THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2020-01208**

BETWEEN

THE TRINIDAD AND TOBAGO FOOTBALL ASSOCIATION

Claimant

AND

THE FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATION

Defendant

Before the Hon. Madam Justice C. Gobin

Date of Delivery: Thursday 13 August 2020

Appearances: -

Dr. Emir Crowne, Mr. Matthew Gayle, Mr. Jason Jones instructed by Ms. Crystal Paul for the Claimant

Mr. Christopher Hamel-Smith SC, Mr. Jonathan Walker, instructed by Ms. Cherie Gopie for the Defendant

RULING

Parties - TTFA

1. The TTFA is a body corporate established under the Laws of Trinidad and Tobago by the Trinidad and Tobago Football Association Act, No. 17 of 1982 ("The Act").

2. One of the aims and objectives under S 3(a) of the Act is:

> *"3(a) To regulate and control the conduct of Football in Trinidad and Tobago (under the Federation Internationale de Football Association System) and to provide playing fields and conveniences in connection therewith".*

3. Section 4 of the Act provides:

> *"The affairs of the Association shall be managed by a General Council whose, election powers and procedures shall be prescribed in The Constitution and the Rules of the Association".*

4. The power to make rules is vested under section 8 (1) which states:

> *"The Association shall have power to make such rules as they may deem necessary or expedient for the proper conduct and Management of the Affairs of the Association and its members and for the discharge of its duties, powers and functions from time to time to alter, amend, vary, revoke or repeal such rules".*

5. Pursuant to the power granted under section 8 (1), TTFA has made rules which have been incorporated into its Constitution, the latest version of which was adopted and ratified on 24/11/2019. The Constitution establishes a comprehensive organisational structure made up of several bodies of which the supreme and legislative body is the General Meeting (I take this to be the General Council), and the Board of Directors is the Executive body.

6. Pursuant to the express power granted under section (4) of the Act, TTFA has enacted rules which provide for a democratic process for elections. TTFA held its constitutionality due elections on 24/11/2019 as a result of which the following persons were among those elected by the General Meeting to the Board of Directors:-

Mr. William Wallace	-	President
Mr. Clynt Taylor	-	First Vice President
Ms. Susan Joseph-Warrick	-	Second Vice President
Mr. Joseph Sam Phillip	-	Third Vice President

FIFA

7. FIFA is an association registered under Swiss Law in Zurich. It is the international governing body for the Sport of Association Football. FIFA is comprised of members who, in turn, are the

national associations for their respective countries. National associations are grouped into 6 confederations. Membership of a confederation is a prerequisite to FIFA membership. TTFA is a member of the Confederation of North, Central America and the Caribbean Football (CONCACAF).

8. TTFA has since 1964 (prior to incorporation) been a member of FIFA as the association that represents Trinidad and Tobago. It is this membership that entitles Trinidad and Tobago to participate in international tournaments and matches against the national teams of other member associations of FIFA. The entitlement of our clubs to participate in regional tournaments is derived from the TTFA's membership of FIFA and its regional confederation CONCACAF.

9. The nature of the relationship between FIFA and the TTFA is contractual. The legal framework for FIFA's relationship with its member associations is set out in its Statutes, regulations, directives and decisions of FIFA (as well as Swiss Law). The FIFA Statutes are FIFA's constitution and they set out the terms and conditions of each individual association's membership.

10. Among FIFA's stated objectives are –

> *"2(a) To improve the game of football constantly and promote it globally in the light of its unifying educational, cultural and humanitarian values as well as to use its efforts to ensure that the game of association football is available to and resourced for all who wish to participate regardless of gender or age.*
>
> *2(d) To control every type of association football by taking appropriate steps to prevent infringements of the statutes, regulations or decisions of FIFA or of The Laws of the Game".*

11. To achieve these and its other objectives, FIFA provides funding and programmes which are designed to provide FIFA's member associations such as TTFA to build and develop a

foundation for the growth of football. The conditions under which FIFA provides funding to its member associations are set out in specific regulations. A breach of regulations may lead to sanctions as set out in FIFA Statutes.

12. As a condition of membership of FIFA, all member associations including TTFA agree to be bound by FIFA Statutes. The extent of FIFA's control of the affairs of TTFA can be seen from the following provisions in TTFA's constitution -

13. The Constitution provides among the objectives of TTFA –

> *"2(e) To respect and prevent any infringement of the statutes, regulations, directives and decisions of FIFA, CONCACAF, CFU and TTFA as well as the Laws of the game and to ensure that these are also respected by its members".*

Act (7) provides –

> *"The bodies and officials of TTFA must observe the statutes, regulations, directives, decisions and Code of Ethics of FIFA, CONCACAF, CFU and TTFA in their activities".*

14. Among the statutes that TTFA has consented to observe is FIFA Statute 57 which mandates recognition of the Court of Arbitration for Sport (CAS) and obligations relating to dispute resolution as follows:

> *57(1) FIFA recognises the Independent Court of Arbitration for sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediators and licensed match agents.*

15. FIFA has gone further with the imposition of obligations relating to dispute resolution.

> *Article 59 provides -*
>
> *1) The confederations, members associations and leagues shall agree to recognise CAS as an independent judicial authority and to ensure*

that their members, affiliated players and officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents.

2) ***Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.***

3) ***The associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the association of confederation or to CAS.***

The associations shall also ensure that this stipulation is implemented in the association, if necessary by imposing a binding obligation on its members. The associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary courts of law. (emphasis added)

16. In accordance with FIFA's dictates above, by articles 65 and 67 of its own constitution, TTFA expressly incorporated similar provisions through the following –

Article 65

1) *Disputes in the Association or disputes affecting Leagues, members of Leagues, Clubs, members of Clubs, Players, Officials and Officials of other Associations, shall not be submitted to Ordinary Courts, unless the FIFA regulations, this Constitution or binding legal provisions specifically provide for or stipulate recourse to Ordinary Courts.*
2) *Instead, such disputes as specified in par. 1 shall be taken to an independent Arbitration Tribunal created by TTFA. The Board of Directors shall issue special regulations regarding the composition, jurisdiction and procedural rules of this Arbitration Tribunal.*
3) *As long as such Arbitration Tribunal has not been duly installed by TTFA and recognised by the General Meeting, any dispute of national dimension may only be referred in the last instance to CAS.*

Article 67

1) *In accordance with the relevant provisions of the FIFA Statutes, any appeal against a final and binding decision passed by FIFA, CONCACAF or the leagues shall be heard by the CAS, unless another Arbitration Tribunal has jurisdiction in according with art.69. CAS shall not, however, hear appeals on violations of the Laws of the Game, and suspensions of up to four matches or up to three months (with the exception of doping decisions).*
2) *TTFA shall ensure its full compliance and that of all those subject to its jurisdiction with any final decision passed by a FIFA body, by a CONCACAF body, by the Arbitration Tribunal recognised by TTFA or by the CAS.*

Articles 8(2) NORMALISATION

17. Under the terms of its membership contract, TTFA also agreed to be bound by Article 8(2) of FIFA statutes which provides for the appointment of normalisation committee in these terms:

8 (2) Executive bodies of member associations may under exceptional circumstances be removed from office by the Council in consultation with the relevant confederation and replaced by a normalisation committee for a specific period of time.

This litigation comes out of FIFA's purported exercise of its power under Article 8(2).

The Appointment of the Normalisation Committee

18. In his affidavit of 15th June 2020, Mr. Mosengo Omba explained why the process under Article 8(2) was set in motion. He stated:

> *"Prior to 2019 FIFA randomly selected 20% of their member associations and confederations to undergo a central FIFA programme audit. In 2018, the TTFA was randomly selected for the central review programme. Coming out of that audit FIFA was concerned by the high level of debt that the TTFA had accumulated and was of the view that there were serious governance issues at the TTFA. However, the TTFA was due to hold elections for a new Executive Committee and FIFA's general practice is to not interfere in governance matters involving member associations during electoral years so as to avoid giving the impression that FIFA is taking the side of any candidate for the position of President of that member association. In keeping with this general practice, FIFA therefore held its hand on taking any action so as to allow an opportunity for those elections to take place and for any new Executive Committee to begin to address these serious issues".*

19. Sometime in February 2020, and just about three months after TTFA's November 2019 elections, a delegation of FIFA officials visited Trinidad and Tobago. It met with the duly and newly elected TTFA executive officers. By letter dated 17/03/2020 FIFA's Secretary General, Fatma Samoura notified TTFA of a decision of the Bureau of the Council to appoint a normalisation committee under Article 8(2). The letter made reference to the visit of the delegation and alleged FIFA's concerns about TTFA's financial management and governance.

The excerpts which follow indicate the extent of the intrusive power FIFA assumed over the TTFA under the normalisation power. The Secretary General wrote:

"Under these serious circumstances, and in accordance with Article 8 paragraph 2 of the FIFA Statutes (which foresees that executive bodies of member associations may, under exceptional circumstances, be removed from office by the FIFA Council in consultation with the relevant confederation and replaced by a normalisation committee for a specific period of time), the Bureau of the Council decided, on 17 March 2020, to appoint a normalisation committee for the TTFA.

Its mandate includes the following tasks:

- ***To run TTFA daily affairs**;*
- *To establish a debt repayment plan that is implementable by the TTFA;*
- ***To review and amend TTFA statutes (and other regulations where necessary) and to ensure their compliance with the FIFA Statutes and requirements before duly submitting them for approval to the TTFA congress; and***
- ***To organise and conduct elections of a new TTFA Executive Committee for a four-year mandate.***

The normalisation committee would be composed of an adequate number of members to be appointed by the FIFA administration, in consultation with CONCACAF. Although those eventually appointed for the normalisation committee will assume their duties with immediate effect, all members of the normalisation committee will have to pass an eligibility check to be carried out by the FIFA Review Committee in accordance with the FIFA Governance Regulations.

The normalisation committee will act as an electoral committee whose decisions are final and binding, and none of its members will be eligible for any of the open positions in the TTFA elections under any circumstances, including in the event that their mandate as a member of the normalisation committee has been revoked or that the resign form their position. The specified period of time during which the normalisation committee will

perform its functions will expire as soon as it has fulfilled all of its assigned tasks, but no later than twenty-four months after its members have been officially appointed by the FIFA Administration. The exact date for the normalisation committee to complete its mandate will be communicated by the FIFA administration once its members have been appointed".

20. This decision of the Bureau of the Council was made pursuant to its powers under Article 38(2) of the FIFA Statutes which allows the making of time sensitive decisions. The rule provides that such decisions shall have immediate legal effect but Article 38(3) prescribes that all decisions taken by the Bureau of the Council shall be ratified by the Council at its next meeting.

21. The effect of the appointment of the normalisation committee was to immediately and unceremoniously strip the duly elected Executive Board of Directors of its powers under TTFA's Constitution. TTFA complains that since its appointment, the Normalisation Committee has wrongly –

    a) *Sought to interfere with the operation of the Claimant's bank accounts, resulting in the Claimant's banker's refusing to allow the Claimant's duly appointed signatories to operate the Claimant's accounts;*
    b) *Usurped the management of the Claimant's website and/or staff and/or buildings and therein exposing the Claimant to litigation from third parties;*
    c) *Sought, by way of a letter dated 30th April 2020 from Mssrs Hobsons who stated that they have been instructed by 'The Normalisation Committee' in accordance with FIFA statutes, to bar the Claimant's Duly Elected President, Mr. Wallace, from using the Claimant's letter head;*
    d) *Entered into discussions and/or agreements with the Government of Trinidad and Tobago for the use of the Home of Football for the Covid-19 relief efforts.*

TTFA appeals to CAS

22. TTFA through the Board of Directors in purported compliance with its obligations under its constitution, Article 67 and FIFA Statutes 59 sought to challenge the appointment of the Normalisation Committee by way of appeal to the Court of Arbitration for Sport (CAS). The Claimant claims the arbitration has failed for two reasons :

    1) *That FIFA has refused to demonstrate that it is willing to do all that is necessary for the proper conduct of the arbitration, in particular by its refusal to pay its share of the advance costs of the arbitration.*
    2) *That the CAS has demonstrated bias.*

23. On 18/05/2020 TTFA withdrew the appeal before CAS and sought permission to issue and serve these proceedings out of the jurisdiction pursuant to CPR 7.2. The substantive relief sought was a declaration that the purported decision of the Defendant dated 17/03/2020 purporting to remove the TTFA's Board of Directors and or its duly elected officers is null and void and of no effect. This is essentially a challenge by TTFA to the appointment of the normalisation committee but the case calls for a consideration of whether Article 8(2) of the Statutes is consistent with our municipal law, and of the validity of those provisions which purport to oust the jurisdiction of the court in Trinidad and Tobago.

Leave to issue proceedings

24. On 18/05/2020 having satisfied myself that the Claimant had a good case on the affidavit evidence together with the exhibits as well as the contents of the statement of case which was duly certified as to the truth by the TTFA President, I granted leave to issue the claim form against FIFA for service in Switzerland. The Claimant's case raised the enforceability of articles of TTFA's Constitution, FIFA Statutes and consistency with the TTFA Act, and the legitimacy of actions taken by FIFA in purported pursuance of them. I granted an order for service by two methods, prepaid international courier service as well as by email. On 26/05/2020 an

appearance was entered on behalf of the Defendant by former attorneys. A notice of change was filed on 09/06/2020.

The Defendant's Application for Setting Aside Service/A Stay of Proceedings

25. By NOA dated 15/06/2020 the Defendant filed the instant application for the following reliefs that:

    I. The issuance of the Claim Form and Statement of Case filed on 18th May 2020 be set aside;

    II. The Order made by the Honourable Court on the 19th May 2020 permitting the service of the Claim Form and Statement of Case by way of email be set aside;

    III. The Claimant's case be dismissed; or in the alternative,

    IV. The proceedings be stayed; or in further alternative,

    V. In the event that the proceedings are not stayed or the substantive matter is deemed to be properly before the court, the time for the filing of the Defence by the Defendant be extended to 28 days from the date of the determination of this application; and in any event,

    VI. All proceedings in this matter be stayed until the determination of his application; and

    VII. The Claimants pay the Defendant's costs of this application.

26. The application was supported by affidavits of Mr. Veron Mosengo Omba, most senior manager FIFA's Member Associations Division and Mr. Miguel Lietard Palacios. Both these gentlemen are attorneys. In response Mr. Kendall Tull and the President of TTFA, Mr. Wallace filed affidavits on 26/06/2020. The Swiss based attorneys filed responses on 07/07/2020. In his later affidavit, Mr. Lietard confirmed that on 25/06/2020, FIFA's Full Council ratified the decision to appoint the normalisation committee. I considered this to be significant for two reasons. It raised a question as to whether the decision of the Bureau of the Council

17/03/2020 to appoint the normalisation committee was a "final decision". And, since the ratification came more than five weeks after FIFA had entered an appearance in these proceedings and more than a week after this application was filed, I consider that the action demonstrated scant regard for the judicial process and the courts of this country.

The Issues

27. The issues which arose for determination were identified by the Defendant as follows:
    a) Whether commencement of these proceedings was ultra vires TTFA and therefore a Nullity;
    b) Whether commencement of these proceedings was outwith the authority of those who purported to do so on behalf of TTFA;
    c) Whether these proceedings should be stayed in favour of arbitration at CAS as agreed between TTFA and FIFA; and
    d) Whether permission to the Claimant to issue and serve the claim form out of the jurisdiction ought to be set aside.

Service of the Claim Form out of the jurisdiction

28. It is convenient to deal first with the issue of service which was effected by email in accordance with the order of 18/05/2020. Essentially the Defendant submits that service of process from a foreign authority by email is unlawful, and therefore in breach of Part 7:8 CPR.

29. I have indicated that service was ordered by two methods. There has been no complaint regarding personal service by international courier service.

30. In support of this submission the Defendant relied on the affidavit of Mr. Lietard to establish a claim that the only means by which international service of process is permissible under Swiss Law is governed by Article (11) of the Swiss Federal Act which prescribes service by Swiss

government officials. Service by any other means including service by email, is therefore unlawful.

31. It is settled that foreign law is a matter of fact to be proved by the evidence of experts skilled in such law. Mr. Lietard is an attorney. He speaks not from his own knowledge or expertise but relies on the legal opinion of a third party albeit an attorney, Ms. Stephanie Mannl who is admitted to practice in Switzerland and head of FIFA,s Institutional Legal . The particular provision of the Swiss Federal Act on Private International Law has not been produced in evidence.

32. The case of **Ferrarini SPA & Others v Magnol Shipping Com. Inc (The "Sky One") [1988] 1 Lloyd's Rep 238** on which the Defendant relies, itself indicates the quality of expert evidence that the court received before it decided what was the applicable law. What was adduced here falls far short of what that case demonstrated would suffice. The expert evidence contained in Mr Lietard's affidavit is in any case inadmissible hearsay opinion evidence and I consider it to be insufficient to establish what the law is on service of process in Switzerland. The opinion is attributed to an attorney within FIFA's litigation department who failed to file an affidavit.

33. In the circumstances, I find no irregularity in the manner in which service was effected. Whether the case is a proper one for this Court's jurisdiction and whether the Claimants have a good cause of action will be more closely considered under the other heads of the Defendant's submissions. .

Ultra Vires

34. It is trite that TTFA's powers are limited to those granted by the Act. FIFA's argument as I understand it is first, that since one of the objectives of the incorporation of TTFA was to regulate and control the conduct of football in T&T under the FIFA system, then FIFA Statutes and its regulatory framework have been incorporated into our local laws. Secondly, TTFA having adopted FIFA Statutes under its own Article 65 (which expressly prohibits recourse to the ordinary courts) and Article 67 (which provides for an appeal process against a final and

binding decision to be heard by CAS) the decision to file this action falls outside of the clear limits of TTFA's powers.

35. FIFA relied on the judgment of this Court in the case of **Bobby Mungal v El Dorado Consumers Co-operative Society Ltd CV2009-02781**, to support the proposition that –

> *"Where a statute provides a specialised procedure to be followed for resolving disputes and which oust the jurisdiction of the courts the party is bound to access the procedure set out in the legislature".*

36. The relevant statutory provision under consideration in **Bobby Mungal** which was held to exclude the jurisdiction of the court was in very clear terms –

> "S 67 (1) of the Co-operative Society Act Chp. 81:03 provided:
>
> 67(1) if any dispute touching the business of the society arises
>
> (f) between the society and any of its creditors. The dispute shall be referred to the Commissioner for decision

37. This is far from the reference in section 3 of the Act to the objectives of the "Association" to regulate and conduct football under the FIFA system. Section 3 of the Act is not an operative section. A reference to FIFA system in any case is not the same as FIFA Statutes. Had Parliament intended to enact FIFA Statutes so as to oust the jurisdiction of the courts and to effectively deprive the TTFA of access to the courts of this country it would have had to do so expressly in clear and unambiguous terms. **Bobby Mungal** is of no assistance to the Defendant.

38. As for the claim that TTFA cannot act outside of its own rules of its constitution which expressly exclude recourse to the court, the effect of this ouster provision in Article 65 was considered by Boodoosingh J in **CV2018-03080 between Keith Look Loy v TTFA**. This is a provision which deals with internal disputes. The judge had to determine whether TTFA was amenable to judicial review. In arriving at his decision that it was, Boodoosingh J attached much weight to the fact that TTFA was incorporated by Act of Parliament. He noted that -

"the functions it (TTFA) undertakes include certain public functions, as well the fact that the Association receives public funding from time to time". The judge also considered that "it is an Association which controls a national sport often referred to as the "World Game", in respect of which there is significant national interest".

39. I agree with the conclusion of my colleague, that because TTFA, is statutory corporation it cannot oust the jurisdiction of the courts by its rules. Further, the adoption of rules which seek to oust the jurisdiction of the courts breach a well-established policy of the law, which renders such rules void (**Keith Look Loy v Ormond Gabriel and Others, HCA no.4150 of 1991,** applying **Lee v Showmen's Guild of Great Britain [1952] 1 A11 ER 1175).**

40. The dispute in this case falls under Article 67 of TTFA's Constitution under which TTFA agreed to subscribe to the exclusive jurisdiction of CAS. A statutory corporation which is empowered to make rules for its operations goes too far when it makes rules or adopts rules which foreclose access to the courts of the country. Moreover it is outwith the jurisdiction of an entity incorporated under our legislation to agree to submit to foreign law as FIFA Statutes prescribe.

41. Ouster clauses are in any event to be strictly construed. **Lord Reid in Anisminic v Foreign Compensation Commission H.L [1969] 2 A.C. 147**, said:

"it is a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly, meaning I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserve the ordinary jurisdiction of the courts".

42. In his affidavit filed 09/07/2020 Mr. Lietard confirmed that the decision of 17/03/2020 to appoint the committee was only ratified by the Full Council of FIFA on 25/06/2020 pursuant to Article 38 of FIFA Statutes. That decision of 17/03/2020, though it took legal effect immediately, was subject to ratification by the Council and was therefore in my opinion not a

final one. Mr. Lietard has sought to describe it as a "new decision" but I reject that explanation. In the circumstances even if Article 67 is enforceable (and I do not think it is), the jurisdiction of the court was preserved in respect of the earlier decision which was left to be ratified under Article 38 of the Statutes.

43. The most forceful ultra vires argument so far arises on TTFA's agreement to submit to Article 8 (2) of the FIFA Statutes and its normalisation powers. This is at the heart of this dispute. S 4 of the TTFA Act vests powers in the General Council and specifically provides for election powers and procedures as shall be prescribed in the TTFA's Constitution. The Constitution of TTFA establishes a comprehensive governance structure within the organisation. A normalisation committee appointed by FIFA is not on the face of it an organ recognised under that structure. The question that will remain to be answered at the appropriate stage is whether TTFA's agreement to Article 8 (2) as a condition of its membership, amounts to contracting outside of the Act and whether its claim to power to conduct elections overrides the process prescribed by it.

44. FIFA may yet have to justify its purported assumption of extraordinary power to control the day to day affairs of TTFA, including authority to review and amend its Statutes and to organise and conduct elections of a new TTFA Executive Committee for a four-year mandate. This appears to be in breach of FIFA Statute (19) (2) which provides:

    1) Each member association shall manage its affairs independently and without undue influence from third parties.
    2) A member association's bodies shall be either elected or appointed in that association. A member association's statutes shall provide for a democratic procedure that guarantees the complete independence of the election or appointment.
    3) Any member association's bodies that have not been elected or appointed in compliance with the provisions of par.2, even on an interim basis, shall not be recognised by FIFA.

4) Decisions passed by bodies that have not been elected or appointed in compliance with par. 2 shall not be recognised by FIFA.

The assumption of the power to conduct elections appears to override the process prescribed in an Act of the Parliament of Trinidad and Tobago. The question for the court as the litigation progresses will be whether TTFA can contract out of the Act to give FIFA such power or whether TTFA's contractual undertakings are subject to the laws of Trinidad and Tobago.

Authority of persons to commence action on behalf of TTFA

45. FIFA has also questioned whether those who commenced this action had the authority to do so. Paragraph 19 of the grounds of the application raised the issue in this way.

> *(19) Further, the commencement of these proceedings contravened the provisions of the TTFA Constitution. Accordingly it was not properly authorised*.

The particular provisions of the TTFA's constitution were not identified. What is clear from the Defendant's submission is that this directly introduced an issue as to whether persons who made the decision to litigate before this court had the requisite authority to do so. This is a ground separate from the ultra vires argument.

46. The Defendant filed no evidence in support of this ground. But in its submissions it claimed that the information as to who authorised the commencement of these proceedings in the name of TTFA ought to have been disclosed to the court. It went so far as to state that *"the court should nevertheless not allow its proceedings to be used in a manner by those who have caused this action to be commenced unless it is satisfied that the decision to institute these proceedings was one properly made by the organ of the TTFA who was empowered to make such a decision"*.

47. Section 37 of the Interpretation Act vests the power to sue in an incorporated body in its name. The claim was signed and issued by the President who under Rule 39 is described as "the legal

person". FIFA has no locus to challenge the authority of persons within the TTFA organisational structure to bring an action, especially when it refuses to submit to the jurisdiction of the court. It can place no onus on TTFA to disclose its internal processes by asking a question in the grounds of its application. It cannot put the TTFA to proof of authority to bring an action to restore its duly elected Board of Directors. That is a matter for TTFA and its membership within this jurisdiction. If the Defendant intended to suggest consistently with its position that the "normalisation committee" having been installed, it is the proper party to bring these proceedings, it has not said so.

48. The Defendant relied on the decision of the court in **Trinidad Aggregate Products Limited v Jeren Ltd and Carmen Reid CV 2017-03422** to support its proposition that a third party can in fact challenge the authority of persons to bring proceedings in the name of a Claimant company. **TAPL** involved an internal dispute between directors and shareholders of a company. A preliminary objection was taken as to whether some of the directors had the requisite authority to bring the action in the name of the company. In that case Wilson J determined that the preliminary issue of authority to bring the action required full ventilation and should not be determined summarily on the basis of untested evidence. The judge had before her nine affidavits with evidence on the issue. In the instant case there is no evidence to introduce this as a bona fide issue. The decision in **TAPL** is not applicable.

49. I have determined however that by raising an issue as to the authority of persons within TTFA to bring the action and commenting on the absence of evidence in this regard, and by inviting the court to consider the effect of the absence of evidence, FIFA has gone beyond mere procedural or jurisdictional objections. It has impliedly submitted to the jurisdiction of the court.

Arbitration

50. FIFA submits that the proceedings should be stayed and the parties be held to their commitment to arbitrate. There is an inherent contradiction in the FIFA's purported appointment of a normalisation committee, the purpose of which has been to usurp the powers and functions of the executive of the TTFA on the one hand, and its insistence on holding the TTFA to the arbitration agreement on the other. The Claimant properly asks the question, whom does FIFA hold to that agreement. In other words, if FIFA disputes the authority of Mr. Wallace and others to act on behalf of TTFA, and TTFA is under the control of the normalisation committee, how does it reconcile that with its insistence that these very persons who have no authority to file these in court should commence arbitration proceedings in Switzerland. The arbitration process cannot be triggered if there is a dispute as to the capacity of one of the parties to invoke the process and to bind TTFA to any outcome.

Is arbitration the appropriate form

51. Even assuming that the arbitration could proceed with the former Appellants, Mr. Wallace and others, I do not think that arbitration would be the appropriate forum for the resolution of this dispute. This case goes well beyond TTFA's alleged governance issues and the justifiability of FIFA's purported action in appointing the Normalisation Committee. This is about the legitimacy of powers exercised under Article 8(2) of the FIFA Statutes and its consistency with a law passed by legislators in this country. This is a matter which falls squarely within the jurisdiction of the High Court of this country. This is not a matter for the Court of Arbitration for Sports.

Should the proceedings be stayed

52. While it is not strictly speaking necessary to deal with the remaining issues, I shall indicate my findings on the application of a stay under section 7 of the Arbitration Act, Chapter 5:01. The application could not succeed for the following reasons. By its challenge to the authority of persons to bring this action, in which proceedings were signed by the President, Mr. Wallace and the Board of Directors named in the arbitration proceedings, the arbitration was rendered inoperable. It raised a basic question as to the capacity of the President and the Board of Directors, even to submit to arbitration.

53. Further, FIFA has not demonstrated that it is ready and willing to do all things necessary to the proper conduct of the arbitration. FIFA has clearly evinced an intention not to perform its obligation to pay under CAS Article R64.4 which provides –

> *"To determine the amount to be paid in advance, the CAS Court Office shall fix an estimate of the costs of arbitration, which shall be borne by the Parties in accordance with Article R64.4. The advance shall be paid in equal shares by the Claimant(s)/Appellant(s) and the Respondent(s). If a party fails to pay its share, another may substitute for it; in case of non-payment of the entire advance of costs within the time limit fixed by the CAS, the request/appeal shall be deemed withdrawn and the CAS shall terminate the arbitration; this provision applies* mutatis mutandis *to any counterclaim.*

54. FIFA has unequivocally refused to pay its share of the advance of costs under the rule. It was the CAS court office that first informed the Appellants then, that FIFA "as a general rule does not pay its share of the advance of costs when it is a respondent". Surprisingly, it appears that this is a practice of FIFA's with which the court office is familiar and one which it is prepared to countenance with no regard for the consequences of the non-compliance on the availability of the arbitration process to the other party.

55. FIFA claims that its non-compliance notwithstanding, it was still open to TTFA to fund the advance through an application for Legal Aid or to make an application to the CAS to enforce its compliance so the arbitration process was not rendered unworkable.

56. In addition to refusing to pay its share of the costs, FIFA made a request and the CAS court office granted it, to fix its time limit to file its answer to the Claimant's statement upon the Appellant's payment of the costs. The relevant part of CAS Article 55 provides –

> *The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Appellant's payment of its share of the advance of costs in accordance with Article 64.2.*

57. The CAS court office applying what appears in my opinion to be a strained construction, construed Article 55 as permitting it to grant FIFA an extension of time to file its answer until after the Appellants (TTFA, Mr. Wallace and others) had paid FIFA's share. It granted the extension. In its interpretation and application of the rules the court office effectively denied access to the prescribed method of achieving dispute resolution to the undeniably weaker of the parties. FIFA was at all times aware of the dire state of the TTFA's finances which predated the installation the new Board of Directors in office in November 2019. Rules which were intended to level the playing field, in the words of the Privy Council allowed "the strong to push the weak to the wall" **(Janet Boustany v George Pigott Co, Antigua and Barbuda [1993] UKPC 17)**.

58. In support of its submission that the refusal to pay its share of the advance costs did not render the arbitration unworkable, Counsel cited the Canadian case of **Resin Systems Inc. v Industrial Service and Machine Inc [2008] ABCA 104** in which the Court of Appeal of Alberta decided that refusal to pay the costs of the arbitration makes it unworkable. However, Mr. Hamel-Smith urged the reasoning in the judgment of the court in the UK case of **BDMS Ltd v Rafael Advanced Defence Systems [2014] EWHC 451 (Comm)**] in which **Resin** was considered.

59. In **BDMS**, Hamblen J declared *"that under English Law for a breach to be repudiatory, it must be shown that the party in breach:*

    1) Has clearly and unequivocally evinced an intent not to perform its obligations under the arbitration in some essential respect and

    2) *Has committed a breach of the arbitration agreement which went to the root of the contract".*

60. The learned Judge confirmed that issues of repudiation are necessarily fact dependent and that a refusal or failure to pay advance costs may in an appropriate case be repudiatory. On the peculiar facts of the case before him the learned Judge found that the refusal to pay the advance costs did not render the arbitration inoperative. There were other funding avenues available and the Respondent had otherwise participated in advancing the process. In his submissions in response, Dr. Crowne conclusively distinguished the facts in BDMS from the case at bar, and I do not need to repeat his submissions, I accept them.

61. In this case, not only has FIFA unequivocally refused to comply with the CAS 64 (2) rule, thumbing its nose at its obligations to pay under the agreement, it further paralysed the arbitral process by obtaining an extension of time to answer the case until after TTFA paid its (FIFA's) costs. This together with the refusal to recognise the Board of Directors was sufficient to establish a wider pattern of repudiatory conduct and in the circumstances of this case I find that the refusal to pay the advance costs rendered the arbitration inoperable. The stay of proceedings would not have been granted in the circumstances.

62. Before I dispose of this matter I think important to address an issue that was touched upon by Mr. Hamel Smith the course of his submissions. Counsel alerted me to the "severe consequences to which TTFA is exposed as a consequence of taking action in direct breach of the terms of its membership of FIFA. He said "the breach renders TTFA susceptible to be suspended from FIFA's membership, aside from the direct implications for TTFA such as suspension will impact the country of Trinidad and Tobago whose various nationals teams will

no longer be allowed to partake in international tournaments and matches. This compromises the careers, livelihood, education and other prospect for players"

63. These are no doubt serious concerns. FIFA has been clear on its objective to control every type of association football by taking appropriate steps to prevent infringements of the statutes, regulations or decisions of FIFA or of the laws of the game. This case has disclosed that among the mechanisms by which it achieves its goals is to dictate that member association's rules are consistent with its Statutes and that they (the associations) adopt stringent rules to enforce them. FIFA also insists on rules which prohibit or limit access to municipal courts.

64. I am confident that FIFA believes the statutes and the mechanisms it uses to enforce them are compliant with the laws of the countries and States to which its member associations belong. FIFA could not presume to be above the law. On the arguments that I have heard so far I have only indicated that under the laws of this country there might be the limits to the validity of those mechanisms.

65. As for the concerns about irreparable fallout or adverse consequences to TTFA and Trinidad and Tobago I am encouraged by the lofty objectives identified in FIFA statutes and particularly Articles (3) and (4) of FIFA's commitment to respecting internationally recognised human rights, non-discrimination of any kind against a country for any reason and its commitment to promoting friendly relations in society for humanitarian objectives all of which are underpinned by an appreciation for the rule of law. I do not expect FIFA to walk off the field or to take its ball and go home if after full ventilation of the issues, this court were to confirm the primacy of an Act of the Parliament of the Republic of Trinidad and Tobago over the FIFA Statutes.

66. **Disposition**

1) The application for the stay of proceedings is refused.
2) The time for filing the defence is extended to 21 days from the date hereof.

3) In all other respects the NOA dated 15/06/20 is dismissed.
4) The Defendant is ordered to pay the Claimants costs to be assessed by this court in default of agreement.

Carol Gobin

Judge