The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. P225 of 2020
Claim No. CV 2020-01208

Between

THE FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION

Appellant

And

TRINIDAD AND TOBAGO FOOTBALL ASSOCIATION

Respondent

PANEL:

I. ARCHIE C.J.
N. BEREAUX J.A.

Date of delivery: October 23, 2020

Appearances:

C. Hamel-Smith SC, J. Walker instructed by C. Gopie, Attorneys-at-law, for the Appellant

Dr. E. Crowne, M. Gayle instructed by J. Jones and C. Paul, Attorneys-at-law, for the Respondent

DECISION

Archie C.J.

1. I have had the benefit of reading the judgment of Bereaux, J.A. in this matter and I agree with his reasoning and conclusions. Accordingly, I too would allow the appeal and set aside the decisions and declarations of the learned judge at first instance. It would also follow that the TTFA must pay FIFA's costs. However, this court – having rendered its decision – I wish to make some observations about the manner in which this case has been managed.

2. Service of originating documents, unless unequivocally waived, is a pre-requisite to the progression of proceedings. As any experienced practitioner will know, service of originating process is an arcane area of procedural law that is littered with pitfalls. Many a claim has floundered at the first hurdle. This is merely the latest example. Having come to the conclusion that the service was unlawful, quite apart from the other reasons set out in the judgment of my learned brother, we have no choice but to allow this appeal.

3. As Mendonca J.A. opined in **Gomes v Nunez**, (see para 33), the Civil Procedure Rules are a complete, self-contained scheme for the management of civil litigation. There is no inherent power in the Court to invent a process that is outside the contemplation of the Rules and then to direct a party to employ it. That is a recipe for chaos. Permitting it to stand would only further complicate an already difficult area of the law as there would be no guardrails for the purported exercise of any such discretion.

4. Owing to the particular primary challenge mounted by FIFA, it would have been wiser to let the challenge to service be determined, particularly in the context of a pending appeal. It was neither prudent case management nor an economical deployment of judicial time and resources to attempt to finally determine the substantive issues and to deliver a judgment less than a week before the scheduled hearing of the interlocutory appeal. The foreseeable result is that we must now set aside the declarations granted below.

5. While we are aware that the filing of an appeal against a final decision does not entitle the unsuccessful party to a stay, deeper consideration must be given in circumstances like this where, depending on the outcome of the appeal, the effort expended would have been in vain and the appellate court may be obliged to reverse any decision. Zeal is commendable but it must not obscure the need for caution. I trust that, in future, Courts at first instance will be guided accordingly.

I. Archie
Chief Justice

Delivered by Bereaux JA

6. This is a procedural appeal by the The Fédération Internationale De Football Association (FIFA) from the decision of Gobin J. It concerns the removal by FIFA of the executive of the Trinidad and Tobago Football Association (TTFA) and its replacement by a normalisation committee pursuant to Article 8 of FIFA's statutes. That article provides for executive bodies of FIFA member associations to be removed at FIFA's discretion *"under exceptional circumstances"* to be replaced by a *"normalisation committee"* for a specific period of time. I shall refer to TTFA as either TTFA or the respondent.

7. In this case, FIFA – out of concern for the governance of the TTFA including the parlous state of its finances and its lack of internal controls – removed the TTFA's elected executive and replaced it with four members (all nationals of Trinidad and Tobago) of FIFA's choice. The respondents, initially challenged their removal by appealing to the Court of Arbitration for Sport (CAS). They subsequently withdrew the appeal and on 18th May, 2020 filed proceedings in the High Court. FIFA contends that those proceedings are

a breach of its statutes, which the TTFA agreed to abide by when it joined FIFA. While not submitting to the jurisdiction of the Trinidad and Tobago courts, FIFA filed a notice of application seeking the following reliefs:

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.

8. On 13th August, 2020, Gobin J dismissed FIFA's application. She also refused to grant a stay of these proceedings pending the hearing of FIFA's appeal of her dismissal of its application and proceeded to hear TTFA's claim. FIFA took no part in that hearing. On 13th October, 2020, she gave judgment for TTFA granting the declarations sought in its claim.

Relevant Facts

9. The facts are taken from the affidavits of the deponents who have given evidence on behalf of both FIFA and TTFA. That is to say, Mr. Veron Mosengo-Omba and Mr. Miguel Lietard Fernandez-Palacios for FIFA and Mr. William Wallace and Kendall Tull for TTFA. It is necessary to give some detail into the nature and history of respective parties to these

proceedings.

The TTFA

10. The TTFA is a body corporate created in 1982 by the **Trinidad and Tobago Football Association (Incorporation) Act 1982 ("the TTFA Act")**. The relevant provisions are sections 3 and 4. Section 3 of the Act provides as follows:

    (3) The aims and objects of the Association are:

    (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;

    (b) …

    (c) to foster and promote the playing of Football under the said system and to become members of or affiliated to Associations having similar objects.

Section 4 provides:

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

11. It is a matter of public notoriety that TTFA has been in straitened circumstances for quite some time. The executive body which was replaced by FIFA and which has brought this action has only been elected to office in November 2019. They contend that they were in the process of coming to terms with the mess that they had inherited and were formulating a plan to address the TTFA's parlous financial state including its large debt.

12. They are aggrieved by their sudden removal and are suspicious of the motives behind it, which they have openly suggested (see affidavit of William Wallace filed on 26 June 2020 at paragraphs [25], [29]-[30]) is because FIFA supported the previous TTFA executive in

the TTFA elections.

FIFA

13. FIFA is an association registered in the Commercial Register of the Canton of Zurich in accordance with the Swiss Civil Code. It is comprised of member Associations which are the national football associations of their respective countries. There are two hundred and eleven (211) affiliated Associations. FIFA supports them financially and logistically through various programmes. In the case of the TTFA, FIFA's contribution is alleged to comprise sixty percent (60%) of TTFA's total revenue. As representatives of FIFA in their countries, these Associations are obliged to respect FIFA's statutes as well as its aims and ideals.

14. The terms and conditions of membership are set out in FIFA's statutes which are effectively its Constitution and which provide the legal structure and framework for its operations and governance. A primary requisite of FIFA membership is compliance with FIFA statutes, regulations, directives as well as decisions of FIFA, FIFA bodies and decisions of the Court of Arbitration for Sport (CAS). Articles 11 and 14 of the FIFA statutes are especially relevant. Article 11(4)(a) and (c) as a condition of admission to FIFA membership, mandates that the rules and regulations of the applicant Association must, inter alia, expressly provide that the association will comply with the statutes, regulations and decisions of FIFA (and the relevant confederation) and must recognise the CAS. Indeed, a copy of the Association's governing regulations containing such express provision, must be submitted to FIFA along with the application for membership. By Article 14(1) it is an obligation of a member association

"(a) to comply fully with the statutes, regulations, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (CAS)…"

(f) to ratify statutes that are in accordance with the requirements of the FIFA

Standard Statutes …"

Articles 22(3)(a) and 23(f) respectively repeat the necessity of member associations for compliance with FIFA statutes and decisions 22(3)(a) and the recognition of the jurisdiction and authority of the CAS 23(f)).

15. As a condition precedent to its FIFA membership TTFA has undertaken in its Constitution, inter alia:

i. 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. Such statutes include Article 8(2) which provides for the appointment of a normalisation committee (Article 2).

ii. To be bound by FIFA Statute 57 which mandates recognition of the Court of Arbitration for Sport (CAS) and obligations relating to dispute resolution (Article 67).

iii. To prohibit recourse to ordinary courts by its members (Article 65 and Article 66).

16. The decision to appoint the normalisation committee was made by the Bureau of the FIFA Council and took immediate effect but was subject to ratification by the full FIFA Council. The full FIFA Council ratified the decision on 25th day of June 2020. As stated earlier that decision was made in the context of FIFA having serious concerns about the financial health of the TTFA, its governance and the absence of any satisfactory plan for addressing those concerns.

17. In response to the appointment of the normalisation committee and in accordance with the statutes to which, by its constitution, the TTFA agreed to be bound, the ousted TTFA executive challenged the decision before the CAS. However, the TTFA alleged that due to the refusal of and a failure to demonstrate a willingness to pay its share of the upfront costs of the proceedings before the CAS and the bias demonstrated by the CAS in condoning FIFA's refusal to pay the costs, the CAS proceedings were withdrawn on the

18th day of May 2020.

18. On that same day the TTFA commenced proceedings in the High Court seeking principally a declaration that the decision of FIFA to appoint a normalisation committee and purporting to remove the TTFA's duly elected officers was null and void and of no effect. TTFA also sought injunctive reliefs but that was overtaken by the subsequent suspension of the TTFA from FIFA, which brought an end to the activities of the normalisation committee.

19. The TTFA also sought the leave of the High Court to issue and serve the claim outside of the jurisdiction on FIFA. Gobin J granted leave to serve the claim on FIFA in Switzerland by two specified methods; that is to say, by prepaid international courier and by email. Service was accordingly effected in accordance with the order of Gobin J and FIFA entered an appearance on the 26th day of May 2020. However, by the 15th day of June 2020 FIFA made this application seeking the reliefs outlined above which did not find favour with Gobin J.

Decision of Gobin J

20. In so far as is relevant to this appeal the judge ruled that:

i. The proceedings were properly served on FIFA. FIFA did not adduce sufficient expert evidence for the court to make a determination as to the true position of the law of service in Switzerland.

ii. 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.

iii. Because TTFA is a statutorily-created 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.

iv. Moreover, it is outwit the jurisdiction of an entity incorporated under our legislation to agree to submit to foreign law as FIFA Statutes prescribe.

v. That since 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 it was not a final decision although it took effect immediately. In the circumstances, even if Article 67 is enforceable, 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.

vi. The arbitration process before the CAS 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. This case goes well beyond TTFA's alleged governance issues and the justifiability of FIFA's purported action in appointing the normalisation committee. It 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 case falls squarely within the jurisdiction of the High Court of this country. This is not a matter for the CAS.

vii. The proceedings should not be stayed

Issues on appeal

21. The parties agree that the issues before this court are:

i. Whether the institution of the proceedings are ultra vires the TTFA under the terms of its own Constitution;

ii. Whether the person who purported to authorise the institution of these proceedings (Mr. Wallace) had authority to do so;

iii. Whether these proceedings should be stayed in favour of the arbitral process before the CAS; and

iv. Whether the proceedings have been properly served in compliance with the law of the territory in which they were purportedly served.

Summary of decision

The appeal is allowed for the reasons given at paragraphs i, iii and iv below:

i. The filing of these proceedings was a breach of Article 67 of TTFA's Constitution by which the TTFA is bound. Section 67 is unambiguous. Any appeal against a final and binding decision passed by FIFA shall be heard by CAS. The filing of these proceedings was therefore ultra vires Article 67, null, void and of no effect and must be struck out.

ii. There is no evidence that William Wallace was not authorised by the Board to bring this action. That there cannot therefore be established.

iii. The judge was plainly wrong in refusing to stay these proceedings in favour of arbitration before the CAS. The Court of Appeal is entitled to look at the matter afresh. FIFA has met the threshold requirements which trigger the court's discretion under section 7 of the **Arbitration Act Chapter 5:01**. I am satisfied that there was no reason why the matter should not have been referred to arbitration and that FIFA was ready, willing and able to conduct the arbitration.

iv. The purported service of proceedings by e-mail was a breach of the laws of Switzerland. Consequently, it was a breach of Part 7.8(2) of the Civil Proceedings Rules 1998 (CPR) which expressly provides that neither Part 7.8 nor any court order authorises any person to do anything in the country in which the court order is to be served, which is in breach of the law of that county. Because service of process by e-mail is illegal in Switzerland, any such service is void and therefore a nullity. It was also a breach of Part 7. 6(2)(b) of the CPR.

Analysis

22. I shall address each issue seriatim.

Issue i - Should these proceedings be struck out because they are ultra vires FIFA's Constitution and are null, void and of no effect?

23. In agreement with Mr. Hamel-Smith the short answer to this question is yes they are. Mr. Hamel-Smith in his excellent submissions, submitted that the TTFA's Constitution is clear. The appropriate tribunal to hear any appeal is the CAS. He prayed in aid, Article 67 of the TTFA's Constitution which is clear. It provides:

> ***"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 accordance 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).***
>
> ***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."***

24. The provision binds both the TTFA and its associated member associations to the CAS in respect of FIFA decisions, CONCACAF decisions or the leagues. It is the typical garden variety arbitration clause found in most commercial agreements, by which parties readily agree to forego the civil jurisdiction of the High Court for a tribunal with specialized training and expertise on the issues arising between them.

25. Civil courts normally defer to such agreements reserving to themselves any issues of law

which have been wrongly decided by the arbitrators in giving their decisions. In this regard, see the comments of Lord Mance in **Ust-Kamenogorsk Hydropower Plant JSC v AES** Ust-Kamenogorstk **Hydropower Plant LLP [2013] UKSC 35**, paragraph 1 that:

> ***"An agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum. If the other forum is the English court, the remedy for the party aggrieved is to apply for a stay under section 9 of the Arbitration Act 1996."***

26. But while the courts largely respect the referral of a dispute to arbitration there is still scope for judicial intervention under section 7. In this regard the phrase *"if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement"*, may offer some scope for not referring the matter.

27. Not only does Article 67 make clear provisions for the appeal to be heard by the CAS, but sub-paragraph (2) also makes it the duty of the *"TTFA to ensure its full compliance <u>and</u> that of all those subject to its jurisdiction with any final decision passed by a FIFA body…"*. Article 67 was inserted into the TTFA's Constitution as a specific requirement for membership in FIFA. The fact that such a provision is enshrined in the TTFA's Constitution means that the TTFA and its executive are bound to comply. The result is that the filing of these proceedings was a breach of the TTFA's Constitution. There was no authority under that Constitution to bring this action. It is *ultra vires* Article 67. These proceedings are therefore null, void and of no effect and must be struck out.

28. Gobin J took the view that Article 65 ousted the jurisdiction of the local courts to consider the dispute. She opined that section 3 of the TTFA Act is not an operative section. A reference to the FIFA system in any case is not the same as FIFA statutes. She noted that if 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.

29. She erred for the several reasons which now follow:

(i) First, section 3 is as operative and effective as any other provision in the Act. Not only is it operative but it provides the broad parameters within which TTFA is to function. It is deliberately drafted in wide terms to permit TTFA the latitude to flesh out its functions and *modus operandi* in the Constitution itself, as its membership see fit, without the necessity of having to return to Parliament to broaden its powers. Those parameters having been set, section 4 then provides for the Council to govern as provided by the Constitution. The term *"FIFA system"* is vague; deliberately so. This is because the term is intended to cover the entire system of football organised and controlled by FIFA. Such governance can only be effected by FIFA through laws, rules and regulations; that is to say, the FIFA statutes, as well as FIFA's subordinate rules and regulations, decisions and directives.

(ii) Second, membership is voluntary. An Association may choose not to join or even to drop out of the FIFA system. But any association which chooses to join must comply with and abide by the laws and statutes that govern the FIFA system. The TTFA has made that choice. A choice which preceded its incorporation in 1982. It has been a member of FIFA since 1964. It chose to join FIFA and to abide by its statutes, rules and regulations. Pursuant to that decision and as a condition of membership, it included in its Constitution, Article 67 accepting the CAS' jurisdiction. To the extent that Article 67 ousts the court's jurisdiction it was the choice made by the TTFA within the wide ambit permitted it by sections 3 and 4 of the TTFA Act. Having made its choice and having bound itself by its own Constitution to comply, it cannot now act outside of its provisions. The CAS is an arbitral panel which specializes in sporting disputes. The parties thus have the benefit of the expertise of persons who are specialists in these issues.

(iii) Third, the judge appeared to rely on the decision **Keith Look Loy v TTFA,**

CV2018-03080 [Look Loy v. Gabriel] for the proposition that the TTFA being incorporated by statute cannot oust the jurisdiction of the courts. But in my judgment that was not the *ratio decidendi* in that decision. In any event I am not persuaded that the *ratio decidendi* in that case is correct. It is true that the fact of incorporation by an Act of Parliament may be a factor in deciding whether the corporation is susceptible to judicial review. But such reviewability turns on the nature of the function of the corporation. The fact of incorporation by an Act of Parliament is not enough. In this case the TTFA Act was introduced into Parliament as a private member's bill. There was no debate on the floors of either the House or Senate. It therefore cannot be said that there was some public policy behind its incorporation. To the extent that there is any policy to be discerned one must look to the provisions of the TTFA's Act and those point to the TTFA working compatibly within the FIFA system. Further, there is no rule of law which prohibits a corporation incorporated by an Act of Parliament from submitting to a jurisdiction of a foreign tribunal. Whether it can do so or not will turn on the express terms of the legislation itself. That is to say, it is the legislation itself which must expressly prohibit it. Contrary to the submissions of Dr. Crowne and Mr. Gayle, there is nothing in the TTFA Act which does so.

(iv) Fourth, Gobin J posed the issue as being a matter of the legitimacy of the powers of FIFA under Article 8(2) and its consistency with the TTFA Act. Even if that were the central issue, there is no inconsistency. Section 3 of the TTFA Act as drafted permits TTFA to operate in compliance with the *"FIFA system"* and left it entirely to TTFA to draft its Constitution in terms that accommodated the FIFA System. TTFA as a condition of membership is committed, to compliance with Article 8(2).

(v) Dr. Crowne submitted that pursuit of this appeal is not only academic but also moot because Trinidad and Tobago's membership in FIFA has now been suspended and TTFA cannot now exercise any rights under the FIFA statutes. While it is not in evidence before us, the reason for the suspension is the fact

that the TTFA is in breach of Articles 11 and 14 of the FIFA statutes by its filing of these proceedings. But in any event, FIFA has challenged the validity of these proceedings in the High Court and in this appeal. It is entitled to pursue its appeal. Further, as Mr. Walker submitted, there are declarations made by Gobin J in the substantive claim which, in so far as they have been made by a High Court judge of Trinidad and Tobago, are binding on FIFA (at least locally) and remain binding so long as the decision subsists.

(vi) Finally, Gobin J opined that the FIFA's decision on 17th March, 2020 to appoint the committee was not a final decision because it had to be and was ratified by the full FIFA Council on 25th June, 2020 and for that reason, that *"preliminary"* unratified decision was reviewable by the High Court. In my judgment she was wrong. Article 67 of the TTFA's Constitution required that any such question be taken to CAS. That is to say, whether the FIFA decision of 17th March, 2020 was final or not is a matter entirely to be pursued before CAS by TTFA. It is not the business of the High Court or the Court of Appeal.

30. It follows that TTFA's filing of these proceedings was *ultra vires* the TTFA's Constitution, null, void and of no effect and must be struck out. On this basis alone, the appeal must be allowed. However, out of deference to the arguments of counsel I shall examine the other issues.

Issue ii – Did the President, William Wallace, have the authority to bring these proceedings?

31. Mr. Hamel-Smith submitted that he did not. He contended that under the TTFA's Constitution, that authority resided in the board of directors as a whole and there was nothing in the evidence to suggest that such authority had been obtained. Certainly we would expect that any action taken by a corporate person will first have had the sanction of its board of directors. But there is nothing in the evidence to suggest that Mr. Wallace did not have the authority.

Issue iii – Should these proceedings have been stayed in favour of arbitration?

32. Had I come to another conclusion on the *vires* of the TTFA's institution of these proceedings the appellant would have been entitled to a stay of these proceedings under section 7 of the **Arbitration Act Chapter 5:01** or under the courts inherent jurisdiction. I shall address only the section 7 power in this appeal. Section 7 provides:

> ***"If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."***

33. As noted by Mendonça JA in **Civil Appeal P059 of 2014 – L.J. Williams Ltd. v. Zim Integrated Shipping Services Ltd & anor.** at paragraphs 18-20, the court in exercising its discretion under section 7 must be satisfied of 2 conditions:

    i. That there is no sufficient reason why the matter should not be referred to arbitration as agreed.

    ii. The person seeking the stay was at the time of commencement of the proceedings ready (and remains ready) and willing to do all things necessary to the proper conduct of the arbitration.

34. There are however threshold requirements to be crossed in order to trigger the section 7

discretion.

i. There must be a concluded agreement to arbitrate.

ii. The legal proceedings were commenced by a party to the arbitration agreement or a person claiming through or under that party.

iii. The legal proceedings were commenced against another party to the arbitration agreement or any person claiming through or under that person.

iv. The legal proceedings are in respect of any matter agreed to be referred to arbitration.

v. The application for the stay must be made at any time after appearance but before delivery of pleadings or the taking of any other step in the proceedings.

The threshold requirements are clearly met here. The question is whether the judge was plainly wrong in refusing the stay.

35. The judge gave four reasons for not staying the proceedings in favour of pursuit of arbitration:

i. By raising the issue of want of authority of the president and others to bring the action on behalf of TTFA, the appellant had submitted to the court's jurisdiction and had taken a step in proceedings.

ii. There was an inherent contradiction in the appellant's appointment of the normalisation committee and its insistence on holding the respondent to the arbitration agreement.

iii. The issue went well beyond TTFA's governance issues and the justifiability of FIFA's claim to appoint the committee. It was about the legitimacy of powers exercised by FIFA under Article 8(2) of the FIFA statutes and its consistency with an Act of Parliament of Trinidad and Tobago. That fell squarely within the jurisdiction of the High Court of Trinidad and Tobago.

iv. By refusing to pay the advance costs, FIFA had not demonstrated that it was ready and willing to do all things necessary to properly conduct the arbitration.

36. We are concerned here with the exercise of a judicial discretion. Gobin J must be shown to have been plainly wrong in exercising her discretion to refuse the stay in order for this court to interfere with her decision. See **Attorney General v. Miguel Regis, Civil Appeal No. 79 of 2011** paragraphs [10] – [11] and Nelson JA in **Fishermen and Friends of the Sea v. EMA, Civil Appeal No. 106 of 2002**. In my judgment she was plainly wrong in her reasoning (which I have summarised above at paragraph 35) for the following reasons:

i. A preliminary objection to the authority of the respondent to bring the action cannot be described as a step in proceedings. *"Proceedings"* in that context means the substantive proceedings. A step in which begins the final process, leading to a final result on the merits of the claim. In this case, the appellant was challenging, as a preliminary question, whether there was authority to bring the action at all. A decision on that issue in no way would have produced a final result on the merits of the claim.

ii. There was no inherent contradiction in the appellant's appointment of the normalisation committee and the appellant's insistence on holding the respondent to the arbitration agreement. On the contrary one follows from the other. The appointment of the committee is at the heart of the dispute between the parties. It follows that if the TTFA disputes the appointment it must go to the CAS per Article 67 of its own Constitution. Far from being contradictory the appellant's insistence on that approach while maintaining legitimacy of the committee's appointment is both logical and consistent.

iii. As stated earlier, there is no inconsistency of Article 8 of the FIFA statutes with the TTFA Act. The TTFA Act is widely drafted to permit the TTFA to operate within *"the FIFA system"*. Operating within the FIFA system, necessarily means complying with and abiding by the FIFA statutes. In this case TTFA complied with the FIFA statutes by inserting the exclusive jurisdiction of the CAS in Article 67 of its Constitution. The real issue then was not the existence of any inconsistency of Article 8 of the FIFA statute with a local statute but the inconsistency of the TTFA's action (in bringing this claim) with Article 67 of its own Constitution.

iv. On a proper review of the evidence, FIFA's refusal to pay the advance costs of the arbitration did not amount to a lack of readiness or an unwillingness to properly conduct the appeal. As Mr. Palacios explained, it was FIFA's practice, in conducting its arbitrations, not to pay advance costs because of the large numbers of arbitrations in which it is involved. Other than that, FIFA had proceeded to nominate one of the three arbitrators required for the conduct of the arbitration.

37. Dr. Crowne submitted that FIFA's refusal to pay the advance costs of the arbitration rendered the costs of the arbitration prohibitive and the arbitration agreement inoperable. The evidence in this regard showed that by letter dated 30th April, 2020 CAS informed TTFA of FIFA's policy of not paying advance costs and then called upon the respondent to pay the entire upfront fee. In the context of an already financially straitened organisation, such a request did seem to me to be highly unreasonable. My concern was heightened when I read Article 64(2) of the Statutes of the Bodies Working for the Settlement of Sports Related Disputes (which govern CAS arbitrations it appears) which was used by CAS to justify TTFA paying the entire amount of upfront costs. There was no basis under that provision for calling on the TTFA to pay the entire sum. Dr. Crowne submitted that calling upon the TTFA to pay that exorbitant sum was unconscionable and rendered the agreement unenforceable. He relied on the decision in **Uber Technologies Inc v Heller 2020 SCC 16**, in which a majority of the Canada Supreme Court held such a clause to be unconscionable and unenforceable in circumstances where the upfront costs to arbitrate a claim against Uber was equal to all or most of the gross annual income of the claimant working full time as an Uber driver. There is no question of unconscionability here. That case is distinguishable. The facts of this case are nowhere as extreme. FIFA in any event recanted its position and was prepared to pay its upfront costs.

38. For all of the above reasons the judge was plainly wrong in her assessment of the threshold requirements and in refusing to stay the proceedings in favour of a CAS

arbitration. The Court of Appeal is now entitled to exercise the discretion afresh.

39. As stated at paragraph 34 the threshold requirements for the exercise of the section 7 discretion are met. I am satisfied, consistent with the section 7 requirements, that there is no sufficient reason why the matter should not have been referred to arbitration as agreed. In this regard, I had entertained some concern about the impartiality of the CAS and what appeared to be a cosy relationship with FIFA. Together with my concerns set out at paragraph 37, the question was whether this was sufficient reason why the matter should not be referred to arbitration. CAS' reaction to FIFA's request to forego its share of upfront costs appeared to be reflexive with no apparent independent consideration being given to it. I am however persuaded by Mr. Hamel-Smith that the actions were those in the administrative division of the CAS as opposed to the arbitrators themselves who would have decided the matter. In any event as Mr. Hamel-Smith rightly submitted that the Swiss Courts would be the proper forum to hear any complaints about the CAS' impartiality.

40. In conclusion, on this point, therefore the appellant was entitled to have had these proceedings stayed in favour of the arbitration proceedings before the CAS.

Issue iv – Were the proceedings properly served on FIFA?

41. The respondent sought to serve these proceedings by e-mail. Mr. Hamel-Smith before the judge (as before us) submitted that the service of process on the appellant by e-mail was in breach of part 7.8(2) of the CPR. Part 7.8 (2) provides:

> ***"Nothing in this Part or in any court order or direction authorises or requires any person to do anything in the country where the claim form is to be served which is against the law of that country."***

42. Mr. Hamel-Smith relied on the affidavit evidence of Mr. Miguel Lietard Fernandez Palacios. In that evidence Mr. Palacios himself relied on the advice of Stephanie MannI

(and he stated that he believed the advice to be true) as to the law on service of process in Switzerland. He deposed that:

i. Ms. MannI is a lawyer admitted to practice in Switzerland and is knowledgeable of the law of Switzerland.

ii. Under Swiss law, international service of process qualifies as an official act that may only be performed by Swiss government officials. Consequently, any service of documents by a foreign authority, including foreign state courts, must be done by way of formal international judicial assistance proceedings pursuant to art. 11 et seq. of the Swiss Federal Act on Private International Law. Any other kind of service by a foreign authority, including service by e-mail, is unlawful.

43. The effect of this evidence is that the purported service on the appellant by e-mail was in breach of part 7.8(2) of the CPR. The judge however rejected the evidence of Mr. Palacios on three grounds:

i. His evidence did not rise to the level required. The particular provision of the Swiss Federal Act on Private International Law was not produced.

ii. In any event his evidence was inadmissible hearsay.

iii. She had ordered service by two methods and there had been no courier complaint regarding personal service by international service.

44. The judge was wrong to reject Mr. Palacios' evidence. We are dealing here with an application to strike out the claim, which is procedural. Part 31.3 (2)(b) of the CPR permits a deponent to refer to matters as a matter of information and belief, where such information is for use in a procedural or interlocutory application, provided that the source of the information is stated. Mr. Palacios has provided the source of that information as being Ms. MannI who he deposed is a lawyer knowledgeable on the law of Switzerland. That satisfied the requirements of Part 31.3 (2)(b). The judge was wrong to reject that evidence.

45. The judge also held that there had been no complaint regarding personal service by international courier service, which she had also ordered. But the fact remains that such service was also a breach of Swiss Law and a breach of Part 7.8(2). Due regard and respect must be paid, as a matter comity, for the laws of other nations. A court is committed to uphold the rule of law and cannot give effect or be seen to give effect, to a form of service of process which is unlawful under the law of another country in which the proceedings have been served. If the proceedings are to have effect in Trinidad and Tobago, they must not be tainted by illegality, especially an illegality in the country of one of the parties to the dispute who will be expected to observe any order which the Trinidad and Tobago court makes.

46. Dr. Crowne submitted that the fact that the appellant has appeared in these proceedings is sufficient to show that service was effective. But it is doubtful whether the appellant can waive what is in effect an illegality in its home country. In any event it has challenged the legality of service in these proceedings.

47. Finally, it appears that the service of the proceedings may also have been in breach of part 7.6(2) which provides that:

    "The court may set aside service under this rule where

    a. …

    b. The case is not a proper one for the court's jurisdictions.

    c. …"

I have already found that the dispute is properly to be heard by the CAS pursuant to Article 67 of the TTFA's Constitution.

48. In the result, service of the proceedings did not comply with the CPR and must be struck out. See **Gomez v. Nunes, Civil Appeal No. P123 of 2016**, per Mendonça JA paragraphs 33 and 34. In this case, there having been no proper service and no waiver of service by

the appellant, the proceedings were not properly before the judge. The form of service ordered by the Gobin J being illegal in Switzerland is void and a nullity. It is another reason why the judge's order must be set aside and the claim struck out on this basis.

49. Since the appellant has ultimately succeeded in its preliminary objection, the decision of Gobin J in substantive claim which she delivered on 13th October, 2020 must also be set aside. That trial proceeded ex parte. FIFA took no part in it. But the judge's decision remains valid and subsisting and is binding on FIFA, at least in Trinidad and Tobago and must be set aside. TTFA by proceeding with the trial while this appeal was pending must bear the costs of what is now a wasted trial.

Order

50. I would therefore formally order as follows:

(i) The appeal is allowed. The decision of Gobin J dated 13th August, 2020 is set aside.

(ii) The decision of Gobin J dated 13th October, 2020 is set aside. The order granting declarations therein is quashed.

(iii) The costs of this appeal must follow the event. The TTFA therefore shall pay the appellant's costs of the application in the High Court, certified fit for one senior and one junior attorney-at-law.

(iv) The TTFA shall also pay the appellant's costs of this appeal which shall be two thirds of the costs assessed in the High Court.

Nolan P.G Bereaux
Justice of Appeal