

CAS 2023/A/1234 Etta S.C. v. Fédération Internationale de Football Association

**ARBITRAL AWARD**

**delivered by the**

**COURT OF ARBITRATION FOR SPORT**

**sitting in the following composition:**

**President:** Mrs Patricia Moyersoen, Attorney-at-Law, Paris, France

**Arbitrators:** Mr Ulrich Haas, Attorney-at-Law, Zürich, Switzerland

Mr Jacques Radoux, Attorney-at-Law, Luxembourg City, Luxembourg

**in the arbitration between**

**Etta S.C., Sportiva, The Republic of Athlos**

**Appellant**

Represented by Messrs Sebastian Plaus and Paul Gregory, Bergen University,

Bergen, Norway

**and**

**Fédération Internationale de Football Association, Zürich, Switzerland**

**Respondent**

Represented by Ms Priyanka Jaiswal and Mr Rishav Kumar, Nirma University,

Gujarat, India

**TABLE OF CONTENTS**

Undisputed Facts	3
Positions of the Parties	6
Appellant's Position	6
Respondent's Position	9
Merits	12
Sporting Succession	13
Right to be heard	15
Due Diligence	18
Doctrine of <i>Res Judicata</i>	19
Conclusion	19
Final Decision	21

**I. SUMMARY OF UNDISPUTED FACTS**

1. Etta S.C. (“the New Club” or the “Appellant”) is a club that has its headquarters situated in Sportiva, Athlos in The Republic of Athlos. The Appellant is a member of the Athlean Football Association (the “AFA”) which in turn is a member of the Fédération Internationale de Football Association (“FIFA or the “Respondent”). The Appellant currently participates in the Women’s Football League, which is the premier professional women’s league in The Republic of Athlos.
2. FIFA is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the worldwide governing body of international football and exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players.
3. Ms Victoria Niki (“Ms Niki”, “the Creditor” or “the Player”) is a professional football player of Sphaeran nationality who currently plays for a club in the Sphaeran Federation. She previously played for Etta F.C. (“the Old Club”), a club that was situated in The Republic of Athlos, was a member of AFA, and which participated in the Women’s Football League until its disaffiliation on 5 August 2020.
4. On 20 August 2019, Ms Niki entered into a contract with the Old Club which included, *inter alia*, the following clause 9:
  - a) Ms Niki was to be paid USD 200,000 for scoring more than twenty goals in the league.
  - b) Ms Niki was to receive USD 150,000 for winning the top scorer award.
5. During the 2019/2020 season, Ms Niki scored 30 goals and finished the season as the top goal scorer.
6. On 1 July 2020, Ms Niki requested that the Old Club pay her the amounts specified in clause 9 of her contract.
7. On 2 July 2020, the Old Club stated that it could not fulfil her request and promised to provide further information after the next meeting of its board of directors.

8. On 10 July 2020, Ms Niki made a second request for payment of the amounts owed under clause 9 of her contract.
9. On 17 July 2020, Ms Niki put the Old Club in default by email and granted it ten days to pay the amounts owed.
10. On 18 July 2020, the Old Club's president commenced negotiations with a company called Dinaria to purchase the Old Club's assets. Dinaria is owned by Bivi, whose owner is Mr Round Tripper.
11. On 28 July 2020 and pursuant to clause 1.1 of the Club Sale and Purchase Agreement, Dinaria purchased the Old Club's assets.
12. On 29 July 2020, Dinaria signed additional contracts which closed the transactions.
13. Also on 29 July 2020, the Old Club filed a notice of disaffiliation with the AFA.
14. On 5 August 2020, the AFA confirmed Etta F.C.'s disaffiliation.
15. Still on 5 August 2020, Etta F.C. filed for bankruptcy before the Athlean Bankruptcy Courts.
16. Also on 5 August 2020, the Appellant submitted its articles of incorporation and bylaws to the Athlean Corporate Registry.
17. On 16 August 2020, the Athlean Corporate Registry confirmed the Appellant's incorporation as a limited liability company with its headquarters in Periphery, 5km away from Sportiva, Athlos. The Board of Directors, top management and the rest of the staff except for the physio team and administrative personnel who had worked at Etta F.C. were dismissed and these positions were filled by new people.
18. Also on 16 August 2020, the Appellant made a request to the AFA to take the Old Club's position in the Women's Football League, and submitted their official colours as white, black and navy blue.
19. On 18 August 2020, Ms Niki requested an update from the Old Club about payment but received no reply.

20. On 20 August 2020, the Appellant's application to take the Old Club's position in the Women's Football League was approved.
21. Also on 20 August 2020, Ms Niki was informed that the Old Club was currently the subject of bankruptcy proceedings under The Athlean Bankruptcy Law (the "Bankruptcy Proceedings").
22. On 21 August 2020, the Appellant launched its new website and social media pages which did not refer to any prior achievements of the Old Club.
23. On 22 August 2020, the Appellant stated that Arena Sportiva would be their home stadium, the same stadium that the Old Club had used for the previous fourteen years.
24. On 31 August 2020, Ms Niki's contract with the Old Club expired where she signed a new deal with a local team in Sphaera.
25. On 15 September 2020, Ms Niki filed her claims for USD 200,000 and USD 150,000 as part of the Bankruptcy Proceedings.
26. On 20 December 2021, the Athlean Bankruptcy Court upheld Ms Niki's claim for USD 200,000 but dismissed her claim for USD 150,000.
27. On 20<sup>th</sup> February 2022, the deadline for Ms Niki to appeal the Athlean Bankruptcy Court's decision expired without her filing an appeal.
28. On 1<sup>st</sup> March 2022, Ms Niki filed a claim in the Dispute Resolution Chamber (DRC) of FIFA, alleging a violation of Article 12bis of the FIFA Regulations on the Status and Transfer of Players (August 2021 version) and seeking payment of USD 150,000 only. FIFA only communicated Ms Niki's claim by reason of the Old Club's email addresses and not the Appellant's email addresses. The Old Club did not participate in the DRC proceedings.
29. On 30 March 2022, the DRC upheld Ms Niki's claim in full and awarded her the amount of USD 150,000 (the "DRC Decision"). The DRC communicated the decision to Ms Niki, the Old Club and the AFA. The DRC Decision was not appealed to the Court of Arbitration for Sport (the "CAS") and became final and binding pursuant to Rule 51(3) of the FIFA Disciplinary Code 2019 ("FDC").

30. On 1 April 2022, the Old Club was formally dissolved and ceased to exist under Athlean law.
31. On 2 April 2022, the AFA informed FIFA about the Old Club’s disaffiliation.
32. On 5 April 2022, Ms Niki discovered that the Old Club had been dissolved and emailed to the Appellant, a copy of the DRC Decision, and requested payment of USD 150,000 within two weeks. The Appellant informed Ms Niki that it disputed liability for the debt.
33. On 6 May 2022, Ms Niki informed FIFA of the non-payment of the DRC Decision and disciplinary proceedings were commenced against the Appellant, alleging a violation of Article 15 of the FIFA Disciplinary Code 2019 and a failure to comply with the DRC Decision with regard to the payment of USD 150,000. The Appellant participated in the subsequent FIFA Disciplinary Committee (the “FIFA DC”) proceedings.
34. On 1 June 2022, the DC concluded that the Appellant had breached Article 15 of the FIFA Disciplinary Code and imposed a fine of CHF 20,000 against the Appellant (the “DC Decision”).

## **II. POSITIONS OF THE PARTIES**

35. The following summary of the Parties’ positions is wholly illustrative and does not compromise the particularities of each submission made. The Panel has, however, carefully examined and considered all the submissions made by the Parties in reflection of the requests of relief.

### **A. The Appellant’s Position**

36. The Appellant filed its Appeal Brief in accordance with Article 51 of the CAS Code of Sports-related arbitration (the “Code”) on 19 June 2022. The Appellant challenged the Appealed Decision (appeal to CAS), submitting the following requests for relief:

*“1. To set aside and annul the challenged decision (DC Decision);*

*2. Should the first alternative be rejected... request CAS to revise... all sanctions imposed on Etta S.C for breach of Article 15 FDC;*

*3. all sanctions are...set aside and left without effect”.*

37. The submissions of the Appellant may, in essence, be summarised as follows:

*i. Sporting successorship*

- CAS and FIFA have decided that a new entity can be considered the sporting successor of an old entity on a case-by-case basis, however, for sporting succession to arise it must meet the standard of proof required under Article 36 FDC 2019 of comfortable satisfaction. The concept of sporting succession includes the non-exhaustive subjective criteria listed in Article 15(4) of the FCD and objective elements of abusive and fraudulent intent (see CAS 2020/A/7183).
- The case fails on the objective element alone because the standard of proof is not satisfied for there is no evidence that the Appellant intentionally dismissed the payment of the Old Club's debt, hence, it did not abuse the financial obligations of sporting succession. The Appellant relies on CAS 2020/A/6873 to demonstrate that the high threshold of sporting succession is not met. The onus rests upon the Respondent to prove that sporting succession has occurred beyond "*comfortable satisfaction*". Moreover, CAS 2014/A/3630 limits the Panel's level discretion within the balance of probabilities but lesser than beyond a reasonable doubt.
- The Challenged Decision also fails on the subjective elements. Weighting the central subjective consideration of club continuation in the eyes of general public in line with CAS 2020/A/6941, the Appellant submits that the name and logo have been competently trademarked by the Athlean authorities. The New Club's co, management and team composition are not indicative of sporting succession, and changes have been made. The Appellant relies on CAS 2020/A/7183 which held that sporting succession was not found despite five out of six board members remaining. The Appellant rejects the Respondent's position that the decision-making influence upon the Club has remained mainly stagnant. Concerning the category of competition and trademarking, the Appellant cleverly utilised its legally acquired assets to advance its competition placement.

- The Appellant asserts that through all the above, it has distinguished itself from the history of the Old Club.

**ii. *The right to be heard and determination of the debt***

- The Appellant's right to be heard was violated because it was unaware of and not invited to the DRC proceedings. The consequences of this Article 6 of the European Convention of Human Rights deprivation according to C-37372/97 is the setting aside of a decision. This authority is applicable through Article R58 of the Code, *par exemplar* in CAS 2010/A/2275. This challenge was not brought to the DC because it would allude to the acceptance of sporting successorship. The Appellant claims that if waived, its right to present its case would be dismissed, resulting in the Club's acceptance of the debt through CAS 2016/A/4774. Therefore, as it has not waived this right, the Appellant still retains the right to raise this in the present proceedings.
- CAS cannot utilise Rule 57 CAS Procedural Code, the *de novo power of review*, and does not have the competence to rectify the violation. This measure and the above case limit its authority to matters of appeal. The Appellant rejects the debt placed against them for this was administered wrongfully in a disciplinary proceeding. CAS cannot determine the existence nor responsibility of the debt; the DRC is the only competent authority to amend the violation.

**iii. *Due diligence***

- CAS jurisprudence establishes the condition of creditor due diligence when applying Article 15 FDC for non-compliance. Ms Niki fails this (CAS/2011/A/2646, CAS/2020/A/6745 and CAS 2019/A/6461). Undisputedly, the degree of diligence is subjectively based upon the "*feasible theoretical possibility*" to recover in the domestic system (see CAS 2019/A/6461). The Creditor was not "*vigilant*" in taking "*prompt legal action*". Instead, Ms Niki purposely superseded the requirement to appeal the first-instance decision, despite the availability to recover the outstanding amount.
- Considering CAS 2020/A/7505 and Article 80 of the Athlean Bankruptcy Code, the national system of Athlos does not prohibit the full recovery of a debt because it provides opportunity to appeal. Further evidence is derived from the



Bankruptcy Court's acknowledgement of Ms Niki's full entitlement to the debt and credit privileged status. The joint appeal is currently progressing and there is an average 5% success rate in appeal. A hypothetical possibility of recovery has been sufficient to exclude a claim (CAS 2019 A/6461). Relying on CAS 2020/A/6745, the Creditor has lost the right to claim due to her "passive" awareness of these circumstances and negligent pursuance of her claim.

**iv. *Existence of the debt***

- Due to the conclusive non-appealed first-instance decision in the national courts, the claim has ceased to exist under Athlean law, and the Respondent should have rejected this claim. The Appealed Decision (appeal to CAS) also fails upon the finding of *res judicata*, as the domestic and DRC proceedings managed the same issue.
- The case fulfils the 3 requirements highlighted by CAS 2020/A/6912: Firstly, the same amount was claimed. Secondly, the facts and evidence only concern Ms Niki's contractual rights with the Old Club. Finally, the decisions were issued to the same parties. Thus, the DC should not have enforced an invalid decision against the New Club.

**B. The Respondent's Position**

38. The Respondent filed its response to the Appeal Brief in accordance with Article 55 of the Code on 5 July 2022 and submitted the following request for relief:

*"The Respondent rejects all claims raised by the Appellant and requests the CAS Panel to uphold the Challenged Decision in full"*.

39. The submissions of the Respondent may, in essence, be summarised as follows:

**i) *Sporting succession***

- The purpose of sporting succession is to protect the Creditor's right to recover its credit and promote financial justice. The Respondent alleges that the New Club satisfies the Article 15 FDC criteria, therefore it is the sporting successor.
- The New Club intends to portray itself as the Old Club satisfying the subjective elements. The Respondent agrees with the Appellant regarding the significance

of public perception in determining sporting succession and thus the liability and payment of the sum owed to Ms Niki (see, *inter alia*, CAS 2020/A/6831 and CAS 2020/A/7290). The Respondent declares that the changes made by the New Club are not substantially different; evidencing that 60% of fans would support the New Club as if it were the Old Club as confirmed in a 2020 survey.

- The Appellant uses the same name, logo and logo colours to establish its identity as the Old Club; though not overtly announced, public perception maintains the sporting history of the Old Club. Legacy is assumed through the purchase and use of the “Etta” brand. The Respondent proposes an intention to maintain and reflect its sporting history for the New Club, only replacing one member of the squad and retaining its administrative personnel: including secretaries, caretakers and maintenance staff. The Respondent further submits that the New Club’s choice to advance upon the same “Sale of Purchase Agreement” lease of the Old Club with Dinarica also indicates this.
- The common ownership, shareholders and management, and, in particular the influence of the controlling stakeholder, satisfies the element under Article 15(4). The category of competition in which the New Club participates, and transference of federative rights is fulfilled through the capability of the New Club to replace the Old Club in the same league and level. Considering the above, the Panel should find that all of the subjective criterion under Article 15(4) FDC have been met.
- Addressing the objective elements raised by the Appellant, it had a clear intention to deceive Ms Niki through engagement in shady practices. The 15-day chronology of events ceased communication with Ms Niki, the negotiations and signing of the “Sale Purchase Agreement”, disaffiliation of the Old Club and the incorporation of Etta S.C. 2020 LLC and immediate succession in competition, demonstrate avoidance of the Old Club’s financial obligations. In summary, due to the similarity of the Clubs and shady practices, the Appellant is the sporting successor of the Old Club and should be liable to pay the debt.

**ii) *Right to be heard***

- The Respondent rejects the Appellant's claim that it was denied the right to be heard. The Appellant had sufficient opportunity to submit this issue before the DC yet decided against this. It questions the Appellant's failure to contest the Committee's adjudicatory powers and the supposed violation of its right to be heard.
- The Panel should dismiss this allegation as it presently has the opportunity to raise this issue and any concern before them. Pursuant to Article R57 of the Code, the *de novo power of review*, any procedural flaws can be cured.

**iii) Due diligence**

- With reference to award CAS 2019/A/6461, the Respondent submits that the degree of due diligence is not a blanket rule but evaluated upon individual circumstances. Ms Niki diligently pursued the recovery of her debt. The current dispute should recognise that there was no "feasible theoretical possibility" to acquire the credit in appealing the Bankruptcy Court decision.
- It is a creditor's responsibility to know of an entity's insolvency and file a claim in insolvency proceedings under Athlean legislation. Despite the language barrier and additional legal costs as a non-national, Ms Niki did this. Furthermore, the Respondent challenges the recommendation to participate in further domestic appeals. The final appeal would be based on liquidated assets from the Old Club, acknowledging that the Old Club does not have money at its disposal. It has insufficient funds to pay its creditors in full, even Ms Niki, a privileged creditor, did not recuperate the entire sum owed to her.
- The jurisdiction of the Bankruptcy Court is limited to issues relating to bankruptcy, where this current dispute requires the establishment of sporting succession and sporting-related rights. The Respondent is the appropriate power and has the agency through its specialised regulatory and adjudicatory body to provide remedy for Ms Niki's entire claim. The Respondent regards the minimum of due diligence proved as participation in national bankruptcy proceedings is not an imposed precursor by its Statutes and Regulation.

- Moreover, the Respondent does not find any ‘passiveness’ or disinterest in recovering this claim. Constant efforts were made at each stage domestically and then in front of its judicial bodies. By dismissing this Appeal, the DC Decision is upheld, and the Old Club is obliged to pay the outstanding debt. Their financial position as the successor club allows them to do this. The principle of sporting succession treats them as one club and one cannot give itself money. Consequently, the rights and obligations pass onto the successor, nothing can be recovered from the Old Club.

**iv) *Existence of the debt***

- The debt was viably claimed under FIFA Statutes and Regulations with all certainty. The status of sporting succession and determination of sports-related rights and responsibilities are still beyond the jurisdiction of the Bankruptcy Court. Moreover, for the doctrine of *lex sportiva* to be upheld, Ms Niki’s right to obtain the entire credit must be served. Unless this crucial concept is observed in the Panel’s decision-making, the current non-payment will be detrimental to the interest of Ms Niki and claims from future players.
- The Respondent rejects the Appellant’s submissions relating to the doctrine of *res judicata*. The parties are two different legal entities and in relying upon CAS 2020/A/7543 the object and cause are substantially different; thus the three stages of identity fail.
- One of the Respondent’s roles is to ensure that the New Club does not harm the interest of its other members. It finds the conduct of the Appellant is detrimental to the player and urges the Panel to produce a result considerate of this.

### **III. MERITS**

#### **A. The Main Issues**

40. Having considered the Parties’ written and oral submissions, the Panel determines that the main issues to be resolved are:
- i. Is the Appellant the sporting successor of the Old Club?
  - ii. If so, was the Appellant’s right to be heard violated in the DRC proceedings?
  - iii. Did Ms Niki engage in the requisite due diligence?

iv. Is Ms Niki's claim dismissed because of the doctrine of *res judicata*?

41. In determining these issues, the Panel bears in mind the applicable standard of proof of comfortable satisfaction, which is set out in Article 35(3) of the FIFA Disciplinary Code 2019.

*i. Is the Appellant the sporting successor of the Old Club?*

42. The Appellant's position is that the New Club is not the sporting successor of the Old Club because the New Club did not display fraudulent or abusive intent in the formation of Etta S.C. nor do both clubs show enough similarities for sporting succession to occur. The Respondent submits that the Appellant is the sporting successor of the Old Club because the Old Club was fraudulent in the selling of their assets and there are enough objective elements to show a continuity between both clubs.

43. The Panel recounts that the concept of sporting succession requires a consideration of two elements, namely: a) the subjective manner in which the New Club is formed from the Old Club; and b) the objective elements of each club.

44. With regards to a), the Panel accepts that sporting succession can be determined, along with objective elements, by a club having fraudulent or abusive intent when a New Club forms from the bankruptcy of an Old Club (see, *inter alia*, CAS 2020/A/7092 and CAS 2020/A/7183). The question arises as to whether Etta F.C. was fraudulent or abusive of their financial responsibilities when Etta F.C. was undergoing bankruptcy proceedings. In this case, fraudulent or abusive would entail the club becoming bankrupt on purpose to avoid the debts to Ms Niki and setting up a New Club in its place. The Panel finds that Etta F.C. was not fraudulent or abusive of their financial responsibilities because they paid Ms Niki USD 200,000 for scoring more than twenty league goals. If fraudulent or abusive intent had occurred then Etta F.C. would not have paid the USD 200,000 to Ms Niki.

45. The issue of fraudulent and abusive behaviour is also relevant to the timing of any bankruptcy proceedings and the question arises as to whether Etta F.C. has been fraudulent or abusive when the bankruptcy proceedings were taking place. The Panel notes that Etta F.C. sold only their assets to Dinaria, which in turn, became the majority shareholder of Etta S.C., rather than selling the assets to raise funds to pay the creditors, including Ms Niki. Ms Niki is a preferential creditor and higher up on the order of

distribution. The Panel finds that Etta F.C. appears to have circumvented their responsibility to pay creditors, including Ms Niki, by selling off their assets to the owner of Etta S.C. Accordingly, the Panel finds that Etta F.C. appears to have engaged in fraudulent and abusive behaviour and used the sale of assets to avoid payment of the Old Club's debts.

46. With regards to b), the Panel recalls that not all objective elements bear the same weight, as some elements are more important than others when establishing sporting succession. In particular, the number of fans supporting an Old Club bears more weight than the legal entities of the New Club. The sporting identity is identifiable by itself and, as a general rule, transcends the legal entities which operate it. (see, *inter alia*, CAS 2018/A/5618, CAS 2020/A/7092).
47. After analysing both logos, the Panel considers that the logo of Etta F.C. and the logo of Etta S.C. are similar due to the similar shape of the logo and the colour scheme. The Panel finds that they are fundamentally similar and differ only slightly on the grounds of the shade of blue. The Panel also finds that the Appellant's claim that both logos are fundamentally different, due to the Athlean trademarking authorities trademarking both logos, is incorrect because it is presumed Etta F.C. sold their trademark rights as part of the business sale to Dinaria, meaning that Etta S.C. own the trademark rights to Etta F.C.'s logo. A club can trademark a logo that may conflict with a different trademark that it owns, without incurring liability because if they were to bring a claim, the club would be claiming against itself.
48. The Panel agrees with the FIFA Disciplinary Committee's conclusion that the year of establishment is not relevant in assessing sporting succession between Etta F.C. 1997 and Etta S.C. 2020. The year of establishment only shows what year a legal entity is formed, and it does not disprove continuity of the clubs.
49. For the avoidance of doubt, the Panel is clear that public perception is the element that holds the most weight. The Panel notes that most of the fans of Etta F.C. would support Etta S.C.; more specifically 60% as shown by an Etta F.C. supporters' poll. However, the Panel considers that a large number, specifically 40%, of fans not deciding to support Etta S.C. is also relevant, because it would, in essence, decrease the revenue of Etta S.C. by a significant amount. The Panel notes that the poll was carried out by Etta F.C. supporters and as Etta F.C. is their local club, the Panel questions whether the fans

have any other choice than to support Etta S.C. Accordingly, the Panel finds that 60% is enough to demonstrate continuity between Etta F.C and Etta S.C in the eyes of the public. The Panel finds that the poll shows a general idea of the public's perception of Etta S.C. being similar to Etta F.C.

50. The Panel agrees with the Respondent's submission that although Etta S.C. does not refer to the sporting achievements of Etta F.C. on their website or social media page, they have assumed the history of Etta F.C. by keeping the name, logo and team colours very similar. This is because the majority (60%) of Etta F.C. fans said they would support Etta S.C. which the Panel believes would only happen if the fans associated the sporting history of Etta F.C. with Etta S.C. It is unlikely such a high percentage of football fans would support another club if they did not believe the sporting history of Etta F.C. should be associated with Etta S.C. Therefore, the Panel finds that sporting history is an important element that shows a continuity between Old Club and the New Club.
51. On the basis of the available evidence and for all of the above reasons, the Panel determines that the Appellant is the sporting successor of Etta F.C.

*ii. Was Etta S.C.'s right to be heard violated in the DRC proceedings?*

52. Having established that the Appellant is the sporting successor of Etta F.C., the Panel will examine whether there was a violation of the Etta S.C.'s right to be heard and if this should warrant the setting aside the Appealed Decision (appeal to CAS).
53. The widely recognised principle of the right to be heard requires that all parties to legal proceedings must be provided with the opportunity to present their case in-front of a competent and the appropriate body. It is a principle that is well-established in CAS jurisprudence (see, *inter alia*, CAS 2010/ A/ 2275 and CAS 2011/ A/ 2343).
54. The Appellant submits that it was wrongly denied the opportunity to be heard when it was not invited to the initial FIFA DRC proceedings where the debt was determined. This opportunity could not have been recovered before the FIFA DC because these proceedings concerned the enforcement of this decision. Neither the DC or CAS have the competence to determine sporting succession or the liability of the debt. The Respondent submits that the Appellant's right to be heard was not violated because the New Club had sufficient opportunity to raise this argument as party before

the DC. Regardless, if there were a violation, it is not irreparable because its judicial body and CAS have the capability to revise the alleged violation of this right.

55. The Panel finds it necessary to clarify that Etta S.C. became the alleged debtor once the Creditor proved it to be the sporting successor. The Panel notes that the Appellant was not invited to the DRC proceedings because *pacta sunt servanda* was not observed by the Old Club party to the contractual relationship with Ms Niki. Moreover, pursuant to Article 1 of the FIFA RSTP, proceedings only apply to affiliated clubs and the disaffiliation of the Old Club was unbeknownst to the Respondent and the Creditor. It is not FIFA's responsibility to discover whether a club has been dissolved. The Panel finds that Ms Niki submitted her claim with all information of which she was aware as required in Article 36(2) FDC.
56. The DRC decision became final and binding on the Old Club when the deadline of appeal expired, in line with FIFA article 51(3) of the Procedural Rules Governing the Football Tribunal 2021 edition and CAS jurisprudence (see, *inter alia*, CAS 2016/A/4774 and CAS 2019/A/6461). In accordance with Article 15(4) FDC and CAS 2019/A/6461, the sporting successor entity of the non-compliant club inherits from its predecessor, the obligation to pay an outstanding debt.
57. Aligning with the approach taken in CAS 2019/A/6461 at paragraphs 54 and 55, the Panel finds that the New Club could have used the opportunity available to raise its issues at the Disciplinary Committee proceedings to which it was invited as a party. While the facts of this case have a slight difference, being that the clubs co-existed for some time having the same contact details and the Old Club and the New Club did not co-exist in the same manner, the Panel nevertheless considers the approach in this case to apply.
58. The Appellant submits that the case must go back to the DRC as the actions of the DC are limited to the disciplinary sanctioning from the first FIFA proceedings and because the DC acted beyond its capacity. With reference to CAS 2019/A/6461 paragraph 55, the matter of succession can be decided by this Panel as it directly links to sanctioning the New Club. In paragraph 58 of CAS 2019/A/6461 the Panel concluded that the DC has a duty to determine whether Etta S.C. is the successor club and the responsibility over debt liability. The Committee sufficiently complied with this duty to "*pronounce additional sanctions*" upon "*any breach*" (Article 53 FDC). In this the Disciplinary



Committee has the competence to “investigate, prosecute and sanction” in the application of the Article 27(1) FDC therefore its position will be upheld by the Panel. Referring the case back to the Dispute Resolution Chamber is not necessary (see CAS 2019/A/6461, paragraph 58).

59. Pursuant of Article R57 of the Code, the Panel has a *de novo power of review* with which to re-evaluate a case and supply a new decision or grant the case to the previous instance through the nullification of a previous decision. Pursuant to Article 49 of the FDC, it is commonly accepted that this Panel hears appeals from the DC. The Appellant proposes that the competency of CAS to employ this rule is limited. The phrase in question may be:

*“The President of the Panel may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal.”*

60. Unfortunately, the Appellant did not explore this in much detail, therefore the Panel shall derive a decision based upon its own interpretation, commentary and cases. Illuminating the Appellant’s perspective, CAS can only adjudicate upon issues which are linked to the sanction. Case CAS 2016/A/4774 was underlined to support this claim, but in the Panel’s view it does not.
61. The case history of the present matter fulfils this requirement. The Panel recalls from paragraphs 35 to 38 of the DC Decision, that the Article 15 sanction was directly invoked in the DC’s conclusion on sporting succession and responsibility of the debt of the non-compliant club. This conclusion is supported by a decision produced by FIFA, Decision 171380 PST paragraphs 11-14. Which evidenced that Articles 53(2), 60(2) and 14(1)(d) of the FIFA Statutes 2016, which correspond with Article 27 FDC 2019, calls its Federation to ensure that its own members comply with its regulation, principles and decisions. As Etta S.C. is an affiliated member, the DC has the competence to legally assess and review the Creditor’s request. This Panel upholds the DC’s jurisdiction to adjudicate upon this as a disciplinary body, thus the sanction imposed upon the Appellant is enforceable.
62. Regardless of this, the preceding first line of this rule clearly declares that CAS Panels have “...*full power to review the facts and the law*”. This Panel relies upon SFT Decision - 4A\_616/2021 to find the Appellant’s position as a misinterpretation. As the highest independent tribunal in sports arbitration, CAS has absolute authority to

adjudicate upon cases in their entirety to ensure that procedural, legal and factual novices have the possibility to be amended. There is no support for this claim. Neither literature nor following cases have taken on this interpretation. Instead, the Panel agrees with the decision of the FIFA Disciplinary Committee.

63. In conclusion, the Appellant did not need to be a party to the DRC claim as the successor club, and its right to be heard was not violated. The Appellant was party to two proceedings where it could have exercised its right to be heard. It neglected the opportunity to raise this in the DC proceedings, but it has also used accessed this in these present proceedings. Since the Appellant did not fulfil its obligation to repay Ms Niki within 30 days of receiving the judgment, as demanded by the Committee, it is now subject to further sanctioning, which falls within the scope (or jurisdiction) of FIFA Statutes and Regulations. In accordance with Article R27 of the Code, the case does not need to be referred to the DRC.

*iii. Did Ms Niki display the requisite due diligence?*

64. It is established CAS jurisprudence that the degree of creditor due diligence is a subjective element which has been important in determining whether a New Club was compliant with Article 15 FDC (see, *inter alia*, CAS 2020/A/6941, CAS 2011/A /2646 and CAS 2019/A/6461). As held in CAS 2011/A /2646, paragraphs 28 and 31, a lack of due diligence may substantially impact the ability of the creditor to receive their money, especially as a privileged creditor which is the circumstance in this present case. A sanction will not be imposed if the creditor should have further explored its options. A CAS Panel must be able to determine whether the “*passive[ness]*” of the creditor eliminated the recovery of their sum or if there was no “*feasible theoretical possibility*” in bankruptcy proceedings (CAS 2011/A /2646, paragraph 31).
65. The Appellant asserts that the Creditor had a “*feasible theoretical possibility*” to acquire the entire debt through the national system, where the Creditor must actively pursue their claim taking “*prompt legal action*”. It appears that Ms Niki was entitled to the entire contractual award for achieving the “Best FIFA Women’s Player Award” and scoring 20 League goals. However, the probabilities of attaining the whole debt domestically were low and therefore not “*feasible*” for a star athlete who recently joined a New Club. Instead of the purely hypothetical position taken by the Appellant, this Panel a practical perspective. It was more reasonable to recourse to FIFA. This issue

was tackled by the Respondent itself in paragraphs 30-33 of the DC decision. In that regard, the Panel agrees with the DRC stand at a player's "*disposal*" and are "*violations of FIFA instruments*" and is "*independent of local proceedings*"; members of FIFA are not bound or limited to domestic resources.

66. The Panel find that the Creditor satisfied her degree of diligence and did not contribute to the New Club's failure to comply with the judgement passed by the DRC. Following, CAS 2019/A/6461 paragraphs 55 and 56 the New Club could have arrested the FIFA system itself once Ms Niki charged them via email or filed a counterclaim in formal proceedings.

67. Accordingly, for the above reasons, the Panel determines that the Creditor sufficiently fulfilled the required degree of diligence in reflection of her personal circumstances and rejects the Appellant's claim that Ms Niki did not exercise due diligence.

*iv. Is Ms Niki's claim dismissed because of the doctrine of res judicata?*

68. The Panel recalls that there are three cumulative elements that must be proven in order for *res judicata* to apply, namely: there must be an identical claim; the same parties must be involved; and the same facts and evidence as the first judgement must be the same (see CAS 2020/A/6912).

69. In the present case, the Bankruptcy Proceedings and the DRC decision, do not involve an identical claim. This is because in the Bankruptcy Proceedings, Ms Niki claimed for USD 200,000 and USD 150,000 whereas before the DRC, the claim was only for the USD 200,000. The Panel also finds that the cases in the Athlean Bankruptcy Court and the DRC are not identical because Ms Niki claimed a violation of Article 12bis of the August 2021 edition of the FIFA Regulations on the Status and Transfer of Players ("RSTP") in the DRC, but she did not do so in the Bankruptcy Proceedings.

70. Therefore, the Panel determines that these two cases are fundamentally not identical and the requirements of *res judicata* are not met and it rejects the Appellant's submission that Ms Niki's claim should be dismissed because of the doctrine *res judicata*.

**B. Conclusion**

71. Having taken into due consideration all the specific circumstances of the case, the evidence produced, and the arguments submitted by the parties, the Panel determines that:
- i. The Appellant is the sporting successor of the Old Club.
  - ii. The Appellant's right to be heard was not violated in the DRC proceedings.
  - iii. Ms Niki did undertake the requisite due diligence.
  - iv. Ms Niki's claim is not dismissed *res judicata*.
72. Accordingly, the Panel dismisses the appeal and all other and further motions or prayers for relief.

**ON THESE GROUNDS****The Court of Arbitration for Sport rules that:**

1. The appeal filed on 19 June 2022 by Etta S.C. against the Fédération Internationale de Football Association with respect to the decision issued on 1 June 2022 by the Disciplinary Committee of the Fédération Internationale de Football Association is dismissed.
2. The decision issued on 1 June 2022 by the Disciplinary Committee of the *Fédération Internationale de Football Association* is confirmed.
3. The costs of arbitration, to be determined and served on the Parties by the CAS Court Office, shall be borne by Etta S.C. in their entirety.
4. Each party shall bear its own costs and legal expenses.
5. All other and further motions or prayers for relief are dismissed.

Seat of Arbitration: Lausanne, Switzerland

Date: 1 September 2023

Mrs Patricia Moyersoén

President

Mr Ulrich Haas

Arbitrator

Mr Jacques Radoux

Arbitrator