SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. SLUCHCV 988/2004

BETWEEN:

HORACE FRASER

Claimant

And

1. JUDICIAL & LEGAL SERVICES COMMISSION
2. CHAIRMAN OF THE JUDICIAL AND LEGAL SERVICES COMMISSION
3. SIR DENNIS BYRON

Defendants

Appearances:

Mr. Leonard Ogilvy for Claimant
Mr. Sydney Bennett Q. C. & Ms. Patricia Augustin for Defendant

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2005: 18 March
8 April
…………………………………….

1. **SHANKS J:** The Claimant was a magistrate in St. Lucia until his dismissal on 19 January 2004. He sues the Commission and its ex officio Chairman, Sir Dennis Bryon, for libel in respect of various statements connected with his dismissal from the magistracy.

Procedural History

2. The claim form was issued and served on 17 December 2004. An acknowledgement of service and notice of intention to defend was filed on 14 January 2005. A Defence was due by 17 January 2005. On that day the Defendants filed an application to strike out the claim on the basis of Article 28 of the St. Lucian Code of Civil Procedure (which requires one month's notice of proceedings to be given before a person performing public functions can be sued for damages by reason of any act done in the exercise thereof). The Claimant received the application notice on 18 January 2005 (see paragraph 3 of his affidavit of 21 January 2005). On 21 January 2005 the Claimant filed a request for judgment in default of defence (this document cannot be traced by the court but for the purposes of this application it is accepted by the Defendants that it was indeed filed on 21 January 2005).

3. On the same day the Claimant made an application that "given that the …Defendants are seeking to strike out the Claimants claim for libel" the entire ECSC should recuse itself from sitting on grounds of bias. Both applications came before me on 28 January 2005. I heard the Claimant's application to recuse and reserved judgment. For obvious reasons I adjourned consideration of the Defendants' Article 28 application.

4. On 4 February 2005 I gave judgment refusing the Claimants' application for recusal and I directed that the case be relisted as soon as possible for the hearing of the Defendants' application to strike out and (if necessary) directions. On 7 February 2005 the Claimant

made a petition to the Privy Council to challenge that decision, apparently under a "leap frog" procedure with which I confess I am unfamiliar. At the same time they apparently applied to the Court of Appeal seeking a stay of the Defendants' application to strike out the claim and an order that the ECSC recuse itself from dealing with any aspect of the claim (see Mr. Ogilvy's skeleton argument at paragraph 10 to 12). A single judge of the Court of Appeal apparently ruled that those applications could not be dealt with because any appeal needed leave (see Mr. Ogilvy's skeleton argument paragraph 13).

5. In the meantime a further request for a default judgment was made on 2 March 2005 and, on 9 March 2005, before the Defendants' application to strike out the claim had been heard, judgment in default of defence was entered for an amount to be decided by the court. The Defendants now seek to set aside that default judgment on the basis of Article 28 and on the basis that they have a defence on the merits to the defamation claim. I will first consider the arguments in relation to Article 28 and then consider whether the default judgment should be set aside. Before going any further, I should record a preliminary objection raised by Mr. Ogilvy which was to the effect that the Defendants could only challenge the default judgment by way of an appeal and not by way of an application to me. I am afraid he is just wrong in this submission: a default judgment granted administratively by the count at the request of one party is always challenged by an application to the court to set it aside and not by way of an appeal to the Court of Appeal.

Article 28

6. Article 28 says this:

"No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any judgment be rendered against him, unless notice of such suit has been given to him at least one month before the issuing of the writ of summons".

7. It is accepted by the Claimant that no notice was given to the Commission or Sir Dennis before the claim was filed. But Mr. Ogilvy submits that Article 28 is no answer to this claim because, in summary:

(a) it does not apply to defamation proceedings;

(b) the Commission and Sir Dennis were not public officers or persons fulfilling a public duty or function;

(c) in making defamatory statements they cannot have been acting in the exercise of such functions.

I shall consider these points in term.

8. The precise relationship between the old Code of Civil Procedure and the CPR has not been defined. The Code of Civil Procedure is a piece of primary legislation which remains in force though it can apparently be amended by rules made by Chief Justice (see Article 37). There is nothing in the CPR, however, which either expressly or by implication abrogates Article 28 in defamation claims or any other type of claim. The fact that there are special procedural rules in relation to defamation claims (CPR 69) does not mean that there are no other rules relating to defamation claims which are to be found within other

parts of the CPR and elsewhere in the law. In my judgment Article 28 continues to apply to defamation claims and to any other claim for damages which comes within the terms of the Article.

9. It is accepted that by reason of various definitions in the Interpretation Act neither the Commission nor its Chairman are "public officers", which words effectively refer to civil servants. But Mr. Ogilvy also says they are not persons "fulfilling any public duty or function". He says that those words must be construed "eiusdem generis" with "public officer". I confess I do not understand this submission. The "eiusdem generis" rule says effectively that where there is a list of items followed by "sweeping up" general words, the general words must be construed as referring to things of the same type as those in the list. That is not the case here because there is no list: the section just refers to public officers and others fulfilling public duties or functions. I do not see that the "eiusdem generis" rule has any bearing on the construction of those straight forward words, which I construe as including the Commission and its Chairman. If they are not fulfilling public duties or functions I cannot think what they are doing. Mr. Ogilvy also referred me in this connection to s. 124(2) of the constitution of St. Lucia. That section excludes various persons from the definition of "an office in the public service", but it is expressed to apply to references "In this constitution". In the circumstances I fail to see what it has to do with Article 28 of the Code of Civil Procedure. In any event I note that the Commission in question in this case and its Chairman would not come within the exclusion at s.124(2)(b).

10. As to Mr. Ogilvy's point that making defamatory statements cannot be an act done in the exercise of public functions, I fully endorsed Mr. Bennett's simple response that it is

perfectly possible to commit a wrong in the exercise of public functions and that if the Article was not designed to give protection to public servants in such cases it would be pointless.

11. I conclude that Article 28 means what it says and clearly applies in this case. If the Commission or Sir Dennis have libelled the Claimant they have clearly done so in the exercise of their public functions in relation to the magistracy in St. Lucia. They should therefore have been given notice before the claim was filed and judgment should not have been entered against them. Under the old rules I do not doubt that the court would have set aside the judgment without further consideration in such a case as this. Under the CPR however this is not a case where the judgment must be set aside under CPR 13.2 since, as I have indicated, CPR 12.5 was fully complied with. It may be that the Court retains a residual inherent power to set aside a judgment entered in direct contravention of a statutory provision outside the CPR but, fortunately, I do not need to consider this point further because Mr. Bennett relies solely on CPR 13.3 in relation to his Article 28 point. I turn therefore to consider the application of CPR 13.3.

CPR 13.3(1)(a)

12. Mr. Ogillvy accepted that the application to set aside was made promptly after the Defendants found out about the judgment.

CPR 13.3(1)(b)

13. The explanation put forward by the Commission through its Secretary for failing to file a Defence is that there was little point in incurring the costs of a substantive Defence while the application under Article 28 (which if successful would dispose of the current claim) remained outstanding and that the Defendants had a number of other applications to deal with from the Claimant both in these proceedings and the separate judicial review claim. It seems to me that, in the light of the procedural history which I have outlined, this is a good and acceptable explanation for the Defendants' failure to file a Defence. Given in particular the Claimant's response to the application to strike out, I think the Defendants would have been entitled to think that the Claimant was not going to enter judgment in default until the Article 28 issue had been resolved. I would also remark that it was surprising at the least that the Claimant thought it appropriate to request that a judgment be entered when he knew that the Defendants were seeking to rely on an Article which expressly prevented such a judgment being entered and at a time when the court had not had an opportunity to decide whether that Article did or did not apply.

CPR 13.3(1)(c)

14. In the light of my conclusion on Article 28 it is clear that it provides not just a defence with a realistic prospect of success but a defence which is bound to succeed. Accordingly, I would exercise my discretion under CPR 13.3 to set aside the default judgment on the basis of the Article 28 defence. If follows that the claim must also be dismissed on the basis of Article 28.

15. Mr. Bennett also relied on various substantive defences which are set out in a draft Defence, in particular privilege and fair comment . I do not think it necessary or appropriate to go into the detailed submissions made on both sides about them. I am quite sure they pass the threshold of having realistic prospects of success. If necessary I would also have set aside the default judgment on the basis of these proposed defences.

Result

16. I therefore order:

(1) Judgment in default dated 9 March 2005 is set aside;

(2) Claim is dismissed on basis of Article 28 of Code of Civil Procedure.

I will hear the parties on costs.

Murray Shanks
HIGH COURT JUDGE (ACTING)