of the first half of 2016. Under the circumstances, it is simply not the case that throughout the employment relationship ADS had been consistently defaulting on its obligation to compensate the Player for his services. A default notice in writing was therefore, in the Sole Arbitrator's view, warranted, necessary indeed, to explain in what exactly the breach by ADS consisted in light of the contractual obligations that it had assumed vis-à-vis the Player. It would also have allowed ADS to remediate to its contractual breach, if any. All the more so, since the Parties could not agree on the question whether the termination letter had been properly received by ADS: whereas the Respondent denies having received the termination letter (or any other warning), the Player submits that the termination letter was sent to ADS and to the Portuguese Football Federation by fax, but could not provide the fax receipt either for ADS or for the Portuguese Football Federation. Finally, the breach by ADS, if any, could in any case not qualify as persistent and severe to exonerate the Player from the obligation to place ADS at default, since in August 2016 the Player had signed a statement in which he had confirmed that ADS did not owe him anything. As a result, the Sole Arbitrator finds that in light of the circumstances of the present case, a warning prior to termination letter was necessary, otherwise the Player's claim that he had "just cause" to terminate his employment relationship with ADS could not be sustained.

83. Since it is not disputed that the Player had not warned ADS about its failure to pay his salary, the Sole Arbitrator finds that by leaving Portugal and ADS without authorization in August 2016, the Player had terminated the employment contract without just cause.

C. Consequences of the termination of the employment relationship without just cause

84. Article 17 para. 1 of the FIFA RSTP 2016 provides that, in case of termination of a contract without just cause, the party responsible for such termination shall pay compensation to the other party. In light of the conclusion reached above, the Sole Arbitrator finds that the Player is liable to pay compensation to ADS for the termination of the employment relationship without just cause.

85. Article 17 para. 1 of the FIFA RSTP 2016 further provides guidelines as to the calculation of the amount of the compensation due in case of termination of the contract without just cause. In accordance with Article 17 para. 1 of the FIFA RSTP 2016, the amount of the compensation shall be calculated, in particular and unless otherwise provided for in the contract at stake, with due consideration for the law of the country concerned, the specificity of sport, and other objective criteria, including in particular the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years as well as the fees and other expenses paid or incurred by the former club and whether the contractual breach falls within the protected period. In accordance with Article 17 para 1 of the FIFA RSTP 2016 and the FIFA Commentary to such provision, the list of objective criteria provided for under Article 17 para. 1 of the FIFA RSTP 2016 is not exhaustive.

86. The Sole Arbitrator notes that neither the 2015 Contract, the 2016 Contract 1 nor the 2016 Contract 2 include a specific compensation clause, so that it cannot be argued that the Parties had mutually agreed upon an amount of compensation in the event of breach of contract.

87. The Sole Arbitrator agrees that in the circumstances of the case at stake, it is appropriate to retain the market value of the Player at the time of the termination of the employment relationship with ADS as benchmark for the calculation of the compensation due to ADS.

88. The Player terminated the employment relationship with ADS in August 2016 and on 16 September 2016, the Player and AC Léopards signed a transfer agreement of the Player with Khourigba. The value for the transfer of the Player to Khourigba initially amounted USD 30,000, but was amended on 29 November 2011 to MAD 160,000, which is equal to USD 17,950.30.

89. In light of the discrepancy between the two sums, the Sole Arbitrator finds that it is the amount actually paid that constitutes the market value of the Player. The Sole Arbitrator had before him information that the Player had been transferred for an amount not exceeding USD 17,950.30. ADS did not rebut this information. Consequently, this amount is to be considered as a reasonable and justified compensation for the breach of contract in the case at hand.

90. In addition, the Sole Arbitrator sees no reason not to confirm the Appealed Decision as to the imputation of an interest of 5% p.a. on the amount of compensation as of the date on which the claim was lodged before FIFA DRC, i.e. 21 February 2017, until the date of effective payment.

91. The appeal of the Player is thus, for all the aforementioned reasons partially accepted.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 7 November 2019 by Kader Georges Bidimbou against Associação Desportiva Sanjoanense with respect to the Decision of the FIFA Dispute Resolution Chamber dated 7 March 2019 is partially accepted.

2. The Decision of the FIFA Dispute Resolution Chamber dated 7 March 2019 is confirmed save for point 2, which shall state as follows:

   "Kader Georges Bidimbou, has to pay to Associação Desportiva Sanjoanense, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of USD 17'950.30, plus 5% interest p.a. on said amount as of 21 February 2017 until the date of effective payment".

3. (…).

4. (…).

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