SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2009/483

BETWEEN:

PATRICIA EDMUND

Applicant

and

SR. MAGISTRATE FLORETA NICHOLAS

Respondent

Before:
The Hon. Mr. Ephraim Georges — High Court Judge [Ag.]

Appearances:
Ms. Mary M. Francis for Applicant
Ms. Jan Drysdale, Crown Counsel for the Respondent

2010: November 24.

JUDGMENT

[1] **GEORGES, J. [AG.]:** This is an application by way of notice filed on 25th May 2009 pursuant to Part 56 of the **Civil Procedure Rules 2000** (**CPR**) for leave to apply for judicial review of the decision of a Magistrate sitting in Castries rescinding her Order made on 25th March 2009 reserving judgment to be delivered in writing on 29th October 2009 by reopening the case ex parte to allow cross examination of the claimant/applicant by counsel for the defendant/respondent.

[2] The grounds of the application are:

(1) The decision of the Learned Magistrate is unreasonable and irrational.

(2) Illegality – The Magistrate being a creature of statute acted ultra vires her statutory power District Court Act Cap. 2:02. The Procedural Rules give no such power or alternatively if the Learned Magistrate relied on her discretionary powers her decision amounts to a wrongful exercise of discretion. The wrongful exercise of her discretion is an error of law rendering her decision illegal or unlawful.

(3) The decision of the Learned Magistrate constitutes procedural impropriety because by ignoring the procedural law governing Court Sittings, Notice of Hearing and adjournments and attendance of the parties in Court and deciding instead to reopen the hearing of the case the Learned Magistrate acted contrary to the rules and procedural fairness.

[3] In paragraphs 4 to 8 of her supporting affidavit filed 25th May 2009 the applicant a vendor and mother of five children averred:

"4. That on the 14th day of July 2005 through my Lawyer, I filed 2 Civil Cases, Numbers 68 & 69 in the District Court in Castries against the Castries City Corporation entitled the Mayor and Citizens of Castries and 3 Special Police Constable employees of the Corporation. The cases were for false imprisonment, assault, wrongful seizure and detention of my property in violation of the Bye-Laws governing the Castries City Corporation.

5. That I attended Court on 17th August 2005 when the said cases came up for hearing in District Court "C" and were adjourned at the request in writing of Counsel for the Defence.

6. That from 17th August 2005 until 21st June 2007 there were 14 adjournments for a number of reasons including the Defendants' evading service, or taking issue with service and their inability to attend Court at one time or the other. For example on one occasion a 6 month adjournment was granted to facilitate the absence of 1 defendant from the State.

7. On 21st June 2007 after hearing submissions from Counsel on my behalf and Counsel for the Defendants, Ms. Beverly Downes on a preliminary point taken by Counsel for the Defence, the presiding Magistrate, Ms. Anne Marie Smith reserved her decision and adjourned for 26th September 2007.

8. The Learned Magistrate did not deliver her decision as promised, but rather by letter dated 12th September 2007 (a copy of which is attached herewith marked "A") transferred the cases to another Magistrate who, on recusing himself, further transferred the cases to another Magistrate. On 1st November 2007 the cases were further transferred to District Court "A" presided over by the learned Senior Magistrate Floreta Nicholas. That up until this time I had attended Court on each occasion, disrupting my vending in the process."

[4] The first three paragraphs of the learned magistrate's letter dated 12th September 2007 transferring the two cases to another magistrate reads:

> "12th September 2007
>
> Magistrate Errol Walker
>
> Dear Errol,
>
> **Re: Case numbers 74 and 75 of 2005/The Mayor and Citizens of Castries et al.**
>
> I am transferring a contentious case to you! It involves two attorneys who are always 'getting at each other's throats in an unbecoming manner'. I recommended mediation but that failed. We tried to begin the trial on numerous occasions but there have always been some delay tactics on the part of the defence.
>
> I ask that you assist me by taking over this matter. I started to hear some of the evidence but due to Ms. Downes behaviour towards Miss Francis it has always had to be adjourned."

[5] Eventually the learned Senior Magistrate on 25th June 2008 announced on 25th June 2008 a final adjournment of the matters and fixed 16th July 2008 for the hearing and gave instructions for serving of a notice of hearing on the 2nd defendant.

[6] Notwithstanding the 16th July 2008 fixture the cases were again adjourned to 24th September 2008 because on that date the Court did not sit. A new hearing date of 29th October 2008 was fixed in the absence of defence counsel and the defendants save one.

Cases heard ex parte

[7] On 29th October 2008 on the application of claimant counsel the learned Magistrate proceeded to hear the cases ex parte and announced that she would reserve her decision to be delivered in writing on 12th November 2008.

[8] It is averred that on that day the Magistrate did not sit.

[9] At paragraphs 11 and 12 the learned Senior Magistrate in her affidavit in response sworn and filed 27th October 2009 deposed that:

> "11. ... at that time several matters of national importance arose. Cases of national importance the Court has ruled are to be given priority and are to be determined in an expeditious manner. I presided over these matters between September 2008 to December 2008 at the Bordelais Court.
>
> 12. As a result a conflict with scheduled cases before Court A and the Bordelais Court arose. I therefore instructed the Clerk of the Court to adjourn all matters listed for Court A which were affected during the sittings of these cases."

[10] Paragraphs 13 to 16 of the said affidavit merits displaying as to my mind it sets out the central issue of this matter in bold focus and I accordingly do so thus:

> "13. On 29th October 2008 the matter was called for hearing. Only the Applicant was present. The Applicant requested the hearing of this matter and a decision was made to allow the Applicant to present her case in the absence of the Castries City Council. Upon completion of the case presented by the Applicant I reserved my judgment.
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> 14. On 19th December 2008 the matter was called. Counsel for the Castries City Council informed the Court that neither she nor the Castries City Council were made aware of the adjourned date of 29th October at which time the Applicant had presented her case to the Court. Counsel for the Castries City Council further indicated that she had been liaising with the Clerk of Court and the District Office as to the date set for the matter but no date was forthcoming to them.
>
> 15. I conferred with the Clerk of the Court whether all parties had been properly notified of the adjourned date of 29th October 2008; I also took note of the Court's Cause List for the relevant date.

Based on the information given and received, I was satisfied that the Castries City Council had not been notified of the adjournment date and therefore its failure to attend Court could not be attributed to any fault of it.

16. Cognizant of the principles of natural justice I therefore decided that fairness and justice dictated that the Castries City Council be given an opportunity to present its defence to the Court in order that a fair and reasoned decision may be arrived at. The Applicant has disagreed with this decision and has filed this application seeking leave for judicial review."

[11] In keeping with rule 56.4(3)(a) **CPR** which requires an open court hearing where the interests of justice makes it desirable the application for leave for judicial review was eventually heard inter partes in open court and occupied the afternoon session of Tuesday 24th November 2009 after being stood over from the morning. Thereafter alas the file went missing misplaced or misfiled (not unfortunately a rare occurrence or an unusual phenomenon) until 2nd July 2010 when a notice of hearing for 12th October 2010 was issued by the Court Office.

[12] Be that as it may in order to obtain leave to apply for judicial review the applicant is required to show that he has an arguable case for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. Dicta of Lord Diplock in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Limited** [1982] AC 617 and of Lords Bingham and Walker in **Satnarine Sharma v Carla Browne-Antoine and Others** [2007] WLR 780 followed.

[13] In her submissions counsel for the applicant whilst acknowledging that an alternative remedy by way of appeal did exist argued that it was inappropriate because of inherent delay. I respectfully demur as ground (a) of the application challenges the **decision** of the learned Magistrate itself as do grounds (b) illegality and (c) exercise of discretion – all of which could have more conveniently be dealt with on appeal.

[14] Learned Crown Counsel pointed to the fact that the applicant had delayed in excess of five months before instituting these proceedings without any explanation for the inordinate delay. And Rule 56.5(1) stresses the paramount importance of promptitude in making such applications. In the instant matter section 31 of the **District Court Act** provides that proceedings against any magistrate must commence within three months of the decision.

[15] As I see it and this is not disputed the Magistrate began the hearing of he matter ex parte on 29th October 2008 as she was entitled to do. She reserved her decision for delivery in writing at a later date. She certainly was not functus then.

[16] On 19th December 2009 for good reason and in the interest of justice the learned Magistrate in her wisdom quite correctly in my view reopened/continued the case to achieve a fair and just result in keeping with the rules of natural justice.

[17] I am satisfied that the applicant has not made out an arguable case for judicial review having a reasonable prospect of success and would accordingly refuse leave to do so but would make no order for costs. I would as a footnote add that the proper course to have taken in the circumstances would have been to abide the Magistrate's decision and if dissatisfied or aggrieved by it appeal. The relief sought for orders of mandamus prohibition and certiorari are also in my view wholly misconceived and inappropriate in the circumstances.

Ephraim Georges
High Court Judge [Ag.]