SAINT LUCIA:

IN THE HIGH COURT OF JUSTICE
(Civil)
A.D. 1995

SUIT No. 512 of 1993

BETWEEN:

EMMA HIPPOLYTE

Applicant

and

ATTORNEY GENERAL

Respondent

Mr. A. Alexander Q.C. and Mr. H. Deterville for Applicant.
Mr. E. Thomas, Solicitor-General, and Mrs. A. Foster for the Respondent.

1995: January 31;
May 2 and 10;
July 12.

MATTHEW, J.

PLEADINGS

On January 4, 1994 the Applicant who held the post of Director of Audit up to August 31, 1993 filed a notice of motion to the effect that she was unlawfully removed from her post as Director of Audit. On the same day she filed an affidavit in support of the notice of motion.

On January 20, 1995 she filed an amended notice of motion requesting five orders and six declarations but all emanating from the alleged unlawful termination of her services or the unlawful removal from her post as Director of Audit. On

January 24, 1995 she filed a supplemental affidavit to which she exhibited several documents which were referred to in her original affidavit.

On February 4, 1994 the Respondent entered an appearance and on February 28, 1994, Ausbert d'Auvergne, Permanent Secretary in the Ministry of Planning, Personnel, Establishment and Training filed an affidavit in answer to the original notice of motion.

On January 26, 1995, Johnson Cenac, Personal Secretary in the Ministry of Personnel, Establishment and Training filed an affidavit in response to the amended notice of motion.

A request for hearing had already been filed on October 20, 1994.

In the presentation of his case, learned Senior Counsel for the Applicant stated that the application was being made under **section 105** of the **Constitution of Saint Lucia.**

AFFIDAVIT EVIDENCE

In her affidavit filed on January 4, 1994 Emma Hippolyte stated that by a memorandum dated July 25, 1986 the Public Service Commission advised the Director of Audit that they had approved her appointment as Deputy Director of Audit on contract for three years with effect from August 1, 1986. That document was exhibited as **E.H.2.**

She said she commenced her employment in the public service of Saint

Lucia on August 1, 1986 in the post of Deputy Director of Audit on secondment for a period of three years from the National Commercial Bank where she was employed.

She stated that by letter to her dated August 21, 1986 the Public Service Commission stated that they had approved her appointment to the post described as Deputy Director of Audit (Director of Audit designate). She said it was an express term and condition of the offer that the appointment was on contract for a period of five years and was terminable by six months' notice in writing by either side. But it was provided that on the appointment to the post of Director of Audit the condition regarding termination by six months' notice would become null and void and would be replaced by the condition regarding termination relating to the Director of Audit contained in the Constitution.

She said she performed the duties of Deputy Director from August 1, 1986 to May 31, 1987.

She said on May 22, 1987 the Acting Governor-General pursuant to section 90 of the Constitution appointed her as Director of Audit from June 1, 1987. She said the instrument of appointment made no reference to the duration of her appointment or to the letter of August 21, 1986.

She tendered in evidence the letter dated August 21, 1986 as exhibit **E.H.3** and the instrument of appointment by the Acting Governor-General as **E.H.4**.

She stated that acting on the erroneous belief that she was appointed on a

five year contract from August 1, 1986 she wrote to the Public Service Commission and advised them of her intention to renew and renegotiate the contract. That letter dated December 31, 1990 is exhibited as **E.H.5.**

The Permanent Secretary Planning, Personnel, Establishment and Training responded to her request on July 15, 1991 and that was exhibit **E.H.6.** Further correspondence on the matter followed on July 18, 1991, December 5, 1991 and on May 25, 1992 by exhibit **E.H.10.** she entered into an agreement with the Government of Saint Lucia to continue in the office of Director of Audit for a two year period from August 1, 1991 to July 31, 1993.

She referred to a legal opinion on the two-year contract given to her by the Attorney-General two days after the agreement was signed by herself and Ausbert d'Auvergne on behalf of the Government.

She stated that by letter dated January 18, 1993 she wrote to the Permanent Secretary in the Ministry of Planning, Personnel, Establishment and Training advising him of her willingness to remain in the employment of the Government as Director of Audit after the contract ended on July 31, 1993. This was exhibit **E.H.13.** She sent a reminder on April 29, 1993.

On June 25, 1993 she received a reply from the Permanent Secretary informing her that the Government did not wish to avail itself of her offer and that her services would not be required beyond the contract period. That letter was tendered as exhibit **E.H.15.**

On July 29, 1993 the Permanent Secretary sent a memorandum to the staff of the Audit Department informing them that the two-year contract of the Director of Audit would expire on July 31, 1993 and that Mrs. Arlette Hyacinth, the Deputy Director, would be the officer in charge. That was **E.H.16**.

On the same July 29, 1993 the Permanent Secretary advised the Appellant by memorandum to proceed on 20 working days vacation leave. That was **E.H.17**.

These are the essential facts of a lengthy memorandum interspersed with legal arguments and/or submissions.

The affidavit of Ausbert d'Auvergne does not dispute the facts stated above and it mainly contains legal arguments which were not only repeated in Cenac's later affidavit but also submitted by the learned Solicitor-General at the hearing.

To do justice to the Respondent I shall state some of the contents of Cenac's affidavit filed on January 26, 1995.

Johnson Cenac stated that it was his understanding and belief that it was within the competence of any sovereign government to enter into any contract even in relation to service in the public service of Saint Lucia and even in respect of posts created by the Constitution. He said that during the time he had been attached to the Ministry he had witnessed the execution of contracts of service for senior management and professional posts.

He said it was his firm understanding that it is the settled executive policy

of the Government to fill certain critical posts in the public service by contract in order to attract well qualified and experienced persons.

He said that at the present time there are more than ten persons appointed to senior posts in the public service whose terms and conditions are governed by contract and included in these were the Comptroller of Inland Revenue, the Chief Engineer, the Director of Legislative Drafting, Magistrates, Medical Doctors and the Solicitor General.

He stated that where a person is to be appointed to an established post in the public service of Saint Lucia, including the post of Director of Audit, it is mandatory for such appointment to be made by the relevant constitutional authority but the terms and conditions governing such employment are either to be statutory and/or constitutional or as negotiated and agreed on between the Executive, acting through the Ministry, and the other contracting party, subject to the Constitution.

He stated that he had been advised and he verily believes that it has recently been established that the determination of terms and conditions for public officers is the province of the Executive and not that of the Public Service Commission or other Commissions established by the Constitution or the Governor-General.

He further stated that the Applicant of her own free will entered into a five-year contract and later a two-year contract with the Government and that such contracts are to be read in conjunction with the appointment of the Applicant by the Governor-General on May 22, 1987.

He stated that for the duration of the two contracts the Applicant was on secondment from the National Commercial Bank and as such permanent tenure and secondment are contradictory or mutually exclusive and further the Applicant resumed her employment with the National Commercial Bank on the expiration of the second contract.

In paragraph 20 of her affidavit filed on January 4, 1994 the Applicant stated that she resumed employment with the National Commercial Bank at its head office in order to mitigate her losses.

Cenac stated that as Director of Audit the Applicant received salary, allowances and gratuity in excess of the prescribed amounts which she would have received had her terms and conditions not been fixed by the two contracts referred to earlier. He said further that the receipt of gratuity on the expiration of a contract is inconsistent with holding office until the attainment of the prescribed age.

He said he was advised and verily believes that section 90 subsections (1), (5), (6) and (7) of the Constitution do not prohibit or preclude the Government from entering into a contract with the person to be appointed Director of Audit.

He also stated that he was advised and verily believes that section 90, subsections (5), (6) and (7) are concerned with the age of retirement and the removal of the Director of Audit from office and are matters which do not concern the Applicant having regard to her legal circumstances while holding the said post

of Director of Audit; and further that cessation of office by virtue of the expiration of a contract and removal or dismissal are separate and distinct legal concepts with the former being governed by the terms of the contract and the latter by the Constitution.

He tendered several exhibits. I shall refer to the relevant ones. Exhibit **J.C.1** is a letter from George Theophilus, Chairman of the Board of Directors of the National Commercial Bank, to Dwight Venner, Director of Finance, Planning and Statistics, informing him that the Directors of the Bank had agreed to second the Applicant to the public service for five years in the first instance - to assume duty as Deputy Auditor General initially and Auditor General ultimately.

J.C.2 is a memorandum from the Applicant to the Accountant General dated March 14, 1991 pertaining to her gratuity and **J.C.3.** together with a schedule to **J.C.5** dated May 27, 1991 suggest the Applicant got a gratuity of $87,922.63.

SUBMISSIONS OF APPLICANT

Learned Counsel for the Applicant submitted that exhibit **E.H.3** was the foundation of the constitutional errors made by the Respondent. He said it was the contractual arrangements but it purported to do more than that. Counsel stated not only is it strange that the document purports to create a term in a contract which may not even eventuate but it also sought to create a term in the anticipated

contract contrary to the imperative provisions laid down in the Constitution in respect of the tenure of a person appointed to the office of Director of Audit.

He submitted that the Respondent seems to be combining two positions in one period of employment and appears to be relying on a plea of *volenti non fit injuria* according to paragraph 9 of the affidavit of Cenac; and also seems to be saying that the terms and conditions attaching to the office as laid down by the Constitution are applicable, however, the Applicant has waived those terms and conditions and she is estopped from relying on them by reason of her conduct in entering into contracts and accepting terms different to those stipulated in the Constitution.

With reference to the statement in paragraph 3 of Cenac's affidavit concerning the competence of the Government as regards sovereignty Counsel observed this to be as broad a statement as one can ever find to bestow on a constitutional Government unlimited power to enter into a contract in the public service.

Counsel submitted that a Director of Audit can never be appointed by contract for a period of years. He submitted in this context that where there are statutory provisions which are absolute, explicit and preemptory which are made in the public interest and for the protection of the public good there can be no room for any statement in the absence of express provisions that the situation for which provision is made can be done in any other way.

Counsel observed that the office of Director of Audit is not peculiar to Saint Lucia and he referred to **Basu's Commentary on the Constitution of India, 7th Edition, Volume H,** Section 148 where it deals with the Comptroller and Auditor-General of India. He referred also to the case of **Caldow v Pixell 1877 36 L.T. 469** which he said is helpful.

Learned Counsel submitted that the conjoint effect of sections 90 and 122 is that upon the appointment to the office of Director of Audit by the Governor-General the appointee acquires a constitutional status and is entitled to perform the functions of the office until he or she attains the prescribed age of 55 unless he or she resigns or is removed from office for inability or misbehaviour or suspended from the exercise of his or her functions.

Counsel observed that in this case there is the implication that having been appointed by the Governor-General there is implied power in the Executive to avoid the constitutional consequences of the Governor-General's appointment by an arrangement which antedated the Governor-General's appointment.

Counsel submitted that in the context of the preempting provisions in section 90 of the Constitution and in the further context of the provisions being entrenched by section 41 of the Constitution there can be no room for the claim that there is power in any authority be it the Executive or any other body or person by contract or any other means to appoint the Director of Audit other than the Governor-General or to appoint that functionary on terms and conditions different from those

stipulated in the Constitution.

Counsel stated that upon her appointment the Applicant received constitutional status and in this context he cited the case of **Abeywickrema v Pathiram and Others 1987 (L.R.C.) (Const.) 999.**

Counsel submitted that the Applicant's prime position is that there can be no question of contract so far as the Director of Audit is concerned and any appointment by contract will not be the Director of Audit established under section 84 or section 90 of the Constitution.

Counsel observed that reliance is placed by the Respondent on a document which precedes the appointment and the document is made by a body which is not empowered to appoint the Director of Audit. Counsel asks how can one secure a term in the contract before the contract begins.

Counsel submitted that exhibits **E.H.3, E.H.10, E.H.15** and **E.H.17** were all unconstitutional and contrary to sections 84 and 90 of the Constitution.

Counsel submitted that at the constitutional level there can be no waiver or estoppel in respect of constitutional provisions as this will amount to legitimizing powers which would be *ultra vires*. In this context he referred to the following cases:

Equitable Life Assurance Society v Reed 1914 A.C. 587;
Bowmaker Ltd v Tabor 1941 2 A.E.R. 72;
Edward Ramia Ltd v African Woods Ltd 1960 1 AER. 627 P.C.;

The first two cases dealt with ordinary statutory provisions.

Counsel observed that to concede that the Applicant waived or is estopped or that she voluntarily dispensed with the provisions of the Constitution would be to ignore the intention of the legislature to insulate her from Executive interference. Reference was then made to the case of **Tellis v Kuppusami (1987) L.R.C.** at pages 351, 365 (h) and 366/367.

Counsel submitted that where provision is made by statute to deal with a particular matter the prerogative power to deal with that matter is in abeyance and he gave as authority for that submission the case of **Attorney-General v De Keyer's Royal Hotel Ltd 1920 A.C. 508** or **1920 A.E.R. 80** at pages 84, 85, and 92. Counsel said that it was absurd to provide for the appointment of the Director of Audit by the Constitution and then say the prerogative exists to make an appointment in any other way.

Counsel submitted that not even the Governor-General can make an appointment to the office of Director of Audit terminable before age 55 and if he sought to do that his act would be unconstitutional, ultra vires and void. Counsel referred to the case of **Waterside Workers' Federation v Alexander Ltd 1918 25 C.L.R. 434.** Counsel submitted that applying the principle in that case the Director of Audit must hold office during good behaviour and up to 55 years and any period for less is ineffectual.

When learned Senior Counsel replied to the submissions of the learned Solicitor-General he said that after the Court had heard both sides the key to the

questions to be resolved is the interpretation of section 90 of the Constitution to ascertain whether security of tenure was intended to attach to the office of Director of Audit and the period of time, if any, during which the tenure was secured thereby. Counsel stated that he wished to emphasize that the Applicant's case is based on the instrument of appointment by the acting Governor-General and he was not relying on any contract or any legitimate expectation which might have risen in other circumstances.

Counsel said that the Solicitor-General referred to other Constitutions where the periods of time prescribed were short of retirement age but he submitted that one cannot interpret the provisions of one Constitution by reference to the provisions of other Constitutions and he referred to the case of **Hinds v Queen (1975) 24 W.I.R.** page 330 letter (1) which was instructive on the fact that the meaning of one constitution is to be garnered from the constitution itself.

Counsel said he wished to state that the period of tenure does not guarantee its security and it is the certainty of the period and the limitation on power of removal which guarantees tenure. Counsel submitted that security of tenure means a period fixed not by the Executive but by the constitution and the limitation placed on removal of those officers during that period.

Counsel further submitted that one cannot interpret one part of the Constitution in isolation as the Solicitor-General was doing. He further submitted in that context that to ascertain the proper meaning of section 90(5) of the

Constitution the whole of the section must be looked at as well as other provisions relating to tenure to discover the spirit of that section to arrive at a generous and purposive interpretation of the section.

Counsel submitted that the phrase "shall vacate his office" as found in section 90(5) of the Constitution has the same meaning as "shall hold office" as found in section 8(1) of the **Courts Order S.I. 1967 No. 223**.

Counsel finally submitted that the interprètation of section 90(5) of the Constitution is that period of tenure is until the relevant age.

SUBMISSIONS OF RESPONDENT

In the course of his submission the learned Solicitor-General tendered no fewer than 63 documents comprising cases, notices, constitutional instruments and other texts. Needless to say I do not think it appropriate to list all of them and I shall only be referring to his authorities which are relevant and or necessary for the purposes of this judgment.

Counsel submitted that the central issue in the case is whether the Applicant has a right to the office of Director of Audit created by section 84 of the Constitution even if -

(a) the Applicant voluntarily entered into two contracts to serve for seven years;

(b) the Applicant was seconded from her substantive post from the National Commercial Bank; and

(c) the Applicant was in receipt of remuneration in excess of the statutory remuneration and was paid gratuities at the end of the two contracts.

Counsel stated that the Respondent would attempt to show that the answer is in the negative and that there was no violation of the Constitution.

Counsel then submitted nine authorities pertaining to constitutional interpretation. Counsel referred to paragraphs 3, 4, 5 6 and 15 of Cenac's affidavit and submitted that under the **Westminster** system there is a prerogative residing in the Sovereign which is a residue because Parliament has legislated and eroded some of that power.

The Solicitor-General stated that his preliminary submission is that there is nothing in the Constitution or in any statute which contradicts the exercise of the executive authority or prerogative power with respect to public officers whether or not such offices are created by the Constitution. He referred in this context to **Thomas v A.G. of Trinidad and Tobago 1981 3 W.L.R. 601** at page 610 paragraph (b). He referred also to the case of **Satish Anand v the Union of India 1953 S.C.R.** 655/656; 660/661 which deals with temporary employment and **Toby v A-G of Trinidad and Tobago (1973) 27 W.I.R.** 266 lines (f)-(g) and submitted that there is the power to contract.

Counsel submitted that as long as a particular course of action is not prohibited by the constitution that course of action can be taken and the authority for that is the **Nigerian case** of **Ukaegbv v A-G of IMO State (1985) L.R.C.**

(Const.) 867.

Counsel submitted that nothing in the St.Lucia Constitution prohibits any one from entering into a contract even in respect of some constitutional post. He then referred to **Whitfield v A-G of the Bahamas (1989) L.R.C. (Const.)** page 249.267 (f); and **Hinds v Queen 1976 2 W.L.R. 366; 378.**

The Solicitor-General then looked at section 90 of the Constitution and submitted that section 90(5) bore a different meaning to section 8 of the Courts Order of 1967.

Counsel submitted that service in constitutional posts for limited periods are not entirely new and he referred to the Constitutions of:-

(a) **Belize, section 102(1);**
(b) **Republic of Kiribati, sections 83(1) and 93(1);**
(c) **Bermuda, section 78(1); and**
(d) **Turks and Caicos Islands, section 54(1).**

In this context he referred to the case of **DaCosta v Minister of National Security (1986) 38 W.I.R.** page 2.

The Solicitor-General then referred to a text headed **Judicialism in Commonwealth Africa** by **Professor Nwabueze** in which he refers to another text, **Law and its Administration in a One Party State,** with selected speeches by **Professor Telford Georges.** He stated that Professor Nwabuege was making the point that there is nothing in the Constitution which says a person cannot be appointed Director of Audit by contract.

The Solicitor-General submitted that in the case of the Director of Audit the power to appoint can only be made by the Governor-General and likewise in the case of removal, only the authority that has the power to do so can validly remove the person. He cited in support of that submission **Emmanuel v Government of Dominica, High Court Suit 194 of 1989** at page 38.

Counsel referred to the case **King v A-G of Barbados, No. 1878 of 1991** page 17 where it was stated that the terms and conditions of the appointment were not left to the Public Service Commission who could only appoint. He said the same point was made in **Thomas v A-G of Trinidad and Tobago 1981 3 W.L.R.** at page 611.

Counsel submitted that on the facts of the case there has to be a presumption that the terms and conditions of the Applicant's employment were determined by the Executive and thereafter the Public Service Commission informed the Applicant what the terms and conditions were. Counsel asked the Court to infer a contract if it is the case as the Applicant submitted that exhibit **E.H.3** is nugatory.

Counsel observed that if exhibit **E.H.4.** did not specify a period as the Applicant contended then there is need to explain the salaries and allowances prescribed in the estimates for they were not the usual terms and conditions for a person who did not have special terms and conditions.

With reference to the case of **Tellis v Bombay and Others** the learned

Solicitor-General referred to page 366 letter (f) and observed that the case of **Tellis** was dealing with fundamental rights and in this case no fundamental right is involved.

Counsel observed that paragraph 20 of the Applicant's original affidavit deals with unlawful removal but he says there was no attempt to remove the Applicant for the simple reason that employment was expired. In that context he referred to **Thomas v A-G** page 610 paragraph (b) where the learned Judge was saying there is a specific period that has come to an end.

Counsel submitted that the letters in this case do not evince an intention on anybody's part for permanent employment and therefore the Applicant is estopped from asserting a claim to the office of Director of Audit.

He submitted that the case is not dealing with fundamental rights but with derivative rights and therefore the doctrine of estoppel is relevant.

On the question of tenure the learned Solicitor-General submits as authorities the works of:-

(a) **Robert Wray page 63; and 77-80;**
(b) **De Smith pages 139-142; and**
(c) **Dr. Barnett pages 321-323.**

He stated that the authors put emphasis not so much on duration of tenure but on removal and in this context he said that the Comptroller of Audit in India has tenure for six years and in the United States of America, the corresponding officer has tenure for 15 years.

CONCLUSIONS

I should like to begin by commenting on certain submissions made by the learned Solicitor-General based on the contents of the affidavit of Johnson Cenac. In paragraphs 4 and 6 of his affidavit Cenac stated that since his attachment to the Ministry he has witnessed the execution of several contracts in relation to posts in the Public Service and at the time of his affidavit there were more than ten persons appointed to senior management and professional posts in the public service and among these were the Comptroller of Inland Revenue, the Chief Engineer, the Director of Legislative Drafting, Magistrates, Medical Doctors and the Solicitor-General. Learned Counsel for the Applicant has in my view correctly answered that none of these posts are constitutional posts.

Basu in his **Commentary of the Constitution of India, Volume H** at page 203 states - "Government is free to enter into a formal contract for the employment of a person which is not in contravention of any constitutional provision". The author realizes and is stating that the freedom to contract is subject to the Constitution and by implication subject to posts created by the Constitution.

The same thing was stated in **Satish Chandra Anand v The Union of India 1953 S.C.R. 655.656** namely: "The State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution." **S.A. de Smith** in **The New Commonwealth**

and its Constitutions at page 109 speaks of the supremacy of the Constitution over ordinary law and it follows that provisions with respect to the appointment of posts established by the Constitution cannot be equated with other posts not provided for by the Constitution.

Cenac stated in paragraph 11 of his affidavit that the receipt of a gratuity on the expiration of a contract or contracts is inconsistent with holding office until the attainment of the prescribed age of the Applicant. The Solicitor-General gave no authority for this and I cannot see why this needs be so.

In paragraph 8 he stated that it had recently been established that the determination of terms and conditions for public officers is the province of the Executive and not that of the Public Service Commission or other Commissions established by the Constitution or of the Governor-General. He forgot to say by whom that norm was established. But in my view that determination by whoever cannot override the law.

Perhaps, more forcefully, he says in paragraph 7 that where a person is to be appointed to an established post in the public service of Saint Lucia, including the post of Director of Audit, it is mandatory for such appointment to be made by the relevant constitutional authority, and the terms and conditions governing such employment are to be either statutory and/or constitutional or as negotiated and agreed on between the Executive and the other contracting party subject to the Constitution.

I note he is saying "subject to the Constitution" but the argument being made is as though the words are absent. It seems to me that the Solicitor-General is relying on the cases of **King v A.G. Barbados High Court No. 1978 of 1991** and **Thomas v A-G Trinidad and Tobago 1981 1 W.L.R. 610** as authority for that proposition.

In **King's case** the Applicant was alleging that her fundamental right to property had been infringed. Her Counsel's submission in that respect was to the effect that once an officer is appointed to an office pursuant to **section 94(1)** of the Constitution there is no power to interfere with his or her emoluments unless he or she gives cause. *Sir Denys Williams C.J.* in rejecting it thought the submission was certainly a novel approach to the relatively straight forward provisions of section 94(1) the language of which seems to do no more than to confer on the Commission powers with respect to appointment, removal and discipline. I cannot see that case as any authority for submission that has been made by the Solicitor-General.

In **Thomas's case** at **page 611 letter G** the Court was considering the functions of the Police Service Commission which fell into two classes, namely, (a) to appoint officers to the police service, including their transfer and promotion and confirmation in appointments and (b) to remove and exercise disciplinary control over them. The Court did say it had no power to lay down terms of service for police officers. I might observe that the Governor-General is not a

Service Commission under the Constitution and cannot be equated with one. He holds executive power. **Section 59 of the Constitution** states:

> "(1) The executive authority of St. Lucia is vested in Her Majesty.
> (2) Subject to the provisions of this constitution, the executive authority of Saint Lucia may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him."

But even if it is correct that terms and conditions of the Applicant's employment are to be determined by the Ministry any term with regard to duration of the post would be so intimately connected to the power of appointment that to allow the Ministry to dictate such a term would detract from the authority of the Governor-General and that cannot be allowed.

I think one of the main submissions of the Applicant is that a Director of Audit can never be appointed by contract for a period of years. Learned Counsel for the Applicant so stated in a direct response to a question from me. On the same theme Counsel later submitted -

> "My prime position is that there can be no question of contract so far as the Director of Audit is concerned. Any appointment by contract will not be Director of Audit established under section 84 or section 90 of the Constitution."

In his reply to the submissions of the learned Solicitor-General learned Counsel for the Applicant stated:

> "I submit that after hearing of both sides the key to the questions to be resolved is the interpretation of section 90 of the Constitution."

I think I should set out here the provisions of **section 90**. It is as follows:

"90.(1) The Director of Audit shall be appointed by the Governor-General acting in accordance with the advice of the Pubic Service Commission.

(2) If the office of Director of Audit is vacant or if the holder of that office is for any reason unable to exercise the functions of his office, the Governor-General, acting in accordance with the advice of the Public Service Commission, may appoint a person to act as Director.

(3) Before tendering advice for the purposes of subsection (1) or subsection (2) of this section, the Public Service Commission shall consult the Prime Minister.

(4) A person appointed to act in the office of Director of Audit shall, subject to the provisions of subsections (5), (7), (8) and (9) of this section, cease so to act -

(a) when a person is appointed to hold that office and has assumed the functions thereof or, as the case may be, when the person in whose place he is acting resumes the functions of that office; or

(b) at such earlier time as may be preseribed by the terms of his appointment.

(5) Subject to the provisions of subsection (7) of this section the Director of Audit shall vacate his office when he attains the prescribed age.

(6) A person holding the office of Director of Audit may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(7) The Director of Audit shall be removed from office by the Governor-General if the question of his removal from office has been referred to a tribunal appointed under subsection (8) of this section and the tribunal has recommended to the Governor-General that he ought to be removed for inability as aforesaid or for misbehaviour.

(8) If the Prime Minister or the chairman of the Public Service Commission represents to the Governor-General that the question of removing the Director of Audit under this section ought to be investigated -

(a) the Governor-General shall appoint a tribunal which shall consist of a chairman and not less than two other members elected by the Chief Justice from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from such a court; and

(b) the tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to him whether the Director ought to be removed under this section.

(9) If the question of removing the Director of Audit has been referred to a tribunal under this section, the Governor-General, acting in accordance with the advice of the Public Service Commission, may suspend the Director from the exercise of the functions of his office and any such suspension may at any time be revoked by the Governor-General, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal recommends to the governor-General that the Director should not be removed.

(10) The prescribed age for the purposes of subsection (5) of this section is the age of fifty-five or such other age as may be prescribed by Parliament:

Provided that any law enacted by Parliament, to the extent to which it alters the prescribed age after a person has been appointed to be or to act as Director of Audit,

shall not have effect in relation to that person unless he consents that it should have effect."

I do not agree with the view of learned Counsel for the Applicant that the **Waterside case** affords guidance to the interpretation of **section 90(5)** of the Constitution of Saint Lucia.

In the waterside case the High Court of Australia was concerned with the judicial power contained in section 71 of the Constitution of Australia and the majority of the Court thought that section 72 of the Constitution requires that every Justice of the High Court should be appointed for life subject to the power of removal.

Section 72 states that Justices of the High Court ..... shall be appointed by the Governor-General in Council and shall not be removed except by the same authority on address from both Houses of Parliament praying for such removal on specified grounds.

In my judgment **section 90(5)** of the Constitution of Saint Lucia cannot be interpreted in the same way.

When learned Counsel for the Applicant responded to **Judicialism in Commonwealth Africa** by **B.O. Nwabueze** he submitted that the Applicant had the case of **Tellis** in her favour and that should be preferable to the author's opinion.

In the case of **Tellis v Bombay Municipal Corporation (1987) L.R.C. (Const.)** page 351 the Petitioners were pavement and slum dwellers in the city of

Bombay, some of whom were forcibly evicted and had their pavement and slum dwellings demolished by the Respondent, acting under the Bombay Municipal Corporation Act 1888.

An interim injunction against further implementation of the Corporation's proposal had been granted in 1981. In those proceedings the Petitioners had conceded that no fundamental right to put up dwellings on the pavements could be claimed.

In the present petitions, in the nature of public interest litigation, to the Supreme Court, the Petitioners argued that their fundamental right to life under Article 21 of the Constitution of India had been infringed and that the procedure prescribed by the 1888 Act was unfair.

The Respondent argued that the Petitioners were estopped from claiming enforcement of these fundamental rights by their earlier concession in the High Court proceedings.

The Supreme Court of India held that there can be no estoppel against the Constitution. They said that in petitions which were clearly maintainable under Article 32 of the Constitution the Petitioners were not estopped from raising their fundamental rights under the Constitution, which was not only the paramount law of the land, but the source and sustenance of all laws. They said that the Constitution not only protected individuals, but also served the public interest and that no individual could barter away the freedom conferred upon him by the

Constitution, and so any concession made in proceedings could not create an estoppel in those or any subsequent proceedings; nor could fundamental rights conferred by the Constitution be waived.

At page 367 letter (f) the learned Chief Justice who delivered the judgment of the Court stated that the Constitution makes no distinction between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

I accept the authority of that decision and hold that the Applicant in this case could not be estopped from asserting the provisions of the Constitution despite her entry into a contract or contracts of service and that she cannot be held to have waived those provisions.

I cannot see however how that decision is authority for saying that the Director of Audit provided for by the Constitution of Saint Lucia can never be employed by contract. Learned Counsel for the Applicant submitted once the idea of contract is introduced, the question of terms is wide open and so you can have a period of service beyond the stipulated age of 55 years. I do not agree.

At page 273 of his work **Judicialism in Commonweal Africa, Professor Nwabueze** states as follows:

> "Since independence the usual practice is to appoint expatriate judges on contract. The view seems to be held in some quarters in Zambia that, because the Constitution prescribes a retiring age, appointment of a judge on contract for a specified period is invalid. This view is clearly untenable. What the Constitution says is that a judge shall vacate office on attaining the prescribed age, not that he shall not vacate it until he attains that age. Accordingly, he may retire early. The retiring age is also

> subject to earlier voluntary resignation. If a judge may retire or resign earlier, he may equally, at the time of his appointment, by a similar voluntary act, bind himself to a specified period of service. It seems, however, that it is necessary for the contract to comply with the removal provisions of the Constitution, since these expressly state that a judge shall *not* be removed except in accordance therewith. Thus, no room is left for contrary arrangement by contract. A judge cannot agree by contract to be removed before the expiration of his contract for reasons other than misbehavior or inability, or by a different procedure from that prescribed in the Constitution."

I agree with this view of **Nwabueze** and certainly in its application to the Director of Audit. Section 90(5) of the Constitution is a prescription as to the maximum age for remaining in office, nothing more. I am not persuaded by the submission made by learned Counsel for the Applicant and it is accordingly rejected.

Section 88 of the **Constitution of Dominica** provides for the office of Director of Public Prosecutions. Subsection (6) states -

> "Subject to the provisions of subsection (7) of this section, the Director of Public Prosecutions shall vacate his office when he attains the prescribed age."

It will be noticed the close similarity between this provision and **section 90(5)** of the **Constitution of Saint Lucia**. The case of **Emmanuel v The Government of the Commonwealth of Dominica and the Attorney-General** turned on the question of the removal of the Director of Public Prosecutions according to the provisions of the contract and not under the Constitution. But the case shows that the officer was initially appointed on contract although he held a constitutional post.

The practice continued when a two-year contract was given to another person by the said Government. See the **Dominica Official Gazette Vol. CXVI**

issued on September 9, 1993.

I use these instances not to arrive at my interpretation of a straight-forward provision of the Constitution but to illustrate that I find practical support for the views that I hold.

That is not the end of the case however, for on the facts before me I find that the Acting Governor-General did not appoint the Applicant to the post of Director of Audit on contract for a specific period. Incidentally I can see nothing wrong with the Governor-General laying down terms and conditions applicable to the appointment of the Director of Audit. These terms would be stipulated by the Executive or the appropriate Minister.

By section 64 of the Constitution in the exercise of his functions the Governor-General shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in a few limited cases. And the appointment of the Director of Audit under section 90 is not done by him independently. In that appointment at the end of the day it is the will of the Prime Minister that prevails most of the time. The Governor-General must act on the advice of the Public Service Commission and although all that is required is for the Public Service Commission to consult the Prime Minister it is perhaps unlikely that they will ignore his views.

Learned Counsel for the Applicant submitted that Exhibit **E.H.3** was the foundation of the constitutional errors made by the Respondent. **E.H.3** is the letter

dated August 21, 1986 written to the Applicant by the Public Service Commission which told her that her appointment to the post of "Deputy Director of Audit (Director of Audit-designate)" was on contract for a period of five years. Earlier than that on July 25, 1986 there was a memorandum from the Public Service Commission to the Director of Audit stating that the Applicant was appointed on contract for three years with effect from August 1, 1986. Less than one month after the Commission wrote to the Applicant stating that the period was for five years and was terminable by six months' notice in writing on either side. Nothing wrong with that. The letter went on to say that on appointment to the post of Director of Audit the condition regarding termination will give way to what is stated in the Constitution. Still nothing wrong with that change in respect to termination; but the letter went on to state:

> "It is however, noted and agreed that such appointment does not effect the termination of the contract at the end of the five year period."

Now, it cannot be disputed that the Public Service Commission cannot appoint the Director of Audit. Section 90(5) of the Constitution says how that is to be done. But here they are laying down terms for the appointment of an officer they cannot appoint and even before the appointment is made. Exhibit **E.H.3** is essentially dealing with the Deputy Director of Audit.

Section 86 places in the hands of the Public Service Commission the power to appoint persons to hold or act in offices in the public service but subsection (3) specifically removes the office of Director of Audit from their authority. It is my

view that the document in so far as it purports to deal with the Director of Audit is *ultra vires.*

So when later on May 22, 1987 the Acting Governor-General by Exhibit **E.H.4** wrote:

> "Pursuant to section 90 of the Constitution of Saint Lucia, and acting in accordance with the advice of the Public Service Commission, I hereby appoint you Emma Hippolyte as Director of Audit, with effect from 1st June 1987."

it cannot be said that the appointment was for a fixed period. Even if a term of years was introduced by the Public Service Commission after the appointment that would seek to cut down the authority of the Governor-General for he would be making an unrestricted appointment and some other unauthorised body would be seeking to limit the tenure to a specific period. But here the position of the Respondent is weaker for the cutting down ante-dated the appointment. It is my view that only the Governor-General can make the appointment for a specific term and in this case he did not do so. For the reasons given earlier the subsequent two year contract from August 1, 1991 to July 31, 1993 would equally be *ultra vires.* It sought to cut down on the generality of the Governor-General's appointment and the appointment was not done by him but by an Authority that had no power to make the appointment.

The position then would be that since the Governor-General had made the appointment unlimited in time the only way to remove the Director of Audit would be under the provisions of section 90 and that clearly was not done.

Learned Counsel for the Applicant submitted that the Applicant is entitled to all the relief in her amended notice of motion which was filed on January 20, 1995. As stated earlier in that document she sought six declarations and five orders. I do not think a Court necessarily has to pronounce on all the relief sought. The text of the judgment will render that unnecessary.

The declarations are contained in paragraphs 1(a), 3, 4, 5, 6, and 7 of the motion. Some of them are drawn up so widely that even though I agree in part with them I cannot agree with other parts. This is the case with paragraphs 1(a) and 3. I agree with the declaration at paragraph 4. I do not think paragraph 5 is presently in issue since during the proceedings the Applicant applied successfully to have the proceedings against the Permanent Secretary in the Ministry of Planning, Personnel, Establishment and Training dropped.

I would refuse the declaration sought in paragraph 6 but would grant the one sought in paragraph 7.

The orders requested are contained in paragraphs 1(b), 2, 8(a), 8(b) and 8(c) of the motion.

I would refuse to make the orders requested at paragraphs 1(b), 8(b) and 8(c). What is sought for at paragraph 2 is stated to be an order but it seems to me to be more in the nature of a declaration.

The only effective order that I am prepared to make is that the Applicant is entitled to damages.

I have refused to entertain the request at paragraph 8(c), where the Applicant is asking for an order that she be paid such salary, allowances and pre-requisites to which she is and was entitled from the 1st August 1993 to the date of judgment with interest.

Is the Applicant here asking to pay her these amounts even if she is for the greater part, if not all of that period, in full time employment elsewhere? Is that how her damages are to be computed? I do not think so.

The Applicant is more reasonable in paragraph 20 of her affidavit filed on January 4, 1994 where she speaks of mitigating her losses. There she stated she had opted to resume employment with the National Commercial Bank at its head office in Castries.

The principle of mitigation of damages is paramount in the law and is applicable to both contract and tort. **McGregor on Damages, Fifteenth Edition, Chapter 7** page 168 deals with the topic. The learned author recognises that there are three rules as to the avoiding of the consequences of a wrong. I think the first and third rules are more relevant to the case but I shall state them all here briefly as being -

> "(1) The Plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the Defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed to avoid;
> (2) Where the Plaintiff does take reasonable steps to mitigate the loss to him ..... he can recover for loss incurred in so doing;
> (3) Where the Plaintiff does take steps to mitigate the loss to him consequent upon the Defendant's wrong and these steps are successful, the Defendant is entitled to the benefit accruing from the Plaintiff's action."

So what it is that the Applicant has lost in terms of money? She certainly has not indicated that she is earning less than in her office as Director of Audit. I have no evidence before me to quantify her losses based on the principle of mitigation.

I do not think this is a case where I should award nominal damages. I think I should look at the case in its entirety. Learned Counsel for the Applicant stressed the point that he was not relying on any contract in the case. But in the consideration of a figure to award I could not ignore the contracts and all the other documents and/or other evidence which indicate that the Applicant was never intended to fill the post permanently.

The Applicant held a constitutional post and the authorities seem to indicate that these posts should be treated differently to the other posts not established under the Constitution. There is good reason for establishing the former under the Constitution.

I should depart for a while to say something about an exhibit tendered by the Applicant. It was **E.H.12,** a memorandum from the Attorney-General, the Respondent in this case, to the Applicant dated May 27, 1992. In that memorandum the Attorney-General is telling the Applicant that certain provisions of the agreement which she had entered into with the Government two days earlier were unconstitutional. I have held above that the entire document was *ultra vires*. But I am surprised at the method of execution of such contracts.

In my experience in the public service and when I performed the functions of the Attorney-General all such agreements were vetted by one of the legal officers in the office before signature and in fact they were signed in the Chambers of the Attorney-General; whether it was a teacher going on study leave abroad and required to sign a bond to return to serve the Government, or a recently qualified doctor or civil engineer entering the public service and executing a bill of sale in respect of his first motor car. These administrative blunders here may well have been the cause of, or contributed to, the present proceedings.

I must nevertheless award a sum to the Applicant to reflect the constitutional importance of the office of Director of Audit even if it has not been demonstrated that the Applicant has suffered much, if any, financial loss.

A decision of the Court of Appeal of the **Eastern Caribbean States** given on **June 6, 1995** has just come to hand. It is a case originating from St.Vincent and the Grenadines, **Civil Appeal No. 14, of 1994** between **Randolph Russel and others v Attorney-General and others.** Part of that case concerned the right of some of the Appellants to vote. It was found that these Appellants were denied the opportunity to vote and that their rights had been infringed. In making a monetary award to them the learned Chief Justice, Sir Vincent Floissac, said at page 15 -

> "The violation of such a right should not be compensated by mere nominal damages. The quantum of the damages awarded should be such as to amount to an acknowledgement of the significance and sanctity of the right."

I shall apply that dictum here. In all the circumstances of the case I think I should order the Respondent to pay the Applicant as damages a sum of $10,000.00 with costs fit for two Counsel to be taxed if not agreed.

A.N.J. MATTHEW
Puisne Judge