Arbitration CAS 2016/A/4693 Al Masry Sporting Club v. Jude Aneke Ilochukwu, award of 24 April 2017

Panel: Mr Fabio Iudica (Italy), President; Mr Olivier Carrard (Switzerland); Mr João Nogueira Da Rocha (Portugal)

Football
Termination of the employment contract with just cause
Suspension of a player's contract of employment for the duration of his loan
Analysis of the existence of a just cause to terminate an employment contract
The criterion of the issuance of a default notice prior to terminating the contract of employment

1. **According to FIFA's Commentary on its Regulations on the Status and Transfer of Players (RSTP), and unless otherwise agreed between the relevant parties, the effects, rights and obligations of an employment contract concluded between a player and his/her club of origin are temporarily suspended during the duration of said player's loan to another club. Therefore, in the absence of any relevant contractual provisions or separate document to be referred to, it is the player's burden to prove that the monthly remuneration agreed in the contract signed with his/her club of origin must be respected during the course of the loan period.**

2. **The definition of just cause as well as the question whether just cause in fact exists shall be established on a case-by-case basis, in accordance with the merits of each particular case. With regard to the type of violation, consistent with CAS jurisprudence, non-payment or late payment of remuneration by the employer does in principle – and particularly if repeated – constitute just cause for termination of the employment contract, since the employer's payment obligation is his main obligation towards the employee. In case of failure to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulties by reason of the late or non-payment is irrelevant and the only relevant criterion is whether the breach of obligation is such that it causes the confidence, which the party has in future performance in accordance with the contract, to be lost.**

3. **In principle, according to CAS' jurisprudence, and consistent with Swiss law, a party must have warned the other party to be allowed to validly terminate an employment contract, in order for the latter to have had a chance, if it deemed the complaint to be legitimate, to comply with its obligations. Only a breach which is of a certain severity justifies a termination of a contract without a prior warning. In principle, the breach is considered of a certain severity when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, such as serious breach of confidence. In this context, a club's default of**

payment of a player's salaries in conjunction with its failure to notify him of the beginning of the preparation period, which amounts to the exclusion of the relevant player from his main activity, are clear indications that the conditions for the continuation of the employment relationship between the parties were no longer present at the time when the player terminated the employment contract and that the severity of the infringement by the club was such as to justify termination without a prior warning.

I. INTRODUCTION

1. This appeal is brought by Al Masry Sporting Club against the decision rendered by the Dispute Resolution Chamber (the "DRC") of the Fédération Internationale de Football Association ("FIFA") on 18 February 2016 with regard to a contractual dispute between Al Masry Sporting Club and Mr Jude Aneke Ilochukwu in relation to the early termination of an employment contract (the "Appealed Decision").

II. PARTIES

2. Al Masry Sporting Club (the "Appellant" or the "Club") is a professional football club based in Port Said, Egypt, affiliated with the Egyptian Football Federation (the "EFA"), which in turn is affiliated with FIFA.

3. Mr Jude Aneke Ilochukwu is a professional football player born on 23 April 1990 in Enugu, Nigeria (the "Respondent" or the "Player").

   (The Appellant and the Respondent are hereinafter jointly referred to as the "Parties").

III. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' oral and written submissions on the file and relevant documentation produced in this appeal. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On 29 August 2012, the Club concluded an agreement with Warri Wolves FC for the transfer of the Player for the amount of USD 200,000.00.

6. On 1 September 2012, the Club and the Player signed an employment contract valid as from the date of signing until the end of the sporting season 2014/2015 (the "Employment

Contract") under which the Club undertook the obligation to pay the following remuneration to the Player:

a) USD 150,000.00 for the sporting season 2012/2013, of which USD 75,000.00 payable on 1 September 2012, USD 3,750.00 as monthly remuneration payable as from 1 October 2012 until 12 July 2013, and USD 37,500.00 payable on 1 August 2013;

b) USD 250,000.00 for the sporting season 2013/2014;

c) USD 300,000.00 for the sporting season 2014/2015.

7. The Player was regularly registered with the Club for the sporting season 2012/2013 in accordance with the EFA.

8. On 5 September 2012, a trilateral agreement was signed between the Club, the Player and El Dakhlia Sporting Club ("El Dakhlia") under which the Player was transferred to the latter on loan for the sporting season 2012/2013, *i.e.* from September 2012 until the end of football season 2012/2013 (the "Loan Contract").

9. The "Loan Contract" stipulates that *"The agreement is made against five hundred and sixty-two thousand and five hundred Egyptian Pound to be paid to the Player"* in 12 monthly instalments of 22,500.00 Egyptian Pound each, except for the first instalment which was due on 1 September 2012 in the amount of 196,875.00 Egyptian Pound and the last instalment which was payable on 1 August 2013 and amounted to 140,625.00 Egyptian Pound.

10. By fax letter on 6 August 2013, the Player notified the Club of a formal notice of termination of the Employment Contract claiming that the Club failed to fulfil its financial obligations during the football season 2012/2013, consisting in more than 11 monthly instalments of the Players' salary.

11. Moreover, in the same fax letter, the Player informed the Club that *"Beside these facts, the above mentioned Player cannot carry on his sportive career in the club because of the civil war in Egypt and he hasn't got any safety under the conditions of the country"*.

12. As a consequence, the Player concluded that *"Under these circumstances, the Player has no choice but to unilaterally terminate his employment contract with just cause with immediate effect. We hereby kindly inform you that the employment contract of the above mentioned Player with your club is unilaterally terminated with just cause and the Player will seek remedy before the judicial bodies of FIFA"*.

13. On 2 January 2014, the Player lodged a claim before the FIFA's DRC against the Club, requesting the following:

- Outstanding remuneration as per the Employment Agreement in the amount of USD 150,000.00, with regard to the sporting season 2012/2013 plus interest from the relevant deadlines;

- Compensation for breach of contract based on the Player's termination of the Employment Contract with just cause, in the amount of USD 550,000.00, corresponding to the residual value of the Employment Contract;

- Additional compensation in the amount of USD 50,000.00 relating to the Club's bad faith and for lost bonuses.

14. During the FIFA proceedings, the Club failed to submit its response within the prescribed time limit. In its unsolicited late submissions, the Club claimed that the Player was transferred on loan for the sporting season 2012/2013 to the Egyptian club El Dakhlia and that the latter was responsible for the Player's salaries during the relevant period. In addition, the Club maintained that it could not benefit from the Players' services since the Club did not participate in the Egyptian championship during the sporting season 2012/2013 and moreover, that the Player left Egypt and failed to return to the Club after the loan period, despite having been invited to do so.

15. On 18 February 2016, the FIFA's DRC rendered the Appealed Decision by which the claim lodged by the Player was partially accepted and the Club was ordered to pay to the Player, within 30 days from the date of notification of this decision, outstanding remuneration in the amount of USD 150,000, plus interest *p.a.*, until the date of effective payment as follows:

a. 5% *p.a.* as of 2 September 2012 on the amount of USD 75,000.00;

b. 5% *p.a.* as of 2 October 2012 on the amount of USD 3,750.00;

c. 5% *p.a.* as of 2 November 2012 on the amount of USD 3,750.00;

d. 5% *p.a.* as of 2 December 2012 on the amount of USD 3,750.00;

e. 5% *p.a.* as of 2 January 2013 on the amount of USD 3,750.00;

f. 5% *p.a.* as of 2 February 2013 on the amount of USD 3,750.00;

g. 5% *p.a.* as of 2 March 2013 on the amount of USD 3,750.00;

h. 5% *p.a.* as of 2 April 2013 on the amount of USD 3,750.00;

i. 5% *p.a.* as of 2 May 2013 on the amount of USD 3,750.00;

j. 5% *p.a.* as of 2 June 2013 on the amount of USD 3,750.00;

k. 5% *p.a.* as of 2 July 2013 on the amount of USD 3,750.00;

l. 5% *p.a.* as of 2 August 2013 on the amount of USD 37,500.00.

16. In addition, the Club was also condemned to pay compensation for breach of contract in the amount of USD 250,000.00.

17. The grounds of the Appealed Decision were served by facsimile to the Parties on 7 June 2016.

18. The grounds of the Appealed Decision can be summarized as follows:

- As a preliminarily point, the DRC established that it was competent to deal with the present dispute based on the provision of article 3 para 1 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber in conjunction with article 24 para 1 and 2 (the "Procedural Rules"), as well as article 22 lit. b) of the FIFA Regulations on the Status and Transfer of Players, edition 2015 (the "FIFA Regulations"), since it concerns an employment-related dispute with an international dimension between a Nigerian player and an Egyptian club.

- With regard to the merits, the DRC took into consideration that on 6 August 2013, the Player notified the Club of the termination of the Employment Contract based on the fact that he never received any payment from the Club since the beginning of the employment relationship.

- On the other hand, the Chamber noted that the Club failed to file its response to the Player's claim within the relevant time limit, despite having been invited to do so. In fact, the Club's reply was only received after the closure of the investigation phase. In this context, the members of the DRC decided not to take into account the response of the Club and to decide on the basis of the submissions filed by the Player, in accordance with article 9, para 3 of the Procedural Rules.

- In view of the above, the DRC concluded that the Player had just cause to terminate the Employment Contract on 6 August 2013 and that the Club was liable to pay to the Player the amounts which were outstanding at the moment of termination, *i.e.* USD 150,000.00 corresponding to the monthly instalments related to the sporting season 2012/2013, as well as interest at the rate of 5%, accrued from the relevant deadline until the date of effective payment.

- In addition, the Chamber established that the Player was entitled to receive compensation for the breach pursuant to article 17, para 1 of the FIFA Regulations and considered that the total amount of USD 550,000.00, which was the remaining value of the Employment Contract at the time of termination, shall be reduced in view of the Player's duty to mitigate his damages. As a consequence, the DRC decided to award the amount of USD 250,000.00 (*i.e.* the salary for the sporting season 2013/2014) to the Player as compensation for breach of contract.

IV. PROCEEDINGS BEFORE THE CAS

19. On 27 June 2016, the Appellant filed a statement of appeal before the Court of Arbitration for Sport (the "CAS") against the Player with respect to the Appealed Decision in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (the "Code"). The statement of appeal did not contain the nomination of an arbitrator for the Appellant.

20. On 1 July 2016, the Appellant proposed that the present matter be submitted to a sole arbitrator. The Respondent did not provide the CAS Court Office with his preference in this regard.

21. On 8 July 2016, the Appellant requested that its statement of appeal be considered as the appeal brief, pursuant to Article R51 of the CAS Code.

22. On 8 August 2016, the Respondent filed his answer in accordance with Article R55 of the Code.

23. On 18 August 2016, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division decided to submit the present matter to a panel of three arbitrators in accordance with Article R50 of the Code. Therefore, the Appellant was invited to nominate its arbitrator within a deadline of 7 days.

24. On 1 September 2016, the Appellant nominated Mr Olivier Carrard as arbitrator.

25. On 7 September 2016, the Respondent nominated Mr João Nogueira Da Rocha as an arbitrator.

26. On 19 October 2016, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the Parties that the Panel appointed to decide the present case was constituted as follows:

    President: Mr Fabio Iudica, Attorney-at-law in Milan, Italy.

    Arbitrators: Mr Olivier Carrard, Attorney-at-law in Geneva, Switzerland;
    Mr João Nogueira Da Rocha, Attorney-at-law, in Lisbon, Portugal.

27. On 15 November 2016, FIFA filed its complete case file with the CAS Court Office.

28. On 19 January 2017, the Parties returned to the CAS Court Office duly signed copies of the Order of Procedure. With the signature of the Order of Procedure, the Parties confirmed the jurisdiction of the CAS over the present dispute.

29. On 23 January 2017, a hearing was held in the present case in Lausanne, Switzerland. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution and composition of the Panel, nor to the jurisdiction of the CAS.

30. In addition to the Panel and Brent J. Nowicki, Managing Counsel to the CAS, the following persons attended the hearing:

For the Appellant:

- Mr Nasr Azzam, counsel;
- Mr Hassan Nassef, board member.

For the Respondent:

- Mr Juan de Dios Crespo Perez, counsel.

31. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their rights to be heard and treated equally were respected.

V. SUBMISSIONS OF THE PARTIES

32. The following outline is a summary of the main positions of the Appellant and the Respondent which the Panel considers relevant to decide the present dispute and does not comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Appellant and the Respondent, even if no explicit reference has been made in what follows. The Parties' written and oral submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration by the Panel.

Appellant's submissions and requests for relief

33. The Appellant made a number of submissions in its statement of appeal which can be summarized as follows.

34. The Club first maintained it was prevented from participating in the 2012/2013 championship as a consequence of the disorders occurred during the match played against the club Al Ahly at the Port Said Stadium on February 2012 (sporting season 2011/2012), where more than 70 people lost their lives during the turmoil.

35. For the reason above, the Club decided to loan the Player to El Dakhlia and the Loan Contract was therefore signed.

36. According to the Appellant, during the Loan Contract, which was registered with the EFA, the Player regularly received his salaries from El Dakhlia.

37. In this respect, the Club relied on exhibit 4 attached to its statement of appeal according to which, on 15 August 2013, the Player allegedly acknowledged having received all the payments due during the sporting season 2012/2013, *"and shall have no right to claim any payment hereafter"*. In particular, the Club claimed that on 1 August 2013, the Player received from El Dakhlia the payment of his last instalment due under the Loan Contract.

38. The Club also stressed that although the Player was supposed to return to Al Masry on 1 September 2013, after termination of the loan period (and in fact the Club maintained that it requested the registration of the Player with it for the sporting season 2013/2014), the Respondent never showed up at the Club's premises for the beginning of the sporting season 2013/2014.

39. Since the Player failed to take part in the trainings at the beginning of the preparation period for the sporting season 2013/2014 (*i.e.* 24 August 2013), on 8 September 2013, the Club notified the EFA of the Player's absence. On 30 October 2013, the Club informed the EFA that due to the continuation of the Player's absence from training with the First Team, the Board of Directors decided to impose a financial penalty on the Player in the amount of USD 125,000.00.

40. Afterwards, the Appellant claimed to have become aware of the fact that the Player left Egypt without notifying the Club and without any authorization.

41. Surprisingly, the Player lodged a claim before FIFA against the Club after having unilaterally terminated the Employment Contract and failed to disclose the signing of the Loan Contract.

42. In its statement of appeal, the Appellant submitted the following requests for relief:

- *"To accept our challenge for rendered decision by Dispute Resolution Chamber FIFA, on 18th February 2016 regarding the player Jude Aneke, Nigeria and Al Masry Sporting Club, referred to hereabove".*

- *"To nullify items (2) and (4) of the rendered decision rendered by Dispute Resolution Chamber FIFA, on 18th February 2016, regarding the player Jude Aneke, Nigeria and Al Masry Sporting Club, Case Ref. huk 14-00255, as per the DRC meeting on February 18, 2016, as referred to in the fax addressed to Al Masry Sporting Club on 7th June 2016, attachment (13), which states"*:

  "2. The Respondent, Al Masry Sporting Club, has to pay to the Claimant, within 30 days from the date of notification of this decision, outstanding remuneration in the amount of USD 150.000, plus interest p.a., until the date of effective payment".

  "4. The Respondent has to pay to the Claimant, within 30 days as from the date of notification of this decision, a compensation for breach of contract in the amount of USD 250,000.00".

- *"To bind the player to pay a compensation of USD 300,000.00 for Al Masry Sporting Club for material and immaterial damages incurred by Al Masry Sporting Club – value of contract made to Warri Wolves Club against the transfer of the player, who did not play for our Club and left us without notification or approval and for terminating the contract unilaterally".*

- *"To bind the player to pay FIFA fees, Dispute Resolution Chamber panel cost, administrative and any other fees hereof".*

43. The Club also requested *"To bind the player to pay the cost of the court, administrative cost, and any other relevant costs as well as the compensation stated in the reasons of appeal memorandum"*.

Respondent's Submissions and Requests for Relief

44. The position of the Respondent is set forth in its answer and can be summarized as follows.

45. First of all, the Player argued that the Appellant did not participate in the Premier League Championship during sporting season 2012/2013 by its own initiative and not due to disqualification, as assumed by the Club.

46. According to the Respondent, and with regard to the Loan Contract, the Club assured the Player that it would not suspend the payment of the salaries agreed under the Employment Contract and therefore the Player was persuaded to sign the loan agreement with El Dakhlia on 5 September 2012.

47. In addition to and notwithstanding the above, there is no clause in the Loan Contract providing that the Club would be exempted from paying the relevant salaries to the Player as agreed under the Employment Contract, nor is there any clause by which the Player renounced to receive such payments.

48. In this context, the Player maintained that the Employment Contract was still in force during the validity of the Loan Contract. Since the Parties did not decide to suspend the Employment Contract during the loan period, the Player was entitled to receive remuneration both under the Employment Contract and the Loan Contract.

49. In view of the above and taking into account that the Club did not make any payment throughout the duration of the Loan Contract, the Player had just cause to terminate the Employment Contract on 6 August 2013.

50. Moreover, the Player contested the authenticity and reliability of the declaration contained in exhibit 4 submitted by the Appellant, according to which he allegedly recognized he had no claim against the Club with respect to the payment of his receivables under the Employment Contract. In fact, since it is demonstrated by his passport that he was in Turkey in the period between 23 July 2013 and 30 August 2013, he would not have been able to sign such declaration on 15 August 2013 (*i.e.* the signing date according to the Appellant's document).

51. Therefore, it follows that such a statement was not signed by the Player as it is also confirmed by the fact that the signature on the relevant document does not belong to the Player and therefore exhibit 4 submitted by the Club is a false document.

52. In addition, exhibit 5 submitted by the Appellant does not constitute any conclusive evidence as to the payments allegedly made by El Dakhlia by bank cheques to the Player, since the relevant statement was not signed or endorsed by the Respondent.

53. Even supposing that the Club was not liable to pay the Player's salaries during the Loan Contract, the Player still had just cause to terminate the Employment Contract on 6 August 2013 based on the following facts: a) the first instalment of the Player's salary payable under the Employment Contract, amounting to USD 75,000.00, became overdue on 1 September 2012, *i.e.* before the Loan Contract was signed between the Parties; b) since the Loan Contract was supposed to terminate at the end of sporting season 2012/2013, which fact occurred at the end of June 2013, the Club was therefore liable to pay the Player's salary with regard to the instalments which fell due on 1 July 2013 (USD 3,750.00) and on 1 August 2013 (USD 37,500.00), respectively.

54. Therefore, when the Player notified the Appellant of the termination of the Employment Contract on 6 August 2013, the Club was nonetheless in default towards the Player.

55. With reference to the penalty allegedly imposed on the Player by the Club, the Player maintained that it has no legal effect since the relevant decision was adopted after the Employment Contract had been terminated by the Player.

56. In its answer, the Respondent submitted the following requests for relief:

> *"To Dismiss this Request for Arbitration by the Appellant*
>
> *To fix a sum of CHF 5.000.- to be paid by the Appellant to the Respondent, to help the payment of its legal fees and costs*
>
> *To condemn the Appellant to the payment of whole CAS administration costs and the arbitration fees".*

VI. JURISDICTION

57. The Appellant implicitly relied on article 67, para 1 of the FIFA Statutes as conferring jurisdiction to the CAS. According to this provision, *"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"*.

58. Article R47 of the Code reads 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 him prior to the appeal, in accordance with the statutes or regulations of that body"*.

59. The jurisdiction of the CAS was not contested by the Respondent.

60. The signature of the Order of Procedure confirmed that the jurisdiction of the CAS in the present case was not disputed. Moreover, at the hearing the Parties expressly reiterated that CAS has jurisdiction over the present dispute.

61. Accordingly, the Panel is satisfied that it has jurisdiction to hear the present case.

62. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a new decision which replaces the decision appealed or annul the challenged decision and/or refer the case back to the previous instance.

VII. ADMISSIBILITY OF THE APPEAL

63. According to article 67 para 1 of the FIFA Statutes: *"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"*.

64. The Panel notes that the FIFA DRC rendered the Appealed Decision on 18 February 2016 and that the grounds of the Appealed Decision were notified to the Parties on 7 June 2016. Considering that the Appellant filed its statement of appeal on 27 June 2016, *i.e.* within the deadline of 21 days set in the FIFA Statutes, the Panel is satisfied that the present appeal was filed timely and is therefore admissible.

VIII. APPLICABLE LAW

65. Article R58 of the Code provides the following:

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

66. Article 66 para 2 of the FIFA Statutes so provides:

> *"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*.

67. In their written submissions, the Parties did not explicitly refer to any specific rules of law.

68. In consideration of the above and pursuant to Article R58 of the Code, the Panel holds that the present dispute shall be decided principally according to FIFA Regulations, with Swiss law applying subsidiarily.

69. With regard to the applicability *ratione temporis* of the relevant FIFA Regulations, the Panel holds that the present case is governed by the 2012 edition, given that the Player lodged his claim with FIFA on 2 January 2014.

IX. MERITS

70. By addressing the merits of the present case, the Panel observes that it is undisputed between the Parties that the Employment Contract was unilaterally terminated by the Player on 6 August 2013, based on the alleged failure by the Club to fulfil its financial obligations towards the Player in relation to the sporting season 2012/2013, amounting to USD 150.000,00.

71. Moreover, different from the facts which emerged during the FIFA proceedings in the first instance, the Panel observes that, in the present procedure, it is also undisputed that soon after the signing of the Employment Contract, on 5 September 2012, the Parties concluded the Loan Contract, according to which, the Player was transferred to the Egyptian club El Dakhlia, to be valid until the end of the sporting season 2012/2013. In fact, although he omitted to disclose the Loan Contract before the FIFA DRC, the Player did not raise any objection as to the existence or the execution of the Loan Contract during the proceedings before the CAS. In this respect, the Panel believes that the Appealed Decision shall be reconsidered in view of the new facts on file.

72. Pursuant to the Loan Contract submitted by the Appellant, El Dakhlia undertook to pay to the Player a total amount of Egyptian Pound 562,500.00 in 12 instalments, which fact was not challenged by the Player; and apparently, the first instalment fell due on 1 September 2012, while the last instalment was payable on 1 August 2013.

73. What is disputed between the Appellant and the Respondent is whether or not the Player had just cause for termination of the Employment Contract on 6 August 2013.

74. In this respect, according to the Player's position, the Club illegitimately failed to pay any of the salaries due to the Player under the Employment Contract, as from the date of signing for its entire duration, and therefore it committed breach of contract, thus triggering the Player's right to termination.

75. On the other hand, the Appellant argues that during the term of the Loan Contract, the Player was only entitled to receive his salaries from El Dakhlia according to the Loan Contract, and not from the Club, which therefore cannot be considered in breach of contract.

76. In addition, the Club avers that the Player actually received all the payments due by El Dakhlia under the Loan Contract, based on the following documents:

- exhibit n. 4: a written statement apparently signed by the Player on 15 August 2013 declaring he *"had received all my due payments as stipulated in the contract endorsed with El Dakhlia Sporting Club and I hereby declare and undertake that I shall not claim any other due payments for the current football season or next seasons against contracting with the Club. Signing this declaration shall be deemed as a Final Settlement and Clearance for my full contracting and I shall have no right for any other claims, whether financial or administrative claims"*;

- exhibit n. 5: a summary statement of payments allegedly made by El Dakhlia to the Player for the sporting season 2012/2013, by bank cheques.

77. In view of the above-mentioned documents, the Appellant contends that not only the Player recognized having received all the salaries due by El Dakhlia under the Loan Contract, but, in addition, that the Player allegedly released the Club from any financial obligation with respect to the Employment Contract.

78. In opposition to the foregoing, the Respondent objects to the authenticity of exhibit n. 4 in that he denies having made such a declaration; the signature is not his own and moreover, he had already moved to Turkey the date on which the document was allegedly signed. In any event, the fact that the salaries due under the Loan Contract have allegedly been settled by El Dakhlia has no relation with the present dispute between the Parties.

79. As to exhibit n. 5, the Player contends that it has no probative value as to the payments allegedly made by El Dakhlia since it consists of a unilateral statement which was not signed or endorsed by the Respondent.

80. In addition to the foregoing, and with regard to the Loan Contract, the Player also argues that he was persuaded to sign it only because the Club had assured him that it would not suspend the payments envisaged under the Employment Contract and, in any event, there is no agreement between the Parties in order to suspend the Employment Contract, and therefore the Player was entitled to receive his salaries both under the Loan Contract and the Employment Contract.

81. In consideration of the above-mentioned conflicting positions, the first issue to be considered by the Panel is whether the Club was still obliged to pay the Player's salaries in the period when the Loan Contract was in force and, in any case, whether the Club was in default of any payments in favour of the Player justifying the early termination of the Employment Contract by the Player.

82. With respect to the relationship between the Parties during the validity of the Loan Contract, the Panel refers to Article 10 of the FIFA Regulations according to which:

> *"1. A professional may be loaned to another club on the basis of a written agreement between him and the clubs concerned. Any such loan is subject to the same rules as apply to the transfer of players, including the provisions on training compensation and solidarity mechanism.*
>
> *2. Subject to Art. 5 par. 3, the minimum period of loan shall be the time between two registration Periods.*
>
> *3. The club that has accepted a player on a loan basis is not entitled to transfer him to a third club without the written authorization of the club that released the player on loan and of the player concerned".*

83. The Panel notes that the FIFA Regulations themselves do not state anything regarding the status of the employment contract between a player and his club of origin during a loan to another club. However, the Commentary and its footnotes state, inter alia, as follows:

Comment under article 10, point 4, para 2: *"During the period that the player is on loan, the effects of the employment contract with the club of origin are suspended, i.e. the club of origin is not obliged to pay the player's salary and to provide him with adequate training and/or other privileges or entitlements as foreseen in the contract. It is the responsibility of the new club to pay the player's salary in accordance with the new contract with the player".*

Footnote 49: *"If the player does not co-sign the loan agreement, he needs to enter into a separate agreement with the club of origin, whereas the effects of the employment contract are temporarily suspended".*

Footnote 54: *"For the duration of the loan, the effects, rights and obligations of the employment contract concluded between the player and the club of origin are temporarily suspended (cf. footnote 49). This implies, however, that after the end of the agreed loan period, the relevant effects come back into force. Therefore, the dub of origin must main certain rights to a say during the loan period".*

Footnote 55: *"It is, however, also permitted by the Regulations for the new club to take over all contractual obligations of the club of origin or for the club of origin to continue to pay the player´s salary during the loan period".*

84. The Panel further notes, without incidentally addressing the appropriateness of this, that FIFA evidently pursues a practice in compliance with the Commentary by which the effects of the employment contract with the club of origin are considered temporarily suspended during the loan of a player to another club. This practice is seen to be confirmed in the CAS 2013/A/3314.

85. The Panel therefore finds that in view of the fact that the Employment Contract is to be considered temporarily suspended during the loan period, the Panel shall analyze whether both Parties agreed that the Club continue to pay his salaries while the Player was on loan with El Dakhlia.

86. The Panel notes that the Parties are free to agree on whatever terms they wish in regard to the obligations to pay, for instance, wages, bonuses and other remuneration to the Player during the loan period.

87. The Panel observes that although the Player claims that the Club agreed to continue to pay his salaries during the loan period, no evidence was adduced by the Respondent in support of this argument, nor does the Loan Contract provide in this sense.

88. In this context, the Panel is mindful of the provisions of Article 8 of the Swiss Civil Code according to which *"Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact".*

89. In fact, consistent with the well-established CAS jurisprudence:

"According to the general rules and principles of law, facts pleaded have to be proven by those who plead them, i.e. the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proven by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is

required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. This principle is also stated in the Swiss Civil Code. In accordance with Article 8 of the Swiss Civil Code: unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.

It is well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. The two requisites include the concept of 'burden of proof' are (i) the 'burden of persuasion' and (ii) the 'burden of production of the proof'. In order to fulfil its burden of proof, a party must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequences envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party" (CAS 2015/A/309; CAS 2007/A/1380, with further references to CAS 2005/A/968 and CAS 2004/A/730).

90. As a consequence, failing any evidence of a specific agreement between the Parties to the contrary, which was the burden of the Respondent, the Panel concludes that according to the applicable FIFA Regulations, the Employment Contract was suspended during the validity of the Loan Contract and, therefore, the Club was not liable to pay the Player's salaries in the relevant period.

91. The Panel notes that the Loan Contract was concluded on 5 September 2012 and was valid for one season *"from September 2012 till the end of football season 2012/2013"* which occurred on 30 June 2013.

92. That being established, the Player maintains that even in the case that the Panel may decide that the Appellant was not responsible for any payment during the Loan Contract, the Club was at least in default of the following payments due under the Employment Contract: a) the 1st instalment amounting to USD 75,000.00, payable on 1 September 2012, *i.e.* before the Loan Contract was concluded between the Parties; b) the 11th and 12th instalments payable on 1 July 2013 (USD 3,750.00) and on 1 August 2013 (USD 37,500.00), respectively, *i.e.* after the Loan Contract had expired.

93. In this respect, the Panel is satisfied that, according to the documentation in the file, the instalments mentioned above actually fell due when the Loan Contract was not in force and, therefore, the Club was bound to the relevant financial obligations towards the Player under the Employment Contract.

94. As a consequence, the Panel believes that, at the time when the Player notified the unilateral termination of the Employment Contract on 6 August 2013, the Club was in default of payment of the total amount of USD 116,250.00 (and not USD 150,000.00 as assumed by the Player). The Club shall therefore be condemned to pay to the Player the amount of USD 116,250.00 as outstanding salaries according to the Employment Contract. In addition, in accordance with Article 104 of the Swiss Code of Obligations, the Panel agrees with the Appealed Decision that interest at the rate of 5% per annum shall accrue from each due date until effective payment.

95. With regard to the written statement submitted by the Appellant under exhibit 4, the Panel observes that, even admitting in theory that it was really signed by the Player (which is opposed by the latter), the relevant wording suggests that any declaration contained therein only refers to the Loan Contract and to the relationship between the Player and El Dakhlia, and not to the Club's financial duties towards the Player. Therefore, the Panel believes that this document is irrelevant for the purposes of deciding the present case.

96. Moreover, the Panel notes that, despite the fact that the Appellant claims that the Player did not take part in the trainings at the beginning of the preparation period for the sporting season 2013/2014 (*i.e.* 24 August 2013) and left the country without its authorization, there is no evidence in the file that the Player was notified by the Club of the time and place of the beginning of training period nor that the Club officially requested the participation of the Player in the trainings of the first team or that the Club made any effort to ensure the return of the Player after the termination of the Loan Contract.

97. On the other hand, although in his notice for termination the Player refers to several alleged prior requests for payment of outstanding salaries, the Respondent failed to submit any evidence in relation to any supposed prior warning addressed to the Club before the unilateral termination of the Employment Contract.

98. In such a context, the Panel refers to article 14 of the FIFA Regulations according to which *"A contract may be terminated by either party without consequences by any kind (either compensation or imposition of sporting sanctions) in the case of just cause"*.

99. In order to establish whether the Player had just cause to terminate the Employment Contract on 6 August 2013, the Panel reminds that the definition of "just cause", as well as the question whether just cause in fact exists, shall be established on a case-by-case basis, in accordance with the merits of each particular case (CAS 2008/A/1447; CAS 2013/A/3398; CAS 2016/A/4384; ATF 127 III 153 consid. 1 a).

100. In this respect, when Swiss law applies, reference is made to article 337 para. 2 of the Swiss Code of Obligations (the "Swiss CO") providing that *"any circumstance which, according to the rules of good faith, mean that the party who has given notice of termination cannot be required to continue the employment relationship, shall be deemed good reason. The concept of "just cause" as defined in Article 14 RSTP must therefore be likened to that of "good reason" within the meaning of Article 337 para. 2 CO"* (CAS 2013/A/3091, 3092 & 3093).

101. With regard to the type of violation, consistent with CAS jurisprudence, non-payment or late payment of remuneration by the employer does in principle – and particularly if repeated – constitute just cause for termination of the employment contract, since the employer's payment obligation is his main obligation towards the employee: *"If, therefore, he fails to meet his obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulties by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the party has in future*

performance in accordance with the contract, to be lost" (CAS 2013/A/3398; CAS 2013/A/3091, 3092 & 3093). Likewise, the Swiss Federal Tribunal holds that a serious infringement of the employee's personality rights (Judgement 4C 240/2000, 2 February 2001), such as unilateral or unexpected change in his status which is not related either to company requirements or to organization of the work or the failings of the employee justifies immediate termination at the initiative of the employee (CAS 2013/A/3091, 3092 & 3093, para 190).

102. Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Tribunal has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545). In other words, it may be deemed to be a case for applying the *clausula rebus sic stantibus* (ATF 5 May 2003, 4C.67/2003 no. 2).

103. In view of the foregoing, the Panel considers that in the absence of a specific definition in the FIFA Regulations, and in accordance with the well-established CAS jurisprudence, a "valid reason" or "just cause" for termination of an employment contract exists when the relevant breach (or other impeding circumstances) is of such nature, or has reached such a level of seriousness, that the injured party cannot in good faith be expected to continue the employment relationship, to be established on a case-by-case basis.

104. On the other hand, the Panel observes that in principle, according to CAS jurisprudence, and consistent with Swiss law (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 1 16 II 145 and ATF 108 II 444, 446), for a party to be allowed to validly terminate an employment contract, it must have warned the other party, in order for the latter to have had the chance, if it deemed that the complaint to be legitimate, to comply with its obligations (CAS 2013/A/3091, 3092 & 3093; CAS 2015/A/4327; CAS 2013/A/3398; ATF 121 III 467, consid. 4d) and that, as a consequence, only a breach which is of a certain severity justifies termination of a contract without prior warning. *"In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties such as serious breach of confidence"* (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; ATF 5 May 2003, 4C.67/2003 no. 2; WYLER R., Droit du travail, 1st edition, p. 364, and TERCIER P., Les contrats spéciaux, Zurich *et al.* 2003, no. 3402, p. 496; CAS 2006/A/1180).

105. In CAS 2014/A/3460, the panel ruled that *"[a]lthough the need to send notices is not mandatory in all cases and is established on a case by case basis, CAS panels have regarded notices as a vital step which could possibly have played a role in bringing an end to an unexplained breach or series of breaches, particularly where the breach or breaches in question has not yet reached a fundamentally unacceptable level and/or unduly prejudiced the non -breaching party to the extent that the latter cannot be reasonably expected to continue the contract"*.

106. Therefore, only a particularly severe breach of the labour contract will result in the immediate dismissal of the employee, or, conversely, in the immediate abandonment of the employment position by the latter (CAS 2013/A/3091, 3092 & 3093).

107. In this context, the Panel observes that there is no evidence in the file that the Player's notice of termination dated 6 August 2013, was preceded by a prior warning.

108. However, within the legal framework above, the specific circumstances of the present case lead the Panel to believe that at the moment when the notice of termination was notified to the Club, the essential conditions under which the Employment Contract was concluded between the Parties were no longer present and did not reasonably permit an expectation that the employment relationship between the Parties be continued. With this respect, the Panel first refers to the failure by the Club to pay the Player's salaries in the amount of USD 116,250.00 which corresponds to almost 80% of the remuneration envisaged by the Parties for the entire sporting season 2012/2013. Secondly, the Panel emphasizes that, although the Appellant complains that the Player did not show up in order to resume the trainings with the first team for the sporting season 2013/2014, it actually failed to demonstrate that at the end of the Loan Contract on 30 June 2013, the Club sought to ensure the return of the Player, nor it is proven that the Club notified the Player of the date and place of the beginning of the relevant preparation period, which is indeed the responsibility of the Club. In this context, it is hardly necessary to observe that any internal memo as well as any communication allegedly sent by the Club to the EFA, in order to notify the absence of the Player from trainings, actually dates back to a later date with respect to the notice of termination and therefore, they are irrelevant for the purpose of demonstrating the Club's interest in the Player's return. The Panel believes that the default of payment of the Player's salaries in conjunction with the failure to notify the Player of the beginning of the preparation period are clear indications that the conditions for the continuation of the employment relationship between the Parties were no longer present at the moment when the Employment Contract was terminated. In addition, the Panel notes that the failure by a Club to notify the player of the beginning of the preparation period, actually results in the exclusion of the relevant player from his main activity, contrary to the right of athletes to actively practice their profession. As a consequence, the Panel believes that not only has the Club seriously violated his main obligation towards the Player by failing to pay his remuneration in the amount of USD 116,250.00, but it also resulted that the Club prevented the Player from participating in the trainings for the sporting season 2013/2014, thus committing an infringement of the Player's right to develop and fulfill his personality right as an athlete through sporting activity.

109. In view of the foregoing, the Panel concluded that the circumstances of the present dispute show that the two-fold breach by the Club, as specified above, was of such nature that the Player could not reasonably be expected to have confidence in the continuation of the Employment Contract in the future and, therefore, that the Player had just cause for termination; moreover, the Panel is satisfied that the severity of the infringement by the Club which is aggravated with specific regard to the failure to notify the Player of the beginning of the trainings after termination of the Loan Contract, was such to justify termination without a prior warning in the specific case at hand.

110. Having established that the Club is to be considered responsible for the early termination of the Employment Contract with just cause, the Panel agrees with the FIFA DRC that article 17, para 1 of the FIFA Regulations shall apply and that the Club shall therefore be liable to pay

compensation to the Player according to the following objective criteria, failing any compensation clause in the Employment Contract:

> *"the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period".*

111. In this respect, in light of the principle of the "positive interest" under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in, had the contract been fulfilled to its end (CAS 2012/A/2698; CAS 2008/A/1447; CAS 2005/A/801; CAS 2006/A/1602), the FIFA DRC considered that the Player would have earned a total amount of USD 550,000.00 under the Employment Contract until its natural expiration. Furthermore, in application of the duty of the Player to mitigate his damages according to article 337 c (1), (2) of the SCO, the FIFA DRC *"highlighted that at least one full registration period had been open after 6 August 2013 allowing the Claimant to find other employment from that date and thereby mitigate his damages"* and therefore established to award an amount of USD 250,000.00 to the Player (corresponding to the salary for the sporting season 2013/2014) as compensation for breach of contract.

112. In view of the circumstances of the present case and in view of all the considerations above, the Panel agrees with the assessment and calculation set forth by the FIFA DRC in the Appealed Decision and is satisfied that the compensation awarded by the FIFA DRC in the amount of USD 250,000.00 is equitable and fair and shall therefore be upheld.

113. All other motions or requests for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Al Masry Sporting Club against Jude Aneke Ilochukwu is partially upheld.

2. The item 2 of the decision rendered by the FIFA Dispute Resolution Chamber on 18 February 2016 is amended as follows:

Al Masry Sporting Club is ordered to pay to Jude Aneke Ilochukwu the amount of USD 116,250.00 as outstanding salaries together with interest at the rate of 5% per annum from each single due date until the date of effective payment.

3. The other elements of the FIFA DRC decision are confirmed.

4. (…).

5. (…).

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