

CAS (COURT OF ARBITRATION FOR SPORT)

**ETTA S.C. 2020 V. FÉDÉRATION INTERNATIONALE DE FOOTBALL
ASSOCIATION (FIFA)**

ARBITRAL AWARD

25 June 2023

Tribunal:

Jacques Radoux (Co-Arbitrator)

Ulrich Haas (Co-Arbitrator)

Patricia Moyersoén (President)

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I. PARTIES

1. Etta S.C. 2020 (the “Appellant” or “Etta S.C.”) is an Athlean professional football club with its headquarters and official address in Periphery. Etta S.C. is registered with the Athlean Football Association (“the AFA”), which in turn is affiliated with the Fédération Internationale de Football Association (“FIFA”).
2. FIFA is an association under Article 60 et seq. of the Swiss Civil Code law with its registered office and headquarters located in Zurich, Switzerland. FIFA exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties’ written and oral submissions and pleadings adduced in these proceedings. References to additional facts and allegations found in the Parties’ oral submissions and pleadings will be made, where relevant, in connection with the legal analysis that follows.

A. Background Facts

4. In 2019, the Player, Ms Niki, and Etta F.C. (the “Old Club”) signed an employment contract expiring on 31 August 2020 (the “Athlete Contract”).
5. Under clause 9 of the Athlete Contract, the Player and the Old Club agreed that *the* player was entitled to the payment of USD 200,000 in the event of achieving a club milestone and USD 150,000 in the event of achieving a personal milestone.
6. On 1 July 2020, upon finishing the season as the top scorer of the League with thirty goals, the Player made a justified payment request of the Old Club requesting payment of the milestone bonuses.
7. On 2 July 2020, Etta F.C. communicated to Ms Niki that it could not satisfy her request.

8. On 17 July 2020, Ms Niki put Etta F.C. in default by email and granted a period of 10 days for the payment of her claims.
9. The Old Club has never complied with the financial obligations to the Player under the Athlete Agreement.
10. On 28 July 2020, Etta F.C. and Dinaria concluded a “Club Sale and Purchase Agreement” which provided for the sale and purchase of several types of tangible and intangible assets owned by Etta F.C.
11. On 29 July 2020, the closing of the transactions contemplated in the Club Sale Agreement took place. On the same day, Etta F.C. filed a notice of disaffiliation.
12. On 5 August 2020, the AFA confirmed Etta F.C.’s disaffiliation. On the same day, Etta F.C. filed for bankruptcy.
13. On 16 August 2020, the Athlean Corporate Registry certified that Etta S.C. had been formally established as a Limited Liability Company.
14. On 15 September 2020, Ms Niki filed her claims for the Milestone Bonuses in the Bankruptcy Proceedings.
15. On 20 December 2021, the Athlean bankruptcy courts granted Ms Niki’s claim for USD 200,000 but not her claim for USD 150,000.
16. On 20 February 2022, the deadline for Ms Niki to appeal the first-instance bankruptcy decision expired without Ms Niki filing an appeal.
17. On the 30 March 2022, the FIFA Dispute Resolution Chamber (the “DRC”) rendered a decision (the “FIFA DRC Decision”), ordering Etta F.C. to pay the amount of USD 150,000 to Ms Niki.
18. On 1 April 2022, the Bankruptcy Proceedings were concluded. Etta F.C. was formally dissolved and thus ceased to exist under Athlean law.

19. On 5 April 2022, Ms Niki requested the payment of USD 150,000 within two weeks by sending an email attaching the DRC's decision to Etta S.C.

III. PROCEEDINGS BEFORE THE FIFA DISCIPLINARY COMMITTEE

20. On 6 May 2022, Ms Niki seized the FIFA Disciplinary Committee ("DC") alleging a violation of Article 15 of the 2019 version of the FIFA Disciplinary Code ("FDC"), in connection with Etta S.C.'s failure to pay the amount of USD 150,000.
21. Etta S.C. participated in the proceedings without contesting the jurisdiction of the DC or alleging a violation of its right to be heard in connection with its non-participation in the proceedings before the DRC.
22. On 1 June 2022, the DC rendered a decision accepting Ms Niki's claim in full, rejecting Etta S.C.'s arguments and imposing on Etta S.C. a fine of CHF 20,000.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 10 June 2022, Etta S.C. paid a filing fee of CHF 1,000 and filed a statement of appeal against FIFA before the Court of Arbitration for Sport ("CAS") pursuant to Article R48 of the 2021 version of the Code of Sports-related Arbitration ("CAS Code").
24. On 5 July 2022, FIFA filed its answer to the appeal brief pursuant to Article R55 of the CAS Code.
25. On 6 July 2022, the Appellant paid its portion of the advance on costs pursuant to Article R64.2 of the CAS Code and substituted for the Respondent's portion.
26. On 25 July 2022, the panel fixed the dates of the hearing.

V. POSITIONS OF THE PARTIES AND PRAYERS FOR RELIEF

27. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Panel, for the purposes of the legal analysis which follows, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

A. The Appellant

28. Etta S.C. submissions, in essence, may be summarised as follows:

- ◆ Etta S.C. 2020 is not the sporting successor of the non-compliant party (Etta F.C. 1917) for the purposes of Article 15 FDC 2019. Article 15 was implemented to avoid abuse and the circumvention of financial liabilities. To determine the existence of a sporting succession between clubs the subjective element of fraud must necessarily concur. In the present case, there is no evidence of fraud on the part of Etta S.C. The Panel cannot be comfortably satisfied that Etta S.C. was set up for the specific purpose of escaping the financial obligations entered into by Etta F.C. In the absence of such intention, Etta S.C. is not the sporting successor of Etta F.C.
- ◆ If the Panel wish to apply a more objective approach to the question of sporting succession, the objective elements present are in any event insufficient to support a finding of sporting succession. Article 15(4) FDC 2019 presents a non-exhaustive list of criteria made available to the Panel to assist in the question of sporting succession. The Panel cannot be comfortably satisfied that Etta S.C. gives an image of continuity to the eyes of the general public. There has been no continuity in the eyes of the public. Etta S.C. name refers to a different foundation date to that of Etta F.C. Etta S.C. does not refer to the history and sporting achievements of Etta F.C. Etta S.C. has clearly disassociated itself from the legacy attached to Etta F.C. Etta S.C. has a separately trademarked logo to Etta F.C. Any such similarities to be drawn between the two clubs are not sufficient to establish a finding of sporting succession as the competent trademarking authorities of Athlos have deemed the two logos to be different from one

another. Etta S.C. has primarily different top management, board of directors, shareholders, and coaching staff to Etta F.C. The element of ownership does not hold substantive weight in the assessment of sporting succession. The question of ownership speaks to the internal structure of a club. By this token, it is not a distinguishing element to the general public. Therefore, even if Etta S.C. and Etta F.C. share ownership, the Panel cannot be comfortably satisfied that such evidence is indicative of club continuity in the eyes of the general public. For these reasons, Etta S.C. is not the sporting successor of Etta F.C.

- ◆ Etta S.C. right to be heard was violated in the FIFA DC proceedings. A right to be heard is a fundamental procedural rule recognised in CAS jurisprudence. Etta S.C. was deprived of the right to contest the substance of the debt now opposed to them. A decision in which Etta S.C. right to be heard has been disregarded is per se enough to deem them not liable. In any event, the de novo powers are not applicable in the present proceeding. The CAS power to review matter de novo is limited to the subject of appeal. The FIFA DC did not have the competency to determine the actual existence of the debt in question. Therefore, the subject of the appeal excludes the question of the debt. In this regard, CAS does not have the competency to cure the violation of the right to be heard. Further, there is no evidence to suggest that Etta S.C. “unequivocally gave up the right to be heard on such an important issue”.
- ◆ Ms Niki failed to demonstrate the requisite degree of due diligence. A duty to act arises when there is a feasible theoretical possibility that a claim could have been recovered through the national legal system. In exercising this duty, Creditors must be vigilant and take prompt and appropriate legal action towards retrieving their credits. There existed a feasible, theoretical possibility for Ms Niki to recover her credit by way of appealing the First Instance Athlean Bankruptcy Decision. Therefore, by not appealing the First Instance Decision and remaining passive in recovering her credit, Ms Niki has not acted in due diligence
- ◆ Ms Niki was aware of her opportunity to jointly appeal alongside several other creditors, as well as the feasible prospects of being successful in this appeal. However, Ms Niki did not promptly or vigilantly pursue this legal action; inhibiting her right to

claim her credit in CAS proceedings and preventing Etta S.C. from being held non-compliant under Article 15(4) of the FIFA Disciplinary Code 2019.

- ◆ The principle of *res judicata* exists in Ms Niki's case before the FIFA DRC, to the extent that she could not have claimed the debt before this body. *Res judicata* regulates that an earlier and final decision is conclusive in subsequent proceedings regarding the same issue, therefore the Athlean Bankruptcy Decision should have been deemed conclusive and Ms Niki should have been prohibited for filing a claim in the FIFA DRC. The three cumulative requirements for *res judicata* to apply are fulfilled, notably; an identical claim for the USD 150,000 Personal Milestone Bonus, Ms Niki and Etta F.C. 1997 being the same parties to both proceedings, and the same facts regarding Ms Niki's contract violation being considered in both judgements. Consequently, the *res judicata* principle applies and the DRC, and subsequent DC enforcement DC decision is invalid.

29. On this basis, Etta S.C. submits the following prayers for relief:

- 1) In the first alternative, to set aside and annul the challenged decision.
- 2) In the rejection of the first alternative, revise the challenged decision so that all sanctions imposed on Etta S.C. for the breach of Article 15 of the FIFA Disciplinary Code 2019 are set aside and left without effect.

B. The Respondent

30. FIFA submissions, in essence, may be summarised as follows:

- ◆ Etta S.C. 2020 is the sporting successor of the non-compliant party for the purposes of Article 15 FDC 2019. The Panel must be comfortably satisfied that both the objective elements provided under Article 15(4) FDC 2019, and the subjective element of shady and fraudulent practice exist. The evidence provides that sixty per cent of Etta F.C. fans would continue to support Etta S.C. as if it were Etta F.C. The name, logo and colours of both clubs are the same. Therefore, Etta S.C. has an intention to maintain the sporting identity of Etta F.C. Etta S.C. has several of the same players and

administrative personnel as Etta F.C. Both clubs play in the same stadium. Etta S.C. replaced Etta F.C. in the same category of competition. Therefore, sporting continuity is present through the transfer of federative rights. Etta S.C. also has the same shareholders, stakeholder management and ownership as Etta F.C. Therefore, Etta S.C. and Etta F.C. share ownership by virtue of the sale and purchase agreement with Dinaria.

- ◆ Etta S.C. had a clear intention to deceive the creditor, Ms. Niki. Etta S.C. failed to communicate reasonably with Ms Niki, in spite of her sending various follow-up letters. Therefore, Etta S.C. clearly wanted to avoid any financial obligations to Ms Niki. Further, the chronology of events with which Etta F.C. was disaffiliated, the Club Sale and Purchase Agreement took place and the date with which Etta S.C. was affiliated to the AFA are self-evident of the fact that the Etta S.C. “was set up to avoid the financial obligations that the old club had against Niki”.
- ◆ In the present proceeding, there has been no violation of the right to be heard on the part of Etta S.C. Etta S.C. had the opportunity to raise the issue that its right to be heard has been violated during the FIFA DC proceedings which it did not avail. In any event, Etta S.C., still has the opportunity to raise its concerns related to the right to be heard through the de novo powers of the CAS in accordance with Article R-57 of the CAS Code.
- ◆ There is no blanket rule of required due diligence and an assessment of a Creditor’s diligence must be made on the specific circumstances of the case.
- ◆ Ms Niki was not passive or uninterested in pursuing her claim in Etta F.C. bankruptcy proceedings. The creditor filed in Etta F.C. bankruptcy proceedings on 15 September 2020, therefore, exercising the requisite Creditor diligence before filing a claim at FIFA.
- ◆ The appeal outcome by the Athlean Bankruptcy Court would consider the asset liquidation of Etta F.C., deeming a lack of funds to substantiate Ms Niki’s USD 150,000 privileged credit claim, along with other creditors. Therefore, there is no

feasible theoretical possibility that Ms Niki could have recovered her claim through appealing in the bankruptcy courts; so she was not expected to do so.

- ◆ Subject to Article 15 of the FIFA Disciplinary Code 2019, as the deemed sporting successor, Etta S.C. is obliged to comply with the decision rendered against Etta F.C. (the predecessor). Given Etta S.C. financial capabilities to fulfill Ms Niki's credit, and Ms Niki's due diligence, Etta S.C. is liable to pay her the outstanding debt.
- ◆ This case does not substantiate the triple identity test required to attract the provisions of the *res judicata* principle. The parties, Etta F.C. and Etta S.C. are two different legal entities, the object of the previous FIFA decision is substantially different from the CAS proceedings, and there is a substantial difference in the cause of proceedings.

31. On this basis, FIFA submits the following prayer for relief:

- 1) The FIFA Disciplinary Committee decision is upheld in its entirety.

VI. JURISDICTION

32. Article R47 of the Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with 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.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned”.

33. Article 58.1 of the FIFA Statutes read as follows:

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

34. The jurisdiction of the CAS is not contested and is further confirmed by the Order of Procedure duly signed by the Parties. It follows that the CAS has jurisdiction to decide the present dispute.

VII. ADMISSIBILITY

35. The appeal was filed within the deadline provided by Article R49 of the Code as well as by Article 58 (1) of the applicable FIFA Statutes. It complies with all the other requirements set forth by Article R48 of the Code.

VIII. APPLICABLE LAW

36. 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

37. Pursuant to Article 57 (2) of the applicable FIFA Statutes, "[t]he 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".

38. As a result, subject to the primacy of applicable FIFA’s regulations, Swiss Law shall apply complementarity, whenever warranted.

39. On 06 May 2022, the disciplinary proceedings were initiated against the New Club, i.e., after 21 May 2021, which is the date when the FIFA Statutes, edition May 2021, came into force.
40. As to the applicable version of the FIFA Disciplinary Code and in compliance with the principle *tempus regit actum*, substantive aspects are governed by the regulations in force at the time of the relevant facts, while procedural matters are governed by the rules in force at the time when the procedural action occurs. Hence, the FDC (Edition 2019) is applicable to both the merits and procedural aspects of the present case.
41. These are the editions of the rules and regulations, which the Panel will rely on to adjudicate this case.

IX. THE MERITS

A. The Main Issues

42. The main issues to be resolved by the panel are:
 - A. Is Etta S.C. the “sporting successor” of Etta F.C.?
 - B. Was Etta S.C. right to be heard violated in the regional FIFA DC proceeding?
 - C. Did Ms. Niki contribute to a breach of Article 15 FDC 2019 by not exercising due diligence in the national bankruptcy proceedings of Etta F.C.?
 - D. Is this matter barred by the principle of ‘*res judicata*’?
 - E. Is Ms. Niki entitled to claim the amount of USD 150,000.
43. The Panel will consider these issues in turn below.

A. IS ETTA S.C. THE “SPORTING SUCCESSOR” OF ETTA F.C.?

44. The key issue in the present proceedings is whether Etta S.C. is the sporting successor of Etta F.C.

45. The concept of "sporting successor" is the direct result of several CAS cases, which have been materialized in the latest version of Article 15 (4) of the FDC (Edition 2019) which is applicable to the present case.
46. Based on Article 15 (4) of the FDC 2019, not only the original debtor shall be subject to disciplinary sanctions, but also the "sporting successor" of the original debtor.
47. Conversely, if Etta S.C. is not the sporting successor of Etta F.C. then Etta S.C. cannot be sanctioned on the basis of the above-mentioned provision.
48. In this analysis, the Panel does not consider itself bound by prior decisions of the FIFA DC or CAS, because such analysis is to be made on a case-by-case basis (CAS 2020/A/7092).
49. The Panel finds that the concept of "sporting succession" is mainly implemented in order to achieve financial justice for creditors and promote contractual stability (CAS 2020/A/6831). The parties' submissions claim that provisions relating to sporting succession were implemented to avoid abuse and prevent clubs from circumventing financial obligations. The Panel agrees that in certain awards the concept of fraud has been considered (as in CAS 2020/A/7092 para. 77 and CAS 2020/A/7183 para. 116). However, the Panel does not consider fraudulent intention a *condition sine qua non* for sporting succession.
50. The Panel agrees with the findings in CAS 2020/A/6884 that good or bad faith and transparency are not decisive elements in light of sporting succession. This said, the Panel finds that although fraudulent behaviour or abuse may be considered, its absence does not preclude the Panel from finding in favour of sporting succession.
51. The Panel observes that there is no evidence on the facts to suggest that Etta S.C. committed fraud. Irrespective of this, the Panel considers that given the limited investigatory tools at the disposal of sports bodies, it would be extremely difficult to determine a club's *animus*. The Panel therefore accepts the Appellant's contention that there is no concrete evidence to suggest Etta S.C. was set up to escape their financial obligations.

52. Nonetheless, the Panel considers that Etta S.C.'s actions deviated from the principle of good faith (CAS 2020/A/6745). The Panel finds that in the present case, the old club failed to appropriately communicate with Ms Niki their financial position or inform her that they were in bankruptcy proceedings in due time.

53. The Panel does consider that given Etta F.C.'s legal status as an entity involved in bankruptcy proceedings, there may have been no staff able to communicate frequently with Ms Niki. Therefore, the Panel finds that although Etta S.C. acted in 'bad faith', this is not a decisive factor in favour of sporting succession.

54. Turning to the analysis of the objective elements, Article 15(4) of the FDC 2019 provides the following non-exhaustive list that can be considered:

- ◆ Headquarters
- ◆ Name
- ◆ Legal Form
- ◆ Team colours
- ◆ Players
- ◆ Shareholders, stakeholders, ownership, management
- ◆ Category of competition concerned

55. The parties refer to the following additional criteria in their submissions:

- ◆ Logo
- ◆ Stadium
- ◆ Reliance on bankrupt club's history
- ◆ Fan base

56. The Panel finds that the weight attributed to each objective element must be determined in light of the eyes of the general public (See CAS 2020/A/7543, 2017/A/5050, 2020/A/7290, 2020/A/6941). Hence, the Panel agrees with the Sole Arbitrator in CAS 2020/A/7290 that "the picture the alleged sporting successor presents to the general public

is of relevance”. Against this background, the Panel now turns to assessing the individual criteria. The Panel also finds it appropriate to classify the different criteria into three categories: minor importance, relevant, important (As in CAS 2020/7092).

a) Headquarters

57. The Panel observes that the headquarters of Etta S.C. are located at Periphery, whereas Etta F.C.’s former headquarters were located in Sportiva.

58. The Panel finds this to be an element of minor importance and concurs with the decision in CAS 2020/A/7092 that changing headquarters is relatively easy to accomplish.

59. The Panel finds this element to be of minor importance against sporting succession.

b) Name

60. The name Etta F.C. bears a resemblance to Etta S.C. The Appellant refers to the difference in the nominal date of creation (1997 and 2020) to suggest that the two clubs are different. The Panel finds that the general public will still mostly likely refer to both clubs as ‘Etta’ (CAS 2020/A/7092). The Panel considers the names to be “confusingly similar” (CAS 2019/A/6461).

61. The Panel finds this to be a relevant element in favour of considering Etta S.C. as the sporting successor of Etta F.C.

c) Team colours

62. The Panel observes that apart from a change in the hue of blue, both clubs utilise the same team colours. The Panel understands that, by virtue of the Club Sale and Purchase Agreement, Etta S.C. was entitled to this use.

63. Notwithstanding this, the Panel finds that Etta S.C. was not obliged to use the same colours as Etta F.C. The Panel concurs with the findings in CAS 2016/A/4550 that the identity of a club is constituted by elements such as colours that allow it to distinguish from all the

other clubs. Hence, the Panel agrees with the Respondent that Etta S.C.'s use of the same colours demonstrates an intention to maintain Etta F.C. club identity.

64. The Panel finds this to be a relevant element in favour of considering Etta S.C. as the sporting successor of Etta F.C.

d) Players

65. The Panel observes that both the team captain and goalkeeper of Etta F.C. have been kept in Etta S.C.'s squad.
66. The Panel considers that such players are integral members of a team and would be identifiable by the public.
67. The Panel therefore considers this to be an important element in favour of considering Etta S.C. as the sporting successor of Etta F.C.

e) Shareholders, stakeholders, ownership, management

68. The Panel accepts the Respondent's proposition that Mr. Round Tripper was a controlling stakeholder holding 70% shares of Etta S.C. and 99% of shares in Bivi.
69. The Panel rejects the Appellant's argument that Etta S.C. has a different board of directors and top management. The Panel observes that the evidence only provides that such individuals are not involved in positions they previously occupied. Hence, the Panel considers the possibility that there has only been a change in the composition of the board of directors.
70. Nonetheless, the Panel does not consider these elements to be important in determining whether Etta S.C. is the sporting successor of Etta F.C. The Panel concurs with CAS awards that define a sporting successor as "a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it" (see CAS 2007/A/1355; CAS 2016/A/4550-4567). The Panel distinguishes between the concept of legal succession and

sporting succession and considers those elements relating to the internal structure of Etta S.C. to be more relevant to the question of legal succession.

71. The Panel agrees with the findings in CAS 2020/A/6941 that the question of sporting succession must be viewed in light of the eyes of the general public. Hence, the Panel accepts the Appellant's proposition that elements relating to the internal structure of Etta S.C. are not relevant to the public perception.
72. The Panel concludes that given the ambiguous nature of the fact pattern and the distinguishment between the definitions of legal and sporting succession, these elements are of no additional relevance to the analysis being made.

f) Category of competition concerned

73. The Panel observes that Etta S.C. was permitted to play immediately in the top-tier league of the AFA.
74. The Panel concurs with the Respondent's proposition that this demonstrates club continuity in the eyes of the general public. The Panel agrees with the findings in CAS 2020/A/7092 that a transfer of federative rights allows the new club to obtain the sporting and economic value of the old club.
75. The Panel considers this to be an important element in favour of considering Etta S.C. as the sporting successor of Etta F.C.

g) Logo

76. The Panel observes that Etta S. C's logo bears a similar resemblance to Etta F.C's logo
77. The Panel understands that Etta S.C. has made minor changes to their logo. Nonetheless, the Panel considers that the public would only consider Etta S.C.'s logo to be an updated version of Etta F.C.'s.

78. The Panel concurs with the findings in CAS 2020/A/7290, that even if there are some differences between the logos of two clubs, “it comes down to the confusion that is created, which aspect is found to be of much importance”.
79. The Panel considers this to be an important element in favour of finding Etta S.C. as the sporting successor of Etta F.C.

h) Stadium

80. The Panel observes that both Etta S.C. and Etta F.C. share Arena Sportiva as their home stadium. The Panel does not find this to be particularly important. The Panel concurs with the findings in CAS 2020/A/7290 that “it cannot be expected from the New Club to use a stadium different from the one used by the Old Club because suitable stadiums in a very same city may be limited”.
81. The Panel considers this to be an element of minor importance in favour of finding Etta S.C. as the sporting successor of Etta F.C.

i) Reliance on bankrupt club’s history

82. The Panel observes that the official website and social media of Etta S.C. does not refer to the prior achievements of Etta F.C. The Panel accepts the Appellant’s submissions that electing to showcase themselves as a novel club demonstrates Etta S.C.’s willingness to be viewed as a separate club.
83. Hence, the Panel accepts the Appellant’s argument that Etta S.C. has not expressly relied on Etta F.C.’s club history or achievements.
84. The Panel considers this to be an important element against finding Etta S.C. the sporting successor of Etta F.C.

j) Fan base

85. The Panel understands that 60% of survey participants would continue to support Etta Soccer Club as though it were Etta Football Club.
86. The Panel considers this to be an important element in favour of finding Etta S.C. as the sporting successor of Etta F.C.

k) Conclusion

87. As indicated *supra*, the Panel considers the elements, “Players”, “Category of Competition Concerned”, “Logo” and “Fan Base” to be important, all pointing toward Etta S.C. being the sporting successor of Etta F.C.
88. On the other hand, the Panel considers the element “Reliance on Bankrupt Clubs History” important, pointing against Etta S.C. being the sporting successor of Etta F.C.
89. The Panel considers that although Etta S.C. did not expressly rely on the history of Etta F.C. on their website and social media, they still sought to exploit supporters’ affiliation by utilising the same name, logo, colours and players of Etta F.C.
90. In light of the foregoing and in view of all the circumstances of the case, the Panel holds that Etta S.C. is the sporting successor of the Old Club.

B. WAS ETTA S.C. RIGHT TO BE HEARD VIOLATED IN THE FIFA DC PROCEEDINGS?

91. The Panel acknowledges that the right to be heard is a fundamental right and one of the most important elements of the right to a due process (CAS 2012/A/2740)
92. The Panel considers that as the established sporting successor, the final and binding effects of the FIFA DRC decision extend to Etta S.C. The Panel considers it immaterial that Etta S.C. did not participate in the FIFA DRC proceeding.

93. The Panel acknowledges both parties' respective submissions regarding the de novo powers of the CAS. The Panel agrees with CAS 2010/A/2275 and SFT-246 that the de novo powers of the CAS can only be put in effect if the violation of the right to be heard has a bearing on the outcome of the case.
94. In the present case, any question as to a violation of a right to be heard is concerned with the decision made by the FIFA DRC which affirmed Ms. Niki's employment contract was violated.
95. The FIFA DRC never stipulated or enforced any consequences on the club. The Panel considers it unequivocal that Ms. Niki's contract was violated.
96. Hence, the Panel finds that Etta S.C. was in no way deprived of the opportunity to defend themselves against any the claims made by Ms. Niki.
97. The Panel agrees further with the Respondent's proposition that Etta S.C. had ample opportunity to raise any issues as to its right to be heard in the FIFA DC proceedings.
98. The Panel considers that in any event, Etta S.C. waived any issue as to their right to be heard, given their participation in the FIFA DC.
99. The Panel rejects the submissions of the Appellant and finds that there has been no violation of a right to be heard.

C. DID MS. NIKI CONTRIBUTE TO A BREACH OF ARTICLE 15 FDC 2019 BY NOT EXERCISING DUE DILIGENCE IN THE NATIONAL BANKRUPTCY PROCEEDINGS OF ETTA F.C.?

100. The Panel has determined that Etta S.C. is the sporting successor of Etta F.C. and shall be deemed non-compliant with the FIFA Disciplinary Committee Decision.

101. However, the Appellant has raised arguments as to the enforceability of this non-compliance, so to say that Etta S.C. compliance has been influenced by the lack of due diligence of the Creditor, Ms Niki.
102. The Panel therefore proceeds to further examine the due diligence of the Creditor, and whether this has contributed to Etta S.C. failure to comply with the FIFA Disciplinary Committee Decision.
103. The Panel accept that although an obligation may not arise through the FIFA regulations, other CAS panels have considered a requirement for FIFA players, as Creditors, to demonstrate a level of due diligence when bringing a claim before the FIFA bodies. The Panel concur with the general stance taken by panels across CAS jurisprudence, most notably *CAS 2011/A/2646*, *CAS 2019/A/6461* and *CAS 2020/A/6879*, enforcing a requisite standard of due diligence.
104. Considering the reasoning advanced by both parties, the Panel deems the following frameworks most prevalent in determining the due diligence of Ms Niki. However, the Panel is also of the view that there is no blanket rule for the due diligence check, and that it will be assessed on the specific circumstances of this case (*CAS 2019/A/6461*, *CAS 2020/A/6879*)
105. The Panel does not find merit to the argument that Ms Niki was not vigilant, prompt or appropriate in her action to recover the USD 150,000. The Panel deems it sufficiently appropriate that Ms Niki lodged a claim for both the USD 2000,000 Club Milestone Bonus and USD 150,000 Personal Milestone Bonus in the First Instance Bankruptcy Proceedings on 15 September 2020, only 26 days after she was informed of the Bankruptcy Proceedings on 20 August 2020. For the Panel, this demonstrates a vigilant and active intention to recover credits and participate in the bankruptcy proceedings of Etta F.C. (*CAS 2020/A/6879*).
106. The Appellant submitted that by merely participating in the First Instance Bankruptcy Proceedings, and not appealing the First Instance Decision, Ms Niki was passive and uninterested in genuinely recovering the debt. However, the Panel sees nothing to suggest

Ms Niki was passive or uninterested in following due process in the bankruptcy proceedings, before moving her claim to FIFA (CAS 2019/A/6461).

107. The Panel also notes the expectation for Creditors to pursue legal avenues that present a feasible theoretical possibility of recovering their credit. The Panel is not prepared to accept that Ms Niki was expected to appeal the First Instance Bankruptcy Decision, as appealing did not present a feasible theoretical possibility of recovering the credit.

108. Noted by the Respondent, the liquidated assets of Etta F.C. could not have afforded sufficient surplus to deem the recovery of the debt as feasible via an appeal of the bankruptcy proceedings.

109. Additionally, the funds could not suffice to pay all Creditors in full, and only a 5% predicted prospect of success in ascertaining the full USD 150,000. Considering this, the Panel cannot deem appealing as a feasible or theoretical avenue for Ms Niki (CAS 2020/A/6941).

110. Rather, the Panel supports the position that pursuit of Etta S.C. through the FIFA bodies was feasible and reasonable for Ms Niki. As the Panel understands it, the purpose of Article 15 of the FIFA Disciplinary Code 2019 is to regulate instances of sporting succession and hold financially capable successor clubs liable to pay overdue debts.

111. The Panel finds that this purpose is relevant in the current matter and shall support Ms Niki's duly diligent actions.

112. Consequently, the Panel is of the view that Ms Niki has exercised the requisite level of due diligence expected of creditors. The Panel finds that the conduct of the Creditor has not contributed to Etta S.C. breach of Article 15(4) of the FIFA Disciplinary Code 2019, and rejects all arguments raised by the Appellant in this respect.

D. IS THIS MATTER BARRED BY THE PRINCIPLE OF '*RES JUDICATA*'?

113. The parties have raised the principle of *res judicata* to be or not to be active in the present case. The Appellants raising *res judicata* to be substantiated between the Athlean

Bankruptcy Court decision and the FIFA DRC proceedings. Yet the Respondent has made submissions as to the failed application of *res judicata* between the Athlean Bankruptcy Court decision and the current CAS proceedings. Consequently, the Panel will determine whether the Athlean Bankruptcy Decision is final and conclusive per *res judicata*, and if subsequent proceedings are valid.

114. CAS jurisprudence advises that the same parties, an identical substantive claim and the same facts and evidence must be present for the *res judicata* effects to restrict latter proceedings (*CAS 2020/A/6912*). In this case, the Panel is not satisfied that the three elements of *res judicata* are simultaneous between the Athlean bankruptcy proceedings, and the FIFA DRC or CAS proceedings.

115. Is the FIFA DRC Decision a valid decision? The Panel acknowledges that the parties, Ms Niki and Etta F.C., were the same in both proceedings. Yet the purpose of the DRC proceedings was to exercise Ms Niki's right as a FIFA stakeholder and claim due payment from a contract violation by Etta F.C. Compared to the purpose of the Athlean bankruptcy proceedings, to determine whether Etta F.C. was experiencing financial hardship and how to pay their creditors. Further, the facts and evidence considered in bankruptcy proceedings and FIFA adjudication proceedings are of substantially different nature and significance. Comparatively, the evidence of Etta F.C. financial hardship and the fact that Ms Niki's contract is protected under FIFA regulations.

116. For these reasons, the Panel find that the *res judicata* requirements are not met, and the principle's effect does not diminish the validity of the FIFA DRC decision, later enforced by the FIFA DC.

117. Are the CAS proceedings valid proceedings? For the same line of reasoning discussed above, the Panel is not satisfied that the current proceedings are barred by *res judicata*.

118. Both the purpose, and relevant facts utilised in the Athlean bankruptcy proceedings differ from the current proceedings. Further, the bankruptcy proceedings were between Ms Niki and Etta F.C., whereas the CAS proceedings are between Etta S.C. and FIFA. For these reasons, the Panel believes that *res judicata* does not invalidate the CAS proceedings.

E. IS MS. NIKI ENTITLED TO CLAIM THE AMOUNT OF USD 150,000.

119. The Panel dismisses all arguments raised by the Appellant that the Creditor Ms Niki is not entitled to claim the amount of USD 150,000 for the Personal Milestone Bonus.

120. The Panel is not prepared to accept that Ms Niki USD 150,000 claim is bound by Athlean law, nor that the bankruptcy proceedings and eventual liquidation of Etta F.C. should preclude Ms Niki from recovering her debt.

121. Noting CAS 2020/A/6941, *“If one was to accept the argument that the existence of bankruptcy proceedings per se is enough to exclude any case of sporting succession ... this would effectively invalidate the whole concept of sporting succession.”*

122. Consequently, the Panel finds no reason for Ms Niki to not be entitled to claim the amount of USD 150,000 from the sporting successor club, Etta S.C.

X. COSTS

123. Article R64 (5) of the Code provides that:

“In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.”

124. Having considered the prayers for relief of the Parties, the nature of the case and the outcome of the arbitration, the Panel finds it reasonable that the costs of arbitration shall be borne by the Appellant in their entirety. The arbitration costs are to be determined and served to the Parties by the CAS Court Office.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Etta S.C. on 10 June 2022 against the decision issued by the FIFA Disciplinary Committee on 1 June 2022 is dismissed.
2. The decision issued by the FIFA Disciplinary Committee on 1 June 2022 is confirmed.
3. The Panel rejects the Appellant's prayers for relief and determine that Etta S.C. are liable for the debts owed by Etta F.C. to Ms Niki, and that the fine of CHF 20,000 must be paid.
4. The Panel accepts the Respondent's prayers for relief to reject all claims raised by the Appellant and to uphold the Challenged Decision in full.
5. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by Etta S.C. in their entirety.
6. Each Party shall bear its own legal fees and other expenses incurred in connection with these arbitration proceedings.
7. All other and further motions or prayers for relief are dismissed.

THE COURT OF ARBITRATION FOR SPORT

President

Patricia Moyersoen

Arbitrator

Jacques Radoux

Arbitrator

Ulrich Haas