THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 371 OF 2009

IN THE MATTER OF THE CONSTITUTION OF ST. VINCENT AND THE GRENADINES

AND

IN THE MATTER OF THE REFERENDUM (ALTERATION OF THE CONSTITUTION) ACT 2009

AND

IN THE MATTER OF AN APPLICATION BY FRANK DA SILVA, MARGARET LONDON, VENOLD COOMBS AND EARL ALEXANDER suing in their individual capacity and as members of THE VOTE NO COMMITTEE FOR REDRESS PURSUANT TO SECTIONS 16 AND 96 OF THE SAID CONSTITUTION OF ST. VINCENT AND THE GRENADINES FOR CONTRAVENTIONS OF SECTIONS 8,10,13,69 AND 72 THEREOF IN RELATION TO THEM

BETWEEN:

(1) FRANK DASILVA
(2) MARGARET LONDON
(3) EARL ALEXANDER suing in their own capacity
And as members of the "Vote No Committee" CLAIMANT

AND

(1) DR THE HONOURABLE RALPH E. GONSALVES
Minister of Finance of St. Vincent and the Grenadines
(2) MRS JUDITH JONES-MORGAN
The Attorney General of St. Vincent and the Grenadines DEFENDANTS

Appearances: Ms. N. Sylvester and Ms. P. Browne for the Claimants
Mr. P.R. Campbell Q.C. and Mr. Bollers for the Defendants

2011: April 12th
May 13th

JUDGMENT

[1] **THOM, J**: On 12th April 2011 at the conclusion of the hearing of this Application I dismissed the Application and informed both parties that a written ruling would follow. I do so now.

[2] The Respondents/Claimants on 12th November 2009 filed A Fixed Date Claim Form with supporting affidavit in which they seek several declarations against the Applicants/Defendants.

[3] The Respondents/Claimants allege that on the 29th September 2009 the Referendum (Alteration of the Constitution) Act 2009 was passed in the House of Assembly of Saint Vincent and the Grenadines.

[4] On or about 3rd October 2009 the Government and the Unity Labour Party which is the political party that forms the Government launched a "YES VOTE Campaign" in support of the alteration of the Constitution.

[5] Subsequent to the passing of the Act the First Defendant announced that the sum of four million dollars ($4,000,000) was allocated by special warrant to fund the "YES VOTE Campaign" in accordance with the Finance and Audit Act No. 1 of 1964.

[6] The Respondents/Claimants are members of the "VOTE NO Committee" which opposed the alteration of the Constitution as proposed in the Act. No monies were allocated to the "VOTE NO Campaign".

[7] The Respondents/Claimants allege inter alia that the allocation of the four million dollars to the "YES VOTE Campaign" is unlawful, illegal, null and void as it was authorised on the basis of a repeated Legislation, it was ultra vires the Constitution and Section 28 (1) and (2) of the Finance Administration Act 2004. They also allege breach of Sections 10 and 13 of Constitution.

[8] On the same 12th November 2009 the Respondents/Claimants made a Without Notice of Application for an order that an early date be fixed for the hearing of the matter as the Referendum was scheduled to be held on November 25, 2009. A Without Notice application was also made for an injunction to prevent the First Defendant from making any further disbursement of the sum authorised by the special warrant until further order of the Court.

[9] On the following day, 13th November 2009 His Lordship Justice Bruce-Lyle heard the Without Notice application for early date for hearing of the substantive matter and the application for the injunction and ordered that:

> "(i) That the claim is to be served on the Defendants.
> (ii) Thereafter the matter to proceed in accordance with the Rules of CPR 2000.
> (iii) That this matter cannot and will not be heard without notice."

[10] The Claim Form and Without Notice applications were served on the Applicants/Defendants on the 13th November 2009.

[11] On the 3rd December 2009, Learned Queens Counsel Mr. P.R. Campbell filed an acknowledgment of service.

[12] The Claim Form was amended on 23rd November 2009 and again on the 7th December 2009.

[13] On 12th February 2010 the Respondents/Claimants filed and served their Skeleton Arguments and List of Authorities on the Applicants/Defendants.

[14] In January 2011 the matter was listed to be heard before His Lordship Justice Bruce-Lyle on 14th February 2011.

[15] On 2nd February 2011 the Applicants/Defendants made an application pursuant to CPR 26:8 for relief from sanctions for failure to comply with CPR 10.3 and for leave to file the defence out of time.

[16] On the 3rd February 2011 the matter went before Madam Justice Monica Joseph and it was ordered "Matter be adjourned to 14th February 2011 before His Lordship Justice Bruce-Lyle".

[17] On 14th February 2011 His Lordship Justice Bruce-Lyle ordered that

> "The matter is adjourned to a date to be fixed by the Registrar to be heard by a Judge from another jurisdiction."

[18] On 12th April 2011 the Court heard the Application. The Application was supported by the affidavit of Ms. Raemona Frederick. In paragraphs 3, 6, 8, 9, 10 and 12 Ms. Frederick deposed as follows:

> "3. On 23rd November 2009 the Defendants appeared by Counsel before Madam Justice Jennifer Remy on this hearing of an Application by the Claimants for an Interim Injunction against the Defendants.
>
> 6. The Claimant's Counsel indicated to the Court that the Claimants would not proceed with the application for the Interim Injunction, but that the Claimants intended to file another amended Fixed Date Claim Form.
>
> 8. On 7th December 2009 the Claimants duly filed and served a second Amended Fixed Date Claim Form - Originating Motion together with an Affidavit and exhibits.
>
> 9. An Acknowledgment of Service was duly prepared on behalf of the Defendants and filed in December 2009.
>
> 10. Following the holding of the Referendum Senior Counsel for the Defendants, who had since 2003 been involved as Deputy Chairman/Chairman of Constitutional Review Commission and the Constitutional Review Steering Committee took a well-earned rest from his labours of the previous six years - albeit having resulted in a disappointed climax - and did not find it possible in the present circumstances to prepare a Defence, especially as no date had been indicated for the First hearing of the Fixed Date Claim Form.
>
> 12. The Defendants have a sound Defence to the claim and crave the opportunity to defend same. The Defendants pray that the Court grants relief from sanctions for failure to file the Defence in this matter within time. Senior Counsel for the Defendants has drafted the Defence in the matter and seeks leave of the Court to file the said Defence out of time. Hereto annexed and exhibited is a true copy of the draft Defence marked "R.A.F.1."

SUBMISSIONS

[19] On the hearing of the application Learned Queens Counsel for the Applicants/Defendants Mr. P.R. Campbell referred the Court to paragraph 12 of the Affidavit of Mrs. Frederick that the Applicants/Defendants have a sound defence and submitted that they ought to be given an opportunity to defend the matter. The principles governing such applications were similar to those governing an application to set aside a default judgment as outlined in Part 13.3 of CPR 2000. Learned Counsel referred the Court to the case of **Evans v Bartlett**.

[20] Learned Queen's Counsel acknowledged the delay was long but submitted that the Claim Form was served without a date for the first hearing. The matter raises important constitutional issues and the Applicants agree with the statement in paragraph 25 of the Affidavit of Frank Da Silva made on behalf of the Respondents/Claimants where he deposed:

> "I am advised by Counsel and verily believe the same to be true that this matter raises serious issues of national and constitutional importance and that it is desirable in the interest of justice and for the clarification of the law and the vindication of the rights of the people that the matter be heard and be adjudicated upon by this Honourable Court."

[21] Learned Queen's Counsel further submitted that the issue of locus standi is an extremely important issue in the matter. The question who could challenge the validity of a special warrant, whether public funding could be allocated to fund the expense of a Referendum are issues which have not been determined by the Courts of Saint Vincent and the Grenadines before since the Referendum of November 25, 2009 was the first Referendum in Saint Vincent and the Grenadines. The Respondents/Claimants would not be prejudiced if the application is granted. They would not be entitled to judgment if the application is denied, they will still have to prove their claim.

[22] Learned Queen's Counsel also submitted that the explanation given for the failure to file a defence in paragraph 10 of Ms. Frederick's Affidavit is a good explanation.

[23] Learned Counsel Ms. N. Sylvester submitted that the requirements of Part 13 are conjunctive. Failure to satisfy all three requirements is fatal. Learned Counsel submitted that there was inordinate delay in making the application. The application was made almost one year after the Respondents/Claimants filed and served their Skeleton Arguments and List of Authorities. The fact that there is a good defence is not sufficient. The explanation given by the Applicants/Defendants is not a good explanation.

[24] Learned Queen's Counsel Mr. P.R. Campbell in reply submitted that the Court is not bound to apply the provisions of Part 13.3 cumulatively.

LAW AND COURT'S ANALYSIS

[25] While the application was made pursuant to Part 26.8 the submissions were based on Part 13.3. I find that Part 13.3 is not applicable to this application. Even if it was applicable the Eastern Caribbean Court of Appeal has ruled on numerous occasions that an applicant must satisfy all of the requirements before a Court could exercise its discretion under Part 13.

[26] Similarly the Court of Appeal has ruled that the provisions of Part 26.8 are cumulative. The Court has no discretion to grant relief from sanctions unless the criteria set by Part 26.8 are strictly complied with – see **The Ferdinand Frampton case.** Civil Appeal No. 15 of 2005; **Dominica Agriculture and Industrial Development Bank v Mavis Williams** Civil Appeal No.6 of 2010.

[27] In the **Ferdinand Frampton case** after referring to the provisions of Part 26.8 the Court stated at Paragraph 17:

> "17. These are mandatory conditions imposed by this rule. It is stated in sub rule (1) that the application must be made promptly and it must be supported by an affidavit. In sub-rule (2) a strict fetter is imposed upon the Court's discretion and the Court may grant relief only if it is satisfied that the failure to comply was not intentional, that there is a good explanation for the failure and the party in default has generally been compliant. This means that the court must conduct an examination of the evidence before it (normally the applicant's affidavit) to decide if that evidence satisfies the Court that the failure to comply was not intentional,

> there is a good explanation for the failure and the applicant has been generally compliant."

And in paragraph 19:

> "19...The rule is uncompromising that the Court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied...The rules are not draconian; where a party has made a slip the rules provide a procedure and criteria for avoiding the consequence. It cannot be too much to ask that the party in default satisfy the reasonable conditions that the rules lay down for obtaining relief."

[28] I will now apply the above principles to the present Application. These principles apply whether the application is to file a defence or an affidavit in answer.

Was The Application Made Promptly

[29] The Second Amended Claim Form was filed on the 7th December, 2009. Ms. Frederick in her affidavit at paragraph 8 deposed that the Acknowledgement of Service was filed in December 2009. Learned Queen's Counsel informed the Court that the Acknowledgement of Service was not accepted by the Court Office since an Acknowledgement of Service was filed earlier on December 3, 2009. Part 10.3 (1) provides that the period for filing a defence is 28 days after service of the claim form. The period for filing an affidavit in answer is the same. The Applicants/Defendants did not file the application until 2nd February, 2011 about one year after the Claim Form and Skeleton Arguments and List of Authorities were served on them. Learned Queen's Counsel quite rightly agreed that the delay was long. I agree and I find that the application was not made promptly.

[30] The application was supported by evidence on affidavit.

Failure To Comply Not Intentional

[31] Applicant/Defendants did not adduce any evidence in the affidavit to show that the failure to comply was not intentional. Indeed paragraph 10 shows that the failure was intentional. It states in effect that Learned Queen's Counsel was tired so the defence was not filed especially since no date had been fixed for the first hearing. This shows clearly that a decision was made not to file a defence within the period stipulated by Part 10.3. The

requirement to file a defence within 28 days as stipulated by Part 10.3 is not dependent on the date fixed for the first hearing of the claim.

WHETHER THERE IS A GOOD EXPLANATION

[32] The explanation for failure to file a defence as outlined in paragraph 10 of Ms. Frederick's affidavit is simply that Learned Queen's Counsel was tired after serving as Deputy Chairman of the Constitutional Review Commission and Chairman of the Constitutional Review Steering Committee and no date was fixed for the first hearing of the Claim. In **Richard Frederick v Owen Joseph** and others St. Lucia Civil Appeal, the Court of Appeal found that misapprehension of the law was not a good explanation, similarly in **Dr. Ralph Gonsalves v Arnhim Eustace** the Court of Appeal found that unfamiliarity with parts of the law is not a good explanation. Likewise I find that Learned Queen's Counsel taking a rest from his labour of six years, and no date for first hearing was stated on the Claim Form not to be a good explanation. This is not a case where Learned Queen's Counsel was ill and was receiving medical treatment. The Defendants were served within Skeleton Arguments about one year before the application was made.

[33] I find that the Applicants/Defendants have failed to make the application promptly, the failure to file the defence within the time stipulated was intentional and the explanation given was not a good explanation.

[34] The Applicants having failed to satisfy the criteria in Part 26.8, the application is dismissed. Costs to the Defendants/Claimants agreed in the sum of $1,500.00.

Gertel Thom

HIGH COURT JUDGE