

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division

2022
CLE/GEN/00106

IN THE MATTER of the CONSTITUTION OF THE BAHAMAS LAWN TENNIS
ASSOCIATION

BETWEEN

KENWOOD KERR
BJORN FERGUSON

Plaintiffs

V.

THE BAHAMAS LAWN TENNIS ASSOCIATION
(Sued by its Officers, Perry Newton, Chilean Burrows, Cameel McDonald and
Timothy Dames)

Defendant

Before: The Honorable Madam Justice J. Denise Lewis-Johnson
Appearances: Khalil Parker K.C. for the Plaintiffs
Ramona Farquharson for the Defendant
Hearing Date: 18 July 2022, 19 July 2022, 16 December 2022, 17 February
2023, 23 May 2023, 16 June 2023, 24 August 2023

JUDGEMENT

Civil – Association – Practice and Procedure for an Annual General Meeting Whether Association followed appropriate procedure to conduct Annual General Meeting – Constitutional Amendments - Memorandum of Association – Membership of Association – Requisite Notice Period – Whether Plaintiffs are rightful members of the Association – Costs.

1. The Court having now received all closing submissions of the parties, the Plaintiffs submissions dated and submitted the 16th December 2022, Oral submissions were heard on the 23rd May 2023, the Defendants submissions dated 16th June 2023, further Supplemental submissions submitted to the court 24th August 2023. The Court now provides the judgement in this matter.

2. By an Originating Summons filed 25 January 2022 the Plaintiffs sought the determination by the Court of the following questions, and the following relief against the Defendant:
 - a) **“Whether the Bahamas Lawn tennis Association having no provision by its Constitution for the conduct of virtual meetings, the Defendant’s purported Annual General Meeting held on the 19th day of March A.D. 2021, via the Zoom remote meeting platform, was a valid and/or constitutional Annual General Meeting of the BLTA?”**

 - b) **“Whether, the Defendant having failed and/or refused to provide the requisite Notice of its purported Annual General Meeting on the 19th day of March A.D. 2021 in accordance with Articles 10 and 12 of the BLTA Constitution or reasonable Notice thereof, otherwise, the Defendant’s said purported Annual General Meeting was a valid and/or constitutional Annual General Meeting of the BLTA?”**

 - c) **“Whether, the Defendant having failed and/or refused to provide the requisite Constitutional or any Notice of its intended motion to have the BLTA Constitution replaced by “Articles of Association and Memorandum of Association”. Which documents were neither circulated to or otherwise disclosed to the BLTA membership, the said motion to replace the BLTA Constitution moved at the Defendant’s purported Annual General Meeting held on the 19th day of March A.D. 2021 is valid, constitutional, and/or binding upon the BLTA and its membership.”**

 - d) **“Whether, the Defendant having failed and/or refused to give proper notice of the purported vacancies and election of officers to fill the post of General Secretary and Assistant**

secretary of the defendant, the purported nomination and unopposed election of Cameel McDonald, as General Secretary, and Wendy Bowe, as Assistant Secretary, at the Defendant's purported Annual General Meeting on the 19th day of March A.D. 2021 were valid, constitutional, and/or binding upon the BLTA and its membership."

- e) "Whether, the Defendant having failed and/or refused to provide the requisite notice of its purported Annual General Meeting and election of officers scheduled for the 29th day of January A.D. 2022 in accordance with Article 10 and 12 of the BLTA Constitution or reasonable notice thereof otherwise, the Defendant's said scheduled Annual General Meeting and election of officers is valid and/or constitutional?"
- f) "Whether, the Defendant having failed and/or refused to issue the requisite written notice, pursuant to and in accordance with Article 8 of the BLTA Constitution, the Defendant's pursuant to and in accordance with Article 8 of the BLTA Constitution, the Defendant's purported cancelation of the Plaintiffs', and other members' membership is valid and/or constitutional?"
- g) "Whether, the Defendant having failed and/or refused to issue any notice of its purported deadline for member registration and/or regularization of members' accounts, of the 9th day of December A.D. 2021, the Defendant's acceptance of membership applications and payments of the first annual subscription of \$35.00 for approximately 42 new members, on or about the 29th day of December A.D. 2021, and refusal to consider the said applications in advance of its purported Annual General Meeting scheduled for the 29th day of January A.D. 2022 is reasonable, valid, and/or constitutional?"
- h) "If the answer to Questions 1,2 and/or 3 are in the negative, then:
 - a. a Declaration to that effect;

- b. A declaration that any decision(s) taken by the Defendant at its purported Annual General Meeting on the 19th day of March A.D. 2021 were taken ultra vires the BLTA's Constitution, and are therefore null, void and of no legal effect; and
 - c. A Declaration and an Order that the BLTA is and was at all material times remained governed by its Constitution."
 - i) "If the answer to the question 4 is in the negative, then a Declaration to that effect."
 - j) "If the answer to question 5 is in the negative, then:
 - a. A Declaration to that effect and
 - b. An Order that the Annual General Meeting of the BLTA scheduled for the 29th day of January A.D. 2022 be postponed and rescheduled to a date before the constitutionally mandated deadline of the 30th day of April A.D. 2022 (Article 10), and that all constitutional notice(s) be given to BLTA members of the new date for the Annual General Meeting so as to afford them reasonable and sufficient time to prepare for and participate in the elections to be conducted at the said meeting and to address any business intended to be conducted at the said meeting."
 - k) "If the answer to Questions 6 and 7 is in the negative, then:
 - a. A Declaration to that effect; and
 - b. A Declaration that all those BLTA members whose membership was purportedly cancelled, without notice pursuant to and in accordance with Article 8 of the BLTA Constitution or otherwise, and whose membership was not recognized by the Defendant, remain members of the BLTA."
 - l) "Such further or other relief as the Court may in the circumstances deem just."
- 3. The Plaintiffs alleged that on 19 March 2021, the Defendant conducted an Annual General Meeting ("AGM") via the Zoom remote meeting platform. The Plaintiffs further alleged that the AGM held was unlawful and/or irregular on the following basis:

- a. Article 10 of the Defendant's Constitution makes no provision for the conduct of virtual AGMs or elections;
 - b. Article 27 of the Defendant's Constitution does not allow for there to be an amendment or abolishment of the Constitution via the Zoom remote meeting platform;
 - c. There is no evidence that the AGM was quorate; and
 - d. Pursuant to Article 26 of the Defendant Constitution, the officers of the Defendant did not provide members with constitutional and/or reasonable notice of the AGM indicating that the election of officers would be conducted at the said meeting or of the business to be conducted at the said meeting.
4. The Plaintiffs' Originating Summons was filed along with a Certificate of Urgency, Ex-parte Summons and the Affidavit of Bjorn Ferguson. Pursuant to these applications the Plaintiffs sought an Order restraining the Defendant from conducting their Annual General Meeting and Election.
 5. By Affidavit filed 28th January 2022, the Defendant replied to the Originating Summons of the Plaintiff, filed 25th January 2020 as outlined in the Defendant's evidence.
 6. On 28 January 2022 the Honorable Madam Justice Donna Newton granted the Order as follows:
"The Defendant be restrained whether by themselves or their servants or agents or otherwise howsoever from conducting or purporting to conduct its Annual General Meeting on Saturday, the 29th day of January A.D. 2022 or otherwise pending the hearing of the Originating Summons filed herein on the 25th day of January A.D. 2022.

Costs of the application is in the cause."

The Plaintiffs' Evidence

7. Bjorn Ferguson was the only witness called for the Plaintiffs. He filed an Affidavit dated the 25 January 2022 and a Supplemental Affidavit filed the 1 July 2022 which stood as his evidence in chief during trial.

Bjorn Ferguson Evidence

8. That he is a current member of The Lawn Tennis Association "The Association" and is an intended candidate for Vice-President. Mr. Ferguson alleges the Defendants purported to have an annual General meeting via a zoom platform on the 19th March 2021 which was unconstitutional, that the Defendant failed to provide the requisite notice of the said meeting pursuant to Article 10 and 12 of The Association's Constitution, that the Defendant failed to provide proper notice to have The Association's Constitution replaced with Memorandum and Articles of Association and refused to consider membership applications prior to the Annual general meeting which was scheduled for the 29th January 2022.
9. That members in attendance were asked to vote for the Articles of Association and Memorandum of Association to replace the existing constitution by verbally indicating yes or no. The motion was passed and adopted with sixteen persons voting in favor and one member not providing a vote. Mr. Ferguson asserts that the Defendant's membership was provided no notice of this purported replacement of its constitution with "Articles for Association and Memorandum of Association". It is his belief that such a change in the management and operation of the Defendant ought to have required proper notice to the membership in accordance with the constitution and full transparency.
10. That the Defendant has failed to provide the constitutional notice to the Defendant's members of its AGM scheduled for 29 January 2022, months ahead of April, when such meetings normally take place.
11. That the Defendant has refused to acknowledge receipt and regularize the membership of approximately 42 individuals who paid their subscriptions and submitted membership applications to the Treasurer on 29 December 2021. He states that the Defendant's Council has informed him that the Board will not consider any applications until after the AGM scheduled for 29 January 2022. Mr. Ferguson believes by its dilatory response to the applications and payment, the Defendant is seeking to unreasonably and arbitrarily exclude and disenfranchise, existing and potential BLTA members from full participation in its scheduled Annual General Meeting.
12. That while the Defendant's Council is unable to schedule an AGM, its Board remains under a fiduciary duty to continue to operate and conduct the business of the Defendant, inclusive of processing membership applications.

13. On 15 January 2022 the Plaintiffs were advised by the Defendant that membership registration closed on 9 December 2021. Mr. Ferguson contends that he was never afforded any notice of this purported close date as this practice was not previously employed by the Defendant.
14. That while the Defendant published a Notice of its AGM, scheduled for 29 January 2022, in one of the local daily newspapers in December 2021, he argues that the Defendant's members did not receive by email from the Defendant or otherwise, proper notice of the business to be conducted at the said meeting and the proposed nomination and election process and procedure. He recalls that when inquiring with the General Secretary regarding the Defendant's lack of notice and due process with respect of the AGM, the General Secretary cursorily advised him that his membership had purportedly ceased. He claims that he received no notice of such in accordance with Article 8 of the Defendant's constitution or at all.
15. During cross-examination Mr. Ferguson stated that he has been a member of the Defendant for over 30 years, and served as Treasurer of same until he resigned in 2019. He claimed that his resignation was in opposition to the then President's failure to act in what he considered to be a transparent manner, particularly regarding the publication of a list of members of the Defendant. He also rejected the suggestion by Counsel for the Defendant that these proceedings were instituted out of anger and spite.
16. That during his tenure there was never any publishing of a membership list of the Association. He further accepted that he made no public objection to this decision not to publish but indicated that his opposition was symbolic, to be confirmed by his resignation. Further, he agreed that the first time the Association heard about his objections about the list not being published is December 2021.
17. That he did not object to the AGM being held via Zoom but rather to the change of the Constitution by Zoom.
18. It was also accepted by Mr. Ferguson that the Notices to the AGM were visible, however the quorum was not met. That although a forum of nine is required by the Constitution, he asserted that nine members are insufficient to decide a constitutional change for an association with over 400 members.
19. He denied receiving a link for the Zoom AGM and stated that they did not invite him.

20. That from 2020-2022 he did not pay dues to the Defendant as the Country was placed on lockdown due to the Covid-19 pandemic. He clarified that before December 2021 he never received notice from the Defendant's Council that he was in arrears or that his membership had ceased.

21. Mr. Ferguson accepted that there was no formal evidence that he paid family membership fees.

The Defendant's Evidence

22. The Bahamas Lawn Tennis Association ("the Defendant") is an incorporated Association. The Defendant was registered as a non-profit organization on 16 August 2021 and received its Certificate of Incorporation on 18 March 2022.

Chilean Burrows Evidence

23. Chileans Burrows ("Ms. Burrows"), is an officer of the Defendant, having served as Honorary Secretary on the council from 2018 to 2020 and now as Vice President from 2020 to present.

24. As Honorary Secretary it was her responsibility to complete membership applications. She explained that the process was and still is, that membership is dealt with up to the last meeting before the Annual General Meeting. It has never been the practice to consider or process new membership at its AGM. Any applications that are submitted after the last meeting, were to be held and processed by the new Board. In this regard, Ms. Burrows indicated that membership applications that came in after the last 2020 Board meeting were not processed until after the AGM by the new Board.

25. That the present Board conducted its business in accordance with the Constitution and established protocols. Consequently, all membership applications received well after the last Board meeting, were not processed and will be laid over for the new Board to process.

26. That it is not a constitutional requirement to disseminate its membership list to other members or the public. As such, she personally never did so and has never seen the same done prior.

27. That individuals who serve on the Board do so without a payment. The position is to serve largely and give back to the country via a sport which is loved by all

involved. She claims that the negative comments via social media and other meddling is considered 'annoying'.

28. Under cross-examination she accepted that the resolution published by the Board did not refer to any changes being made to the constitution.
29. She refuted the Plaintiff's claim that the Defendant's Board has conducted further meetings and states that only sub-committees have met since January 2022.
30. That it was her understanding that as there is a current injunction restraining the AGM from occurring and an originating summons dealing with membership, she assumed the Board was unable to deal with membership applications.
31. That members have not consented for their names being circulated and as such, the Board is not in a position to publish the list.

Darnette Eleanor Weir's Evidence

32. Darnette Eleanor Weir ("Ms. Weir") previously held the positions of Honorary Secretary of the Defendant from 2014-2018 and President from 2018-2020.
33. She explained that during her tenure as President, Mr. Ferguson also served as an Officer of the Association. She believes and knows him to have a working knowledge of the Defendant, its then Constitution and established protocols and procedures.
34. That as Honorary Secretary, one of the practices she was intricately involved with, was the processing of membership applications. She states that these were processed at Board meetings by the Council. If applications were presented after the last Board meeting before the AGM, Council did not consider the applications until after the AGM. This has been the practice from as early as she can remember.
35. That Mr. Ferguson never, whilst serving, ever expressed any opposition to this practice or tried to implement any changes.
36. That during her tenure, the Defendant's membership list has never been disseminated to its member, the populace nor published in any government publication or via any other means. Also, there is no processing or ratification of members at the AGM.

37. Under cross-examination she confirmed that there is nothing in the Constitution prohibiting the Council from producing a list of members.
38. She also denied the allegation that Mr. Ferguson resigned under her leadership due to her refusal to implement changes he asked for such as the membership list.

Perry Newton's Evidence

39. Perry Newton ("Mr. Newton") serves as the current President of the Defendant Association and Chairman of the National Tennis Centre.
40. Newton stated that the present action is petty and vexatious. He maintains that the action seems motivated by a letter received by Kerr referencing his improper and unauthorized access to the tennis courts of the National Tennis Center on 25 December 2021 when the facilities were closed. In response to said letter, Mr. Ferguson (who represented as Counsel on behalf of Kerr) in his letter dated 19 January 2021 threatened Newton in his capacity as Chairman, that a failure to respond with a letter of apology by 24 January 2022 will result in legal action. Newton did not respond to the letter. On 25 January 2022 an Ex-Parte summons was filed against the Defendant to stop its scheduled AGM.
41. Mr. Newton maintained throughout the course of the proceedings that the Plaintiffs are not members of the Defendant Association.
42. That he knows Mr. Ferguson to be a past Board member of the Defendant, having served on the Board during 2018 to 2020, when thereafter he resigned. Since his resignation Mr. Ferguson did not attend the 2020 nor 2021 AGM despite being provided notice of same. He claims that Mr. Ferguson has also been delinquent with his membership dues since 2019, and as a result his membership ceased. Newton indicated that Ferguson made an application for membership to BLTA signed and dated 29 December 2021.
43. That Mr. Kerr has not attended any AGM meetings of the Defendant since he has been personally involved with the Association dating back to 2014. Mr. Kerr has also been delinquent with his membership dues since 2018 and as a result his membership ceased. Newton indicated that Kerr made an application for membership to the Defendant, signed and dated 27 December 2021. That Kerr has never reached out to the Defendant via its officers to request any information or to register any complaints, until sometime around 19 January 2022 when

questioning the status of his membership application submitted on 30 December 2021.

44. That the Defendant, through its council, received no communication from the Plaintiffs challenging the 2021 AGM until now. If there was a real concern the same could have been raised at the meeting and dealt with.
45. That notice of the March 2021 AGM was provided for in the Guardian newspaper on 2 March 2021 as well as via email. There are no affiliates of the club to be notified. As the AGM was held on 19 March 2021, the 14 days' notice requirement was met. Due to the pandemic, the Board decided upon a Zoom format as they are permitted to do. Newton states that notice of the format was also provided generally and to Ferguson personally.
46. As to the AGM of 2022, Mr. Newton claimed that the Defendant published a calendar of events on 23 December 2021 via email. As well as a notice was placed in the Nassau Guardian newspaper on 24 December 2021. Newton indicates Mr. Ferguson was advised of the AGM via email.
47. As to the ratification of members, Mr. Newton stated that the Defendant's constitution provides for the Board to consider all applications at the next Board meeting which are held quarterly. The last Board meeting was held on 9 December 2021. Sometime on 30 December 2021, about 42 applications including ones from Ferguson and Kerr were delivered to the treasurer's office. These applications given the time submitted would have to be considered at the next Board meeting which will be determined by the new Board. As the applications were submitted during the holidays, the Defendant was not in a position to impose upon its members unnecessarily.
48. That the process for election of officers takes place every 2 years. The next election would have been in 2022.
49. In response to Mr. Ferguson's query as to why the Defendant did not process applications after the Court Ordered Injunction of the AGM, Mr. Newton states that the court proceedings/ruling take precedence and any determinations around the issue of membership is before the Court and the Defendant's Board is respectful of this.
50. That the membership process of the Association is that a person seeking membership may first fill out an application form which must be presented to the

Board for consideration. The Board has the right to deny, delay or accept any application for membership. He asserts that Mr. Ferguson moved to deny membership to an individual on 23 January 2020 and the application was denied by the Board per Ferguson's request.

51. That the current practice of the 2020-2022 administration is in tandem with the prior three (3) administration, which did not allow persons to join the organization after the last Board meeting before an AGM and also after the AGM notice was issued. At the 23 January 2020 Board meeting of the BLTA, of which Ferguson was a part, members were ratified, as that was the last meeting before the initially schedule 30 April 2020 AGM.
52. As to the question of the release of membership personal details, Mr. Newton stated that the Defendant's members did not authorize release of their personal information to be disseminated. Mr. Ferguson was notified of this in an email dated 29 December 2021, from the Defendant's secretary. It was also communicated to Mr. Ferguson that the option for members to have their information shared will be discussed at the next AGM allowing them to give a written releases should they opt to do so.
53. On 19 March 2021, the Defendant held its AGM where the incorporation documents (circulated in advance to the tennis community) were presented, approved and adopted. Mr. Newton maintains that there was no feedback received prior or post the AGM by Plaintiffs Kerr and Ferguson.
54. The notice of the 2022 AGM was sent well in advance of the 14-day requirement. The notice was disseminated on 23 December 2021, via email and included in the Defendant's 2022 calendar of events. It was also published in the local newspaper on 24 December 2021 more than a month in advance of the scheduled 29 January 2022 AGM.
55. Mr. Newton maintained that the Defendant honors transparency in regard to adequate notifications, processing of applications, membership payments, protecting members personal data, and information sharing to the tennis community.
56. That there is no evidence before the court showing that Ferguson was given the requisite notice of his purported arrears.

57. That his interpretation of Article 20 of the Constitution was that members with arrears are prohibited from raising matters of breach of the Constitution. He accepted that this was incorrect.
58. That there is nothing in the proposed resolution which speaks to abolishing the Constitution pursuant to Article 27 of the Constitution.
59. Mr. Newton accepted that the notice with respect to the March 2021 meeting dated 5 March 2021 does not state the business to be conducted at that meeting – such as the retiring of officers. Nor did he circulate the list of vacancies to the membership following the notice of resignations.
60. That there was an email from the Defendant's Secretary which included the Zoom link for an annual general meeting held 19 March 2021. The email contained a list of attachments which were the draft Articles of Associations, balance sheet 2020, memorandum draft, and profit and loss statement for 2020, Board resolution as well as the agenda for 2021. Mr. Ferguson was one of the recipients of this zoom link.
61. He denied that the Council met to make decisions on the International Tennis Federation's World Junior Championship for the North, Central American and Caribbean Regions and the Junior Davis Cup/Junior Billie Jean King ITF Team Competition, regarding the appointment of coaches, appointing players, and conducting events. He explained that the teams for those events were already pre-selected from 2021.
62. He maintained that Mr. Ferguson's daughter did not participate in the Open National Championships as she would not have met the age requirements to do so. Also, he reiterated that he did not receive payment from Ferguson for his daughter to participate in the tournament.

Issues

63. While the parties had numerous issues the Court finds that the outcome of this case turns on one issue. Were the Plaintiffs members of the Defendant at the time this action was commenced? We however believe it is important that the parties note that all issues they raised were considered. They are therefore addressed in the order raised in the Originating Summons.

Decision

Constitutional Validity

64. The Plaintiff questioned the validity of the Constitution being used by the Defendants and whether the proper procedure was followed in calling the meeting to make constitutional changes.

65. During the evidence led, it became clear to the Court that the parties were relying on different constitutions. The Plaintiffs on the earlier constitution and the Defendants on the "2021" Constitution. This resulted in variation of perceived time and procedure for doing certain things. The Court finds the earlier Constitution to be the relevant one as the proper procedure was not followed to replace the Constitution.

66. Article 12 of the earlier Constitution states,

" Notice in writing of every General Meeting stating the business to be transacted thereat and accompanied in the case of the Annual General Meeting by statement of account for the past year and the names of the retiring Officers and Councillors, shall be distributed to all individual members and to the Secretaries of all Clubs at least 14 days prior to the date fixed for such meeting, and notice convening every such meeting may be advertised in any paper or papers which the Council may think desirable"

This requires the names of the retiring Officer and Counsellors to be distributed and this was not done. Article 12 says "shall" which is mandatory and thus by failing to comply with this the new Constitution was not validly enacted.

67. The Court noted that the constitution is quite inadequate on how alterations ought to be made to the constitution. Further, it does not provide any definition or interpretation clauses and hence there is uncertainty as to what clause 27 "*Alterations in Rules and Laws*" refers, whether it's the rules of the game of tennis or laws of tennis or the constitution itself.

68. However, the Court is of the view that in order for the Constitution to be properly amended, the way in which a General Meeting was called must be proper so as to conduct proper business arising out of the meeting. The Court is satisfied that the Defendant did not follow the requisite procedure in calling the meeting of the 19th March 2021.

Validity of Annual General Meetings

69. The Plaintiffs argued that the 19 March 2021 AGM held via zoom was unconstitutional as Article 10 of the Constitution does not provide for meetings to be held via the Zoom platform.

70. Article 10 of the Constitution provides:

“An annual general meeting shall be held at such place as the council shall decide not later than 30th April for each year when the accounts for the part year duly audited shall be presented, the officers and other members of the council for the ensuing year elected and any general business transacted.

Each club shall be entitled to nominate in writing representatives to attend every general meeting and each such representative shall have one vote. The individual members shall also be entitled to attend and shall each have one vote at every general meeting. Five representatives representing not less than two clubs, or 15 members shall form quorum for every general meeting ...”

71. The Defendant submits that Article 10 of the Constitution does not specifically state that the AGM must be held in a physical place. The exceptional circumstances of the global pandemic necessitated a wider interpretation of the words “such place”. Thus to be in compliant with the time restrictions of 30th April, the Court finds the “virtual place of zoom” valid and not in breach of the Constitution. The Court would not put such a restrictive meaning on Article 10.

72. The issue is whether a meeting held by zoom, is to be considered to be held at a “place”. The Court accepts that place does not mean a specific building or physical location but rather any location (cyber location included) where all members can gather to be seen and heard at the same time.

73. I accept that while at the time of the creation of the Constitution, zoom was not contemplated and may not have existed, however, the word place is broad enough to be inclusive of it. One must also have regard for the date and time of the meeting during the covid pandemic where the physical gathering in one building was prohibited.

74. This was a global position and laws were suspended and exceptional circumstances accommodated. The Court therefore finds that in all the circumstances of this case the zoom platform meeting was held at a requisite place, being (the meeting was properly constituted) Zoom or other electronic meeting platforms.

Requisite Notice

75. The Plaintiffs argued that the Defendant failed to provide the requisite notice in regards to (i) its purported AGM of 19 March 2021, (ii) its intended motion to replace the BLTA Constitution with Articles of Association and Memorandum of Association, (iii) the purported vacancies and election of officers to fill the post of General Secretary and Assistant Secretary of the Defendant and (iv) its purported AGM and election of officers scheduled for 29 January 2022.

76. The Defendant argues that these issues are without merit as Mr. Ferguson confirmed during cross-examination that he knew or certainly ought to have known that the complaint raised was untrue. He admitted that the Notice was placed in the newspaper and the evidence reflect that Mr. Ferguson received the notice of the AGM and draft documents via email.

77. The Defendant asserts that Article 12 was complied with because the Notice was published in the newspaper. Therefore, the argument that Article 12 was not complied with must fail. The Defendant has also adduced into evidence emails demonstrating Mr. Ferguson's knowledge of the AGM.

78. It is also the Defendant's contention that the minutes exhibited in Mr. Ferguson's Affidavit indicate that 17 people were present, meaning that the meeting was properly quorated.

79. The Defendant contends that AGM which was conducted by the Defendant was constitutional as it followed the guidelines with respect to notice.

80. **Article 12 of the Constitution** provides:-

“Notice in writing of every General meeting, stating the business to be transacted there at and accompanied in the case of the annual general meeting by a statement of account for the past year and the names of the retiring officers and councilors, shall be distributed to all individual members and to the secretaries of all clubs, at least 14

days prior to the date fixed for such meeting, and notice convening every such meeting may be advertised in any paper or papers which the council may think desirable.

81. The Court having reviewed the evidence is satisfied that there was noncompliance with Article 12 of the Constitution regarding notice of the 19th March 2021 AGM. Despite notice being placed in the newspaper and sent via email to the members including the Plaintiff, Mr. Ferguson and accepted by him under cross examination, The Defendant failed to provide the names and of the retiring officers and councilors despite the attachments of the balance sheet, profit and loss as well as the draft Memorandum and Articles of Association.

Notice of Vacancies

82. The Defendant submits that the Constitution does not place a duty on the President, a Council member nor the Council as a whole to give notice of the vacancies. Thus, there is no duty to give notice for the vacancies as it is not mandated in the Constitution.

83. Article 12 requires the names of returning officers and councilors to be published with the notice. Implicit with this requirement, the Court find the need for notice for vacancies. The Defendant's failure to indicate this is a breach on their part. As stated above this was not discretionary but mandatory as the word "shall" was used.

Membership requirements

84. The Plaintiffs contends that the Defendant cancelled their and other members' membership against the Constitution. Further, that the purported deadline for member registration and/or regularization of members' accounts was on 9 December 2021.

85. The Defendant asserts that the issues concerning Notice and the 42 applications are not necessary as this Court dismissed the claim concerning "and others".

86. The Court accepts the evidence that the Plaintiffs failed to pay membership dues from 2019. This was a prolonged period and as such the membership lapsed. The Court is mindful that this period encompassed the pandemic and all activities paused globally. However there is no evidence of a timely attempt to make payment of membership fees and thus regularize their membership.

87. Further, despite the participation or lack thereof by the Plaintiffs, the Court is of the view that having regard for the Plaintiffs long standing history with the association, they ought to be aware the requirements to retain their membership.
88. The Court finds it reasonable that they would be aware that non-payment of membership fees would and could result in loss of membership in the Association. This failure to pay rests solely on the Plaintiffs and all subsequent consequences are theirs to bear. There is no evidence lead of a constitutional requirement to notify a member prior to their ceasing membership, to come in and regularize their standing.
89. As a matter of fact, the Constitution pursuant to Article 8 expresses the nature of the standing of members who have been delinquent in their accounts for a period of one year. Mr. Ferguson being delinquent in his accounts from 2019 ceased to be a member of the association at the point of no subscription in 2020. By virtue of this fact the court must consider whether the Plaintiff's had the standing to commence this action.
90. The evidence reflect that Mr. Ferguson applied for membership in The Association on the 29th December 2021 and Mr. Kerr on the 27th December 2021. Implicit in this application is their acknowledgment that they were not members. Further, it was a customary practice of The Association that when an annual general meeting was called, all applications made after that time would be considered after the AGM. The Court accepts this practice and evidence of Mr. Newton in that regard, as such, at the time the Plaintiffs commenced this action, they had no standing in The Association as their membership ceased to exist from non-payment from 2020 and 2021.
91. I am satisfied after considering the "poor evidence" led, along with the inability of the Plaintiffs to provide evidence of their financial standing during the requisite period that they did not meet the necessary burden of proof, required in civil proceedings. The Plaintiff's failed to provide evidence of the claims and assertions made throughout their pleadings and have equally failed to satisfy this Court that they had standing to commence this matter.
92. While the Court has addressed all issues raised in the Originating Summons of the Plaintiffs, for completeness, the issue of locus standi as raised by the Defendants in their Supplemental Closing Submissions had to be considered. The Court is of the view that although the issue of standing was made after the completion of the

trial, written and oral closing submissions, the same must be considered as it affects the conclusion of this Court's decision.

93. The Court considered whether the Defendants raising the issue of locus standi at the end of the trial is an irregularity or was it a nullity. The Court adopts the dicta of Lord Denning in **Harkness v Bell's Asbestos and Engineering Ltd (1967) 2 QBD 729** and relied on by the then Chief Justice Brian Moree in the case of **Gateway Ascendancy Limited v. Patrick Livingstone Hanna , Dr. Alvery Verniece Hanna & Zophim Enterprises Limited 2014/CLE/gen/00104,**

"This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify as long as it can do so without injustice. It can at last be asserted that it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation."

94. The Court is of the view that the Defendant ought to have raised this issue from the onset as a point in limini (preliminary point to the action). This would have certainly saved significant time and resources of the parties and the Court.
95. The Defendants contend that the Plaintiffs did not have locus standi to commence the subject action. They relied on the Constitutional provision of Article 8 which addresses when a person cease to be a member of the Association.

96. The Court having considered their submissions and reviewed the evidence is of the view that the Plaintiffs having only submitted application for membership on 27th and 29th December 2021 respectively were not members of the Association, as the last time they paid membership dues was 2019. By the constitution they would cease to be members after a year of non-payment of membership fees. Their membership was not restored thus they had no real interest or standing in the Defendant's Association to commence this action.

97. In the case of **Nel v Van Schalkwyk NO and Others (207/19) [2020] ZANHC 33 (26 June 2020) NXUMALO**, AJ addresses the point of locus stating in paragraphs 8 & 9 of the judgement:-

"8. He who has a right to sue in an action is said to have a locus standi in such action, and vice versa. The opposing respondents have placed the applicant's locus standi squarely in dispute. The test is whether the applicant has a direct personal interest in the suit to be considered "his cause". [20] In Minister of Safety and

Security v Lupacchini and Others [2015] JOL 33825 (FD), two connotations of the expression were aptly identified. It was well said that its primary sense, it refers to the capacity to litigate or that is the capacity to sue or to be sued. It was correctly pointed out that whilst the capacity to litigate is of course not the same as the capacity to act, there is usually a close correlation between them. In its secondary sense, the expression denotes whether a person has a sufficient interest in the subject matter of the case to be allowed to bring or defend the claim.

9. Locus standi is thus an issue which needs to be determined preliminarily in a judicial process.[21] In other words, the issue of locus standi has to be decided in limine before the merits.[22] That the parties have the necessary legal standing or locus standi in judicio must accordingly appear ex facie the founding pleadings”

98. The Defendants must however admonish that they wasted the time of all parties involved and this must have cost implications in the circumstances.

Damages for loss of Reputation

99. It is the Defendant's contention that because of the defamatory statements and posts on social media that were made by the Plaintiffs, the Defendants should be awarded damages for loss of reputation mainly because the statements are in its permanent form.

100. A defamatory statement is either libel or slander. The present matter deals with libel, which is actionable per se, meaning proof of damage is not necessary. Libel occurs when one party makes a defamatory statement against either party in permanent form.

101. In **Commonwealth Caribbean Tort Law, Fourth Edition**, Gilbert Kodilinye stated:

“a statement is defamatory when (i) it lowers a person in the estimation of right thinking members of society, (ii) it exposes the individual to hatred, contempt or ridicule, (iii) it causes other persons to shun or avoid the individual, (iv) it discredits a person

in his trade, profession or calling and (v) it damages a person's credit."

102. The Defendant submits that as the Plaintiffs went on social media and defamed the Defendant, they should receive damages as it caused irrefutable harm. They further allege the statements and or posts on social media made by the Plaintiffs are defamatory as it lowers the Defendant in the estimation of right-thinking individuals, and it discredits them in their trade and or profession with respect to the sport of tennis. This was reflected in **Richard v British Broadcasting Corporation and another [2019]** where it was stated:

"if the protection of reputation is part of the function of privacy law then that must be reflect in the right of the court to give damages which relate to loss of reputation. That loss of reputation has an impact on the feelings of the wronged individual (which can be reflected in damages), and will inevitable come into that extent in any event."

103. Members of the Board have a right to have their reputation protected. If their right was breached by libel statements and proven, the Defendants would be entitled to damages for loss of reputation given the fact that the defamatory posts on social media are permanent even if they were deleted. However, despite the social media postings, any reputable harm should be proven, which the Defendants failed to prove and as such is not entitled to damages for loss of reputation.

Punitive Damages

104. The Defendant contend that punitive damages should be awarded because the Plaintiffs brought a scandalous, frivolous and vexatious matter.

105. In the matter **Steiner v R 1996 CarswellNat 1742, [1996] FCJ No.1356** the Federal Court of Canada stated at para.16:

"A scandalous pleading includes one which improperly casts a derogatory light on someone, with respect to their moral character. A claim is a frivolous one where it is of little wieght or importance or for which there is no rational argument based upon the evidence or law in support of the claim. A vexatious proceeding is one that is

begun maliciously or without a probable cause, or one which not lead to any practical result.”

106. It is the general rule that punitive damages will be awarded against conduct that was malicious or conduct that deserves punishment. This was illustrated in the Canadian case of **Vorvis v Insurance Corp of British Columbia, 1989 CanLII 93 (SCC)** where the following dicta was provided:

“Moreover, punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.”

107. According to **Halsbury’s Laws of England (Damages Vol. 29 (2019)) Punitive Damages: basic principles, Punitive damages (otherwise known as 'exemplary damages')**, aimed overtly at punishing the defendant and dissuading wrongdoing

108. According to **Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15** punitive and exemplary damages are one and the same.

109. In **Rookes v Barnard [1964] 1 ALL ER 367** the House of Lords advised:

“English law recognised the awarding of exemplary damages, that is, damages whose object was to punish or deter and which were distinct from aggravated damages (whereby the motives and conduct of the defendant aggravating the injury to the plaintiff would be taken into account in assessing compensatory damages); and there were two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government, and in the case where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff.”

110. The Court finds that this is not a case where the standard has been met for the award of punitive damages. I do not find that the Defendants' character has been maligned.

Costs

111. **The Rules of the Supreme Court, Chapter 53, Statute Laws of The Bahamas**, is the source of the Court's inherited power to award costs. The general rule is that in usual circumstances, the unsuccessful party will be ordered to pay the costs of the successful party (See **Gupta v Klito The Times November 23rd, 1989**).

112. Courts have a wide discretion to award costs and this judicial discretion has been confirmed by the Court of Appeal of The Bahamas in **Dorsett v Pictet Bank and Trust Limited SCCiv App & CAIS No. 113 of 2011** where Allen P stated that:-

"I am of the view that the issue of costs is always at the discretion of the trial judge however the discretion must be exercised judiciously... The costs in the court below should follow the event pursuant to Order 59 Rule 3 (2) of the rules of the Supreme Court."

113. **Order 59 Rule 3 (1) and (2) of the Rules of the Supreme Court** provides:

3. (1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceeding except under an Order of the Court.

(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

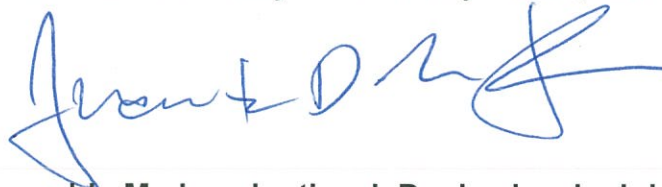
114. It is the Defendant's contention that given the fact that the Plaintiffs delayed in commencing the action, brought the action with no locus standi and waste the Court's time in bringing a vexatious, spiteful and baseless matter, the Court should award costs on an indemnity basis against the Plaintiffs.

115. This Court found the behaviour of all parties unsettling and unbecoming, strategically motivated, whether to retain power, i.e. notices in December when most persons are distracted with other events or as having been offended by being scolded for breach of the rules. While the behaviour and demeanor in Court were despicable, both sides were concerned with personal agendas while the sport suffered. It is a most unfortunate state of affairs. The Court has to determine if the requisite legal standards have been met by the litigants.

116. For all of the reasons stated above, the Court having heard the evidence, observed the demeanor of the witnesses and having considered the relevant law finds as follows:-

- a. The Plaintiffs were not members of the Defendant at the time of commencement of this action;
- b. That the Plaintiffs had no locus standi to commence this action and therefore the action is dismissed;
- c. The Defendants are not entitled to punitive damages or damages for loss of reputation;
- d. Annual General Meeting held on the 19th day of March A.D. 2021, via the Zoom remote meeting platform, was not valid for the reasons stated above;
- e. The Plaintiff is to bear 40% of the Defendants' costs to be taxed if not agreed due to the Defendant raising the issue of locus at the end of the trial.

Dated this 30th day of January 2024, A.D.



The Honorable Madam Justice J. Denise Lewis-Johnson