

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

COMMONWEALTH OF DOMINICA
DOMHCV2010/0199

BETWEEN:

EDISON CHENFIL JAMES Claimant

and

The Speaker of House of Assembly Defendants

The Attorney General

Gerald Burton

Alick Lawrence

Bernie Didier

McDonald Christopher

Kondwani Williams

The Chief Elections Officer

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BETWEEN:

HECTOR JOHN Claimant

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Defendants

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The Chief Elections Officer

Before: The Hon. Justice Birnie Stephenson Brooks

Appearances:

Mr. Gildon Richards for Claimant

Mrs Francine Baron – Royer with Ms. Tameka Hyacinth and Miss

Sherma Dalrymple for Defendants

RULING – ON WRITTEN SUBMISSIONS

[22 October 2010]

[22 November 2010]

- [1] **BROOKS J:** The primary issue before the Court is whether failure to file an acknowledgement of service by the Defendants as is required by Part 9 of the Civil Procedure Rules 2000 (*CPR 2000*) is fatal to the Defendant's application to strike out the proceedings brought by the Claimants. *There are identical applications brought in the two matters and all the parties are represented by the same Counsel and with their consent this application is being dealt with together.*

- [2] On 8th July 2010 the Claimants in the two matters, Mr. Edison Chenfil James and Mr. Hector John filed Fixed Date Claim Forms titled "originating motions" claiming constitutional relief, administrative orders *inter alia* against the Speaker of the House of Assembly of the Commonwealth of Dominica, the Attorney General of the Commonwealth of Dominica, Gerald Burton, Alick Lawrence, Bernie Didier, Mc Donald Christopher, Kondwani Williams and the Chief Elections Officer.
- [3] The Fixed Date Claim forms with its Affidavits in Support were duly served on the Defendants.
- [4] On 12th October 2010 the Defendants filed an application for the claims to be struck out.
- [5] This application came up for hearing in Chambers on 22nd October 2010 and an Order was made for the parties to file written submissions on the point in limine made by Counsel for the Claimants whether or not the Court should entertain the application to strike out the proceedings notwithstanding that the Defendants have failed to file an Acknowledgment of Service.
- [6] Learned Counsel for the Claimants; Mr. Gildon Richards submission in a nutshell is that the Application is not properly before the court as the Defendants' are not properly positioned; in that they have failed to file an Acknowledgment of Service.
- [7] Learned Counsel contends that by making the application to strike out the Defendant's are effectively contesting the proceedings and that part 9.1 (1) (2) and 9.2 along with part 10.1 and 2 of CPR 2000 requires a party contesting proceedings to file and serve an Acknowledgment of Service.
- [8] Counsel further submits that the time as stipulated by part 9.3 10.3 (59.3) has expired.
- [9] Counsel cited Marble Point Energy Ltd -v- MultiPerils International Inc ¹and the dissenting judgment of Joseph Olivetti JA (Ag). In Richard Frederick et al -v- Comptroller of Customs and the Attorney General ²in support of his contention that because of their failure to file an Acknowledgment of Service

¹ BVIHCV2006\0238

² SLUHCVAP2008/037

the Defendants' application to strike out must be denied without consideration of the substantive parts of the application.

- [10] Learned Counsel for the Defendants contends in essence that the nature of the substantive case before the Court is for the alleged breach of the Constitution and is brought pursuant to part 56 of CPR 2000 and that is to be regarded as "*sui generis*", a public law proceeding and based on the decision of the Court of Appeal in the Richard Frederick case *supra* it therefore falls outside the ambit of the requirements of a normal civil matter and as such it is not strictly necessary for the Defendants to file an Acknowledgment of Service and as such the application to strike out is properly before the Court and should be dealt with on its merit.
- [11] Learned Counsel for the Defendants further urged upon the Court that even if it were necessary for them to file an Acknowledgment of Service that part 26.9 of the CPR 2000 vests the Court with a discretion to allow the application notwithstanding their failure to file the Acknowledgment of Service.

Constitutional nature of case

- [12] The Defendants rely on the decision in Richard Frederick case *supra* to say that given the nature of the case at bar, it being a constitutional matter that it is not necessary for them to file all Acknowledgment of Service and as such their failure to file same is not a bar to the Court hearing their substantive application to strike out.
- [13] George-Creque JA in her judgment in the Richard Frederick case at paragraph 32 says in essence that constitutional matters are a particular "specie of civil proceedings" and that they are recognized to be so by the provision of a specific regime provided for in Part 56
- [14] At paragraph 35- George-Creque JA states that when one considers the provisions of Part 56 of CPR which dictates the conduct of constitutional matters she said
- " when these provisions are considered together with the wider powers of the judge set out in CPR 56.9 (5) and 56 (11) in the round, the irresistible conclusion to which one is drawn is that an acknowledgment of service is not strictly necessary in civil proceedings of this specie."*

[15] George Creque JA goes on to say at paragraph 36:

“...the point being made is that an Affidavit of Service filed in this type of proceeding does not serve the same purpose as an affidavit of service filed pursuant to Part 9...”

[17] The Learned Justice of Appeal reviewed briefly the procedure laid down in Part 9 vis a vis the filing of an Affidavit of Service and the filing of a Default Judgment and its none applicability to constitutional matters, she also looked briefly at the focus of the Court in matters falling to be dealt with under Part 56 and found that it is not a Civil Proceeding properly so called and as such the failure by the Defendant to file an Acknowledgement of Service is not fatal and their application to strike out the Claimants' claim can and will be entertained and considered by the Court.

[18] As I understand it, it is the duty of the Court in exercising its function, and in exercising its discretion if called upon to do so, or in applying any rule contained in CPR 2000 is to seek to give effect to the overriding objective of the Rules and that is, to deal with cases justly.

[19] I have read the dissenting judgment of Joseph Olivetti and I am of the view that it does not assist the Claimants' submission herein and I am persuaded by the reasons of George-Creque JA which reasoning was agreed by Rawlins CJ. in the Richard Frederick case

[20] I do not agree with Learned Counsel on behalf of the Claimants Gildon Richards submissions and accordingly I am unable to accede to his application dismiss the Defendants' application to strike out.

[21] It is noted that Counsel for the Defendants have filed their written submissions with authorities to strike out the Claimants claim and I am prepared at this stage to grant the Claimants leave to file and serve their submissions with authorities in response to the application to strike. I will therefore give directions regarding the hearing of that application.

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Birnie Stephenson Brooks J
High Court Judge