SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO.355 OF 1999

BETWEEN:

[1] RAMBALLY & SONS LIMITED
[2] CALYXTE RAMJEWEEN

Applicants

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Appearances:

Mr. Martinus Jean Francois for the Applicants
Mr. Paul Thompson for the Respondent

2000: May 26, 29
September 19

JUDGMENT

[1] HARIPRASHAD-CHARLES J: The Applicants commenced proceedings by issuance of a Notice of Intended Action as mandated by Section 13 (2) of the Crown Proceedings Ordinance alleging that certain of their constitutional rights enshrined, secured and guaranteed under Section 16 (1) of The Saint Lucia Constitution Order 1978 have been, are being or are likely to be contravened in relation to them.

[2] The redress sought in the Notice of Intended Action was three-fold in nature but on the date of hearing, the only relief pursued was a Declaratory Order that Section 2

of the Customs (Prohibited Imports) (Amendment) Order, Statutory Instrument No. 94 of 1998 is unconstitutional, illegal, void and of no force or effect.

[3] The case for the Applicants is reproduced in the affidavit of Rudalph Rambally, the Managing Director of " RECONDITIONED AUTO", sworn to and filed on 10th day of January 2000. An almost identical affidavit of Clarence Rambally, a Director of the First-named Company, sworn to and filed on 28th day of February 2000 formed part of the evidence. For brevity, I will attempt to encapsulate.

[4] Rudalph Rambally deposed that the First-named Applicant Company is a dealer and importer of used motor vehicles into Saint Lucia and sells them to "RECONDITIONED AUTO" which then reconditions them where necessary and sells them to the public. That on or about 18th day of day of November 1998 an Order for a quantity of one hundred and two Used Motor Vehicles was placed by the First-named Applicant Company to their Suppliers in Japan.

[5] At paragraph 3 of his Affidavit, he averred that on 1st day of December 1998, the First Applicant received correspondence from their Suppliers that they could only supply fifty-six [56] Used Motor Vehicles which offer was accepted by the First-named Applicant. On or about 27th day of April 1999, the said quantity of fifty-six [56] Used Motor Vehicles were delivered and shipped to Saint Lucia. In the intervening period, the Customs (Prohibited Imports) (Amendment) Order, Statutory Instrument No. 94 of 1998 purportedly came into effect on 15th day of December 1998.

[6] According to the Managing Director, Section 2 of the said Act prohibited the importation of:

(i) "A used motor vehicle not exceeding three tons in weight and which is more than five years old;

(ii) A used motor vehicle exceeding three tons in weight and which is more than seven years old."

[7] At paragraph 6 of the said affidavit, Rudalph Rambally further averred that a number of the imported vehicles fell within the category of used vehicles thus prohibited by the Act. However, this limb of the relief sought by the Applicants was abandoned during the course of arguments.

[8] Rudalph Rambally also deposed in his affidavit that as a result of the Statutory Instrument still being in force, the First-named Applicant Company is facing the likelihood of closure and the consequential loss of employment to himself and other employees. He also stated that the amended legislation was passed in order to protect new car dealers who were very aggrieved about the competition that they were receiving from the used car dealers.

[9] The issue that this Court has to determine is as follows:

(1) Whether Section 2 of the Customs (Prohibited Imports) (Amendment) Order No. 94 of 1998 is inconsistent with Sections 6, 10 and 13 of the Constitution Order of Saint Lucia No.1901 of 1978 and is therefore unconstitutional, void and of no force or effect or alternatively;

(2) Whether the Minister responsible for Finance acted ultra vires the Constitution in exercise of the power conferred by Section 142 of the Customs (Control and Management) Act 1990, No. 23 in amending the Third Schedule to the Customs (Control and Management) Act, 1990 in Part 1?

[10] Section 2 of the Customs (Prohibited Imports) (Amendment) Order, No. 4 of 1998 reads thus:

> The Third Schedule to the Customs (Control and Management) Act 1990 is amended in Part I deleting item 15 and inserting the following new items-
>
> "15. A used motor vehicle not exceeding three tons in weight and which is more than five years old.

16. A used motor vehicle exceeding three tons in weight and which is more than seven years old."

[11] En passant, I note that Statutory Instrument, No.4 of 1998 has been further amended by Statutory Instrument No. 35 of 1999 which in effect provides as follows:

16. " A used motor vehicle exceeding three tons in weight and which is not more than ten years."

[12] Learned Counsel for the Applicants, after identifying the main issue went into a comprehensive theoretical analysis of the Rule of Law which I find unnecessary for the purpose of deciding this case and as a consequence, does not warrant my consideration.

[13] He then referred to Section 1 of Chapter 1 of the Constitution which reads: Fundamental rights and freedoms.

"Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

(a) life, liberty, security of the person, equality before the law and the protection of the law;
(b) freedom of conscience, of expression and of assembly and association;
(c) protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

[14] According to Counsel, this Chapter is said to "impose a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers: per Lord Diplock in Hinds v the Queen [1976] 1 All ER at page 360.

[15] It was argued on behalf of the Applicants that judges are empowered to strike out whole Acts of Parliament or sections thereof that are inconsistent with the constitutional guarantees. Counsel contended that a "law" might not be a law at all merely because it has passed through the ceremony of legislation in Parliament if it is not "according to law" or if it clashes with the Constitution which is the repository of the Rule of Law. In this regard, reference was made to the affidavit of the Honourable Attorney General and in particular, paragraph 5 where he (Attorney General) deposed that the Customs (Prohibited Imports) (Amendment) Order, No.4 of 1998 was passed in accordance with established practice and procedure as laid out in the Saint Lucia Constitution Order No. 1901 of 1978 and in accordance with the Customs (Control and Management) Act No. 23 of 1990. See: Malone v United Kingdom, European Courts of Human Rights, [1985] 7 EHRR 14.

SECTION 6 OF THE CONSTITUTION

[16] Counsel submitted that the Applicants' principal grievance is that Section 6 of the Constitution has been, is being, or is likely to be contravened in relation to them. Section 6 states as follows:

> "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.
>
> (3) Every person having an interest in or right over property that is compulsorily taken possession of or whose interest in or rights over any property is compulsorily acquired shall have a right of direct access to the High Court for –

(a) determining the nature and extent of that interest or right;
(b) determining whether that taking of possession or acquisition was duly carried out in accordance with a law authorizing the taking of possession or acquisition;
(c) determining what compensation he is entitled to under the law applicable to that taking of possession or acquisition;
(d) obtaining that compensation… "

[17] Counsel submitted that the prohibition complained of by the Applicants fell within the phrase "no property of any description shall be compulsorily taken possession of… and section 6(8) defines "property" as follows:

> "any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional."
>
> And " acquisition" in relation to an interest in or right over property, means transferring that interest or right to another person or extinguishing or curtailing that interest or right.

[18] "Used cars" are property within the meaning of the above provisions, submitted Counsel. Fifty-six of those vehicles were in jeopardy and only came into the possession of the Applicants after legal action.

[19] Learned Counsel contended that the Applicants are in fear that if they import these used vehicles, their rights are likely to be contravened and as such, are seeking a Declaration that Section 2 of the Statutory Instrument be deemed unconstitutional, unlawful, null and void.

[20] But Counsel for the Respondent argued that there is nothing to take from the Applicants since they do not hold or hold in their possession any property neither can they be said to have a proprietary interest or right in the vehicles. In this respect, reference was made to the cases of Belfast Corporation v O.D. Cars Ltd [1960] 1 All ER 65 and Grape Bay Ltd v Attorney General [Privy Council Appeal No. 69 of 1998]. In the former case, a Company was denied planning permission to construct buildings over a certain height and as a result of the

refusal of permission, the Company claimed compensation claiming deprivation of property. It was held, inter alia that Section 10(2) of the Act of 1931 was constitutionally valid and did not contravene Section 5(1) of the Government of Ireland Act 1920 because Section 10(2) of the former Act was a regulatory measure and not confiscatory and was not a law made "so as …to…take any property without compensation" within s.5 (1) of the Act of 1920.

[21] It is the submission of the Respondent that the Customs (Prohibited Imports) (Amendment) Order was in no way designed to take away property or even take property without compensation. It is purely regulatory not confiscatory. I agree with this submission and find little merit in the Applicants' arguments.

"REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY"

[22] It is submitted on behalf of the Applicants that that the phrase *"reasonably justifiable in a democratic society"* as provided for in section 6 (6) of the Constitution is of paramount importance. According to Counsel, the European Court of Human Rights has developed substantial jurisprudence as to the phrases *" reasonably justifiable"* or *"necessary in a democratic society".* Referring to the Sunday Times case (1979-80) 2 EHRR 245, the Court in considering the meaning to the adjective "necessary" within the context of Article 10(2) stated that it implied the existence of a "pressing social need."

[23] Mr. Francois declared that the Customs (Prohibited Imports) (Amendment) Order, No.94 of 1998 could only be saved if the Respondent could prove that in a democratic society, such amendment was reasonable justifiable and in this regard, he asserted that the burden is on the Respondent to show a *"pressing social need."* He confidently stated that the Respondent has not advanced a thread of evidence to justify the pressing social need. He however contended that the Applicants have discharged the burden to show that the enactment is not of a pressing social need; which burden, he insisted is not on the Applicants.

[24] Reference was made to the case of Attorney General v Antigua Times [1975] 3 W.L.R. 232. The Respondent was the publisher of a bi-weekly newspaper called the "Antigua Times." Publication began in December 1970 and ended in December 1971 as a consequence of the passing by the Parliament of Antigua of two Acts dealing with newspapers. The Respondent complains that these Acts were unconstitutional and it applied to the High Court for redress. At page 243, Lord Fraser of Tullybelton delivering the judgment of the Court said:

> "In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the Court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy J.
>
> > 'so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power.' "

[25] Counsel asserted that the Applicants are alleging that the amended Act in question represents a direct execution of a different and forbidden power. He argued that a State cannot just say that it is protecting a national interest or that the constitutional rights of the Applicants in this matter have not been infringed, restricted or breached. The State has to prove what is being alleged by providing the evidence and in support of this contention, he made reference to the judgment of Lord Scarman in Council of Civil Service Unions v Minister for the Civil Service [1985] 1 A.C. 374 at pages 404- 405 and the case of Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing et al [1999] A.C, 69. The latter case concerns the participation by a civil servant in peaceful demonstration against government corruption in Antigua and Barbuda. The Permanent Secretary of the Ministry in which the Applicant worked claimed that the Applicant had acted in breach of Section 10(2)(a) of the Civil Service Act and interdicted him from exercising the powers and functions of his

office pending disciplinary proceedings against him. The Applicant applied to the High Court for redress under Section 18(1) of the Constitution for alleged infringement of his constitutional rights. Lord Clyde at page 80 had this to say:

> "In determining whether a limitation is arbitrary or excessive, he said that the court would ask itself:
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> > 'whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.' "

[26] Counsel submitted that we do not even know the legislative objective of the Statutory Instrument in question and therefore, it is almost impossible to consider the threefold analysis of the relevant criteria. The Applicants alleged that this restriction of the importation of used cars exceeding five years is tantamount to a contraband and cannot be in the national interest of Saint Lucians. Counsel referred to the affidavit of the Second-named Applicant, Calyxte Ramjeween who deposed that he is unable to purchase a car because of the restriction imposed by the Statutory Instrument. It is argued that this legislation is arbitrary and that the sole reason for its enactment was to protect new car dealers in Saint Lucia. According to Mr. Francois, this could not amount to a "pressing social need," but represents a direct execution of a different and forbidden power.

[27] Counsel for the Respondent however submitted that in questions of adjudication upon the validity of ordinary legislation, there is always a presumption of constitutionality and in support of the principle, the case of Attorney General of Trinidad and Tobago v Ramesh Dipraj Kumar Mootoo [1976] 28 WIR 304 was referred to. At pages 311 - 312 Hyatali C.J. stated:

> "Before considering the findings and conclusions of the learned Judge it would be useful, I think, to examine the function and responsibilities of a court and the canons by which it should be guided when it is called upon to consider and determine the constitutional validity of an enactment. The erudite opinion expressed by Viscount Simonds in Belfast Corporation v

OD Cars Ltd. [1960] 1 All ER 69 is relevant to this task and I accordingly turn to seek guidance from the opinions of learned and distinguished judges and authors in the United States and other English-speaking countries in which kindred problems have been dealt with. In Crowell v Benson (1931) 285 US 22 at page 62, Hughes CJ in delivering the opinion of the Court stated:

> 'Where the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first as certain whether a construction of the statute is fairly possible by which the question may be avoided.'

In Fletcher v Peck (1809) 6 Cranch 128, Marshall CJ defined the function and responsibility of the Court in these terms:

> 'The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court when impelled by duty to render such a judgment would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes, but it is not on slight implication and vague conjecture that the legislation is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.'

And Washington J. in Ogden v Saunders (12 Wheat at page 270) in stating the reason for the rule said:

> 'It is but a descent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.'

In Black on ' The Construction and Interpretation of Laws' (1911) page 110 at para 414, the learned author expresses the relevant principles as follows:

> *' Every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality.' "*

[28] Learned Counsel for the Respondent placed great reliance on the principle that the burden of proof in constitutional matters is on the person challenging the constitutionality of the enactment. This principle was authoritatively expressed in the cases of:

(1) Nyambirai v National Social Security Authority (1996) 1 LRC 64;

(2) Re Mc Leod [1978] Civil Suit No. 1501 of 1978 [Trinidad & Tobago] {unreported} at pages 17 : per Bernard J.

(3) Mootoo v Attorney General of Trinidad & Tobago [supra];

(4) King v Attorney General [1992] 44 WIR 52 at pages 66-67: per Sir Denys Williams CJ.

[29] He submitted that the State is under no obligation to prove anything. Counsel challenged the submission of Learned Counsel for the Applicants that the State has to prove that the enactment is reasonable justifiable in a democratic society. According to Mr. Thompson, the State does not have to prove that. He emphasized that there is a heavy burden placed on the Applicants who challenge the constitutionality of the legislation to prove otherwise.

[30] The Respondent further contended that the nullification of enactments is not to be introduced lightly. The violation of the Constitution must be clear, complete, unmistakeable and beyond a reasonable doubt. In Frank Hope & Attorney General of Guyana v New Guyana Co. Ltd et al [1979] 26 WIR 233 the President of Guyana made two trade orders prohibiting the importation of newsprint and printing equipment except by licence issued by competent authority. A company connected to the opposition People's Progressive Party challenged the constitutionality of these orders. It argued that the licensing scheme hindered it in

the enjoyment of the freedom of expression guaranteed by the Constitution. The Trial Judge upheld the submission of the Company. On appeal, the Court of Appeal reversed the decision of the Trial Judge. The Court held that there is no doubt the licensing system can directly hinder the importation of newsprint and printing equipment. However, they added that the importation of newsprint and printing equipment by licence is not a matter directly related to, or any integral part of the fundamental right to freedom of expression of the press. Therefore, the trade orders can only have had an indirect or consequential effect on that right, so they cannot be struck down as being unconstitutional.

[31] Crane JA in delivering the judgment of the Court stated at page 266:

> " There can be no doubt that the licensing system can *directly* hinder importation of newsprint and this is evidently the respondent/company's problem. However, that is not the test. The test is whether it hinders an integral part of the right under art 12(1); but access *by importation* of it is not. So if importation of newsprint be prohibited except by licence, the fundamental right to newsprint will thereby have been indirectly affected by the Orders. The Orders will not have *directly* affected the respondents' right to freedom of expression under art 12(1), because being in essence import restriction Orders, new sprint is only consequential on the prohibition of importation. Only if the Orders had directly affected or had a direct impact on newsprint and printing equipment, i.e. the right under art 12(1), would there have been an interference or hindrance with freedom of expression. In my view, such a direct impact would surely have taken place if, for example, Government had attempted to license or control the use of new sprint or printing equipment which the respondents had previously and legitimately brought into the country."

[32] Adopting the principles enunciated in the Frank Hope's case, Learned Counsel for the Respondent submitted that one can conclude that the restriction of the importation of motor vehicles over five years may directly hinder the importation of motor vehicles. However, the importation of motor vehicles over five years of age is not an integral part of the guaranteed freedom of expression neither does it bear directly or even indirectly on freedom from discrimination or any other fundamental human right.

[33] Submitting further, Counsel said that the closest it might come to affecting any right, may be the question of freedom of movement and even that right is not directly affected though it may have a consequential or indirect effect on movement. But, Counsel asserted, even this is not sufficient to warrant the unconstitutionality of the Customs (Prohibited Import) (Amendment) Order. It is the contention of the Respondent that if there was a total ban on the importation of cars into the country, then one could argue, perhaps successfully that there is a direct infringement of freedom of movement. He however, hastily added that the Applicants have not argued the right to freedom of movement.

SECTION 13 OF THE CONSTITUTION

[34] Counsel for the Applicants addressed the issue of discrimination extensively. Section 13(3) of the Saint Lucia Constitution defines the expression "discriminatory" as:

> "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

[35] He argued that the Customs (Prohibited Imports) (Amendment) Order is discriminatory against Saint Lucians based on their place of origin. Counsel submitted that Saint Lucians at home are being discriminated against as opposed to Saint Lucians Nationals returning home. The category of discrimination alleged is "place of origin."

[36] The Respondent states that there was no allegation in the affidavits of the Applicants that the different treatment alleged was attributable to sex, race, place of origin, political opinions, colour or creed. In the final analysis, the resolution of this issue must be based on the interpretation of the constitutional provision. It is

my opinion that the words are clear and unambiguous and there is no difficulty in giving them their plain and ordinary meaning. The idea was well expressed in Nielsien v Baker (1982) 32 WIR 254 by Massiah JA at page 280:

> "What I am endeavouring to develop is the notion that it is a misconception to think that the Constitution is panacean in character, capacitated for the eventual solution of all legal problems. This process of magnification has led to attempts being made to fit a variety of rights into the framework of fundamental rights and freedoms, although the former often lacked the attributes essential for such categorization…
>
> The word 'discriminatory' in article 149 does not bear the wide meaning assigned to it in a dictionary. It has a precise and limited connotation. Although it contains the elemental constituent of favouritism, or differentiation in treatment, its application is confined only to favouritism or differentiation based on 'race, place of origin, political opinions, colour or creed." No other kind of favouritism or differentiation is 'discriminatory' within the narrow constitutional definition of that word in article 149(2). It is to be profoundly in error to think that there has been a contravention of a person's fundamental rights under article 149 where the alleged discrimination is based on some ground other than those referred to above, no matter how reprehensible such grounds may appear to be. Such a situation clearly does not come within the purview of the constitutional guarantee, although there may well be other means for its investigation and for securing redress."

[37] The case of Baldwin Spencer v Attorney General of Antigua & Barbuda [Civil Appeal No. 20A of 1997 [unreported] is also authoritative of the principle.

[38] As persuasive as the submissions of Counsel for the Applicants were, he was unable to demonstrate any alleged discrimination as outlined in Section 13(3) of the Constitution. Learned Counsel did not provide any legal authorities to substantiate his contention. The basic and insurmountable hurdle of the Applicants was that there was no allegation in their affidavits of a ground of discrimination that was inherent in Section 13(3) of the Constitution. On that basis alone, there could be no cause of action under section 13 of the Constitution. Even if I was wrong to come to this conclusion, I opined that Counsel for the Applicants has misconstrued the meaning of the words: "place of origin."

[39] In dealing with the presumption of constitutionality, Counsel accepted that every Act of the Legislature is presumed to be valid and constitutional until the contrary is shown. He however stressed that the law is bad and is repugnant to the Constitution. The cases of Attorney General of the Gambia v Momodou Jobe [1984] 1 A.C. 689 and Vinton John et al v P.C. Samson et al [Civil Suit No. 698 of 1997] [Saint Lucia] (unreported) were cited to support this notion.

[40] In concluding, Mr. Francois submitted that the Customs (Prohibited Imports) (Amendment) Order, No. 4 of 1998 is repugnant to the Constitution with the primary objective to protect new car dealers. He urged the Court to declare the Statutory Instrument unconstitutional, unlawful, void and of no force and effect.

CONCLUSION

[41] Arguments were advanced that the Saint Lucia Constitution is based on the Westminster Model and from a proper examination of the Constitution, this is evident. With regards to Constitutions based on the Westminster Model, Lord Diplock in Hinds v The Queen [supra] had this to say at page 213:

> "The more recent Constitutions on the Westminster model unlike their earlier prototypes, include a chapter dealing with fundamental rights and freedoms. The provisions of this chapter form part of the substantive law of the State and until amended by whatever special procedure is laid down in the Constitution for this purpose, impose a fetter on the exercise of the legislature, the executive and the judiciary of the plenitude of their respective powers. The remaining chapters of the Constitution are concerned not with the legislature, the executive and the judiciary as abstractions but with the persons who shall be entitled collectively or individually to exercise the plenitude of legislative, executive or judicial powers- their qualifications for legislature, executive or judicial office, the methods of selecting them, their tenure of office, the procedure to be followed where powers are conferred on a class of persons acting collectively and the majorities required for the exercise of those powers."

[42] Counsel for the Applicants made a vigorous attack upon the policy and propriety of the impugned amendment. He submitted that the amendment was repugnant to

the Constitution and it is not reasonable justifiable in a democratic society. Counsel attacked the amendment as being arbitrary and excessive and relied heavily on the words of Louisy J. in Attorney General v Antigua Times [supra].

[43] Complaints of the sort have been echoed from time to time in various courts and in regard to them, the Courts have been careful to lay down and identify what is in essence their true role and function. In Vacher and Sons Ltd v London Society of Compositors [1913] A.C. 107, Lord Macnaughten at page 118 said:

> "Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Courts, and its only duty, is to expound the language of the Act in accordance with the settled rules of Construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the legislature."

[44] In Attorney General for Ontario v Attorney General for Canada [1912] A.C. 571, Earl Loreburn, Lord Chancellor in delivering the judgment of the Privy Council said at page 583:

> "It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no court has a word to say [my emphasis]. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the Constitutional Law of Canada."

[45] A similar pronouncement was made in the case of Attorney General v KC Confectionery Ltd [1986] LRC 172 where it was held that the Constitution of Trinidad and Tobago based on the Westminster model, provides for the separation of powers in the State and the courts must be careful not to usurp the functions which are purely within the plenitude of powers conferred on another organ of the State. Bernard JA at page 186 stated:

> "One final word: the Constitution like the former Independence Constitution provides for the separation of powers as between the Judiciary, the Executive and Parliament. The question whether goods should be placed on the Negative List is a matter within the plenitude of the powers of the Executive and Parliament. Parliament has allocated that function to the Executive acting through the Minister. The Minister's functions are purely executive in nature. That being so, I mean no disrespect in making the observation that in matters of the kind courts must be careful not to appear to usurp functions which are purely within the plenitude of the powers of another organ of the State. Constitutionally the Executive is the entity which is charged with the responsibility for the economic development of the country and by and large it is the body to determine how this is to be charted. "

[46] I have alluded to these instructive dicta because Counsel for the Applicants made the policy and or propriety of the impugned Amendment Act one of his bases for his assault upon the constitutionality of the said Legislation. During his submissions, he spoke extensively about the "hypocrisy" of the legislation but did not venture to explain what he meant. It is my view therefore, that such contention is wholly irrelevant to the real issue before the court - whether or not the Amendment Act is intra vires the powers of Parliament?

[47] It is trite law that there is a presumption of the constitutionality of legislation. And it is also trite law that the burden of proof in constitutional matters is on the person challenging the constitutionality of the enactment. In my considered opinion, the Applicants have not discharged that burden. All that they could say is that the amended legislation was arbitrarily enacted to protect the new car dealers and that the Respondent has not proven that it is of a *"pressing social need."*

[48] The case of Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd [1983] 2 ZLR 376 is apposite in so far as it dispels a contention advanced by Counsel for the Applicants. Counsel argued that the onus is on the Respondent but at pages 382 – 383 of the Zimbabwe's case, it was held that the onus is on the challenger to establish that the enactment under attack goes further than it does not. The standard of proof is a preponderance of probability.

[49] In my view, the Applicants have also not proved that the Custom (Prohibited Imports) (Amendment) Order is not reasonably justifiable. All they have done to a certain extent is to show that they have been personally affected by the enactment but as the authorities demonstrate this is not sufficient to declare the Act unconstitutional since it 'is presumed to be reasonable in the best interest of the public.

[50] In Woods v Minister of Justice, Legal and Parliamentary Affairs [1994] 1 LRC 359 it was said at page 362:

> "What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual…"

[51] In dealing with the instant matter, while I found great force in the submissions advanced on behalf of the Applicants, I am however persuaded by the arguments advanced by Learned Counsel for the Respondent. In my view, the real grievance of the Applicants is that Section 6 of the Constitution has been, is being, or is likely to be contravened. Learned Counsel has not satisfied the Court of any contravention of this section. In fact, I am of the firm belief that he has misconstrued the real meaning of this section.

[52] As I have already indicated, Counsel for the Applicants was unable to demonstrate any alleged discrimination as outlined in Section 13(3) of the Constitution. On that basis alone, there could be no cause of action under section 13 of the Constitution.

[53] It is my considered opinion that Section 2 of the Customs (Prohibition Imports) (Amendment) Order, No. 94 of 1998 is not repugnant to the Constitution. In my view, it is within the plenitude of the powers of Parliament. Parliament must be

deemed to have considered the law necessary for peace, order and good government. To the extent, therefore, that the Amendment Act infringed or could be said to infringe any of the Applicants' guaranteed fundamental human rights and freedoms enshrined in Chapter 1, the Applicants could not complain of any infringement of those rights or freedoms. The Application of the Applicants is therefore wholly misconceived.

[54] In the final analysis, the Applicants have failed to discharge the burden cast upon them to establish to the satisfaction of the Court that the Amendment Act is ultra vires the Constitution null and void and of no effect.

[55] Accordingly, I dismissed the Applicants' application with Costs to the Respondent to be taxed if not agreed.

Indra Hariprashad-Charles
High Court Judge