

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

(CIVIL)

CLAIM NO. DOMHCV 2010/199

CLAIM NO. DOMHCV 2010/200

BETWEEN:-

EDISON CHENFIL JAMES

HECTOR JOHN

Claimants

-and-

1. *THE SPEAKER OF THE HOUSE OF ASSEMBLY OF THE COMMONWEALTH OF DOMINICA*
2. THE ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
3. GERALD BURTON (Chairman of the Electoral Commission)
4. ALICK LAWRENCE (Member of the Electoral Commission)
5. BERNIE DIDIER (Member of the Electoral Commission)
6. MC DONALD CHRISTOPHER (Member of the Electoral Commission)
7. KONDOWANI WILLIAMS (Member of the Electoral Commission)
8. THE CHIEF ELECTIONS OFFICER

Defendants

(Actions consolidated by Order of Court dated 20th January 2011.)

Before: The Hon. Justice Birnie Stephenson-Brooks

Appearances:

Mr. Gildon Richards for the Claimants

Mrs. Francine Baron-Royer and Ms. Tameka Hyacinth for the Defendants

2011: January 25th
June 10th

DECISION

- [1] **STEPHENSON-BROOKS J:** This is an application by the Defendants to:
- (i) Strike out the Claims on the grounds that the Claims disclose no reasonable cause of action and are an abuse of the process of the Court;
 - (ii) That the first and eighth Defendants be struck off as parties;
 - (iii) That the Claims against them should be struck because the said Defendants are not amenable to suit; and
 - (iv) That the issues before the court are now academic and should not be heard.

BACKGROUND

- [2] The Claimants in this consolidated matter are the duly elected members for the constituencies of Marigot and Salisbury respectively, having won the said seats at the general elections held in the Commonwealth of Dominica on the 18th December, 2009 and again in the by-elections held on the 9th July, 2010.
- [3] Prior to the general elections held in December 2009, the Claimants and the members of their party were seeking to have certain actions taken by the Government of the day which would have amounted to electoral reform.

- [4] This requested reform was not forthcoming and the Claimants contend that due to the irregularities which existed and which would be have been cured had there been electoral reform the result of the elections on the whole were not satisfactory.
- [5] After the elections, members of the Claimants' party filed election petitions which are currently before the courts at the time of the filing of the actions and the hearing of this application.
- [6] After the elections it was decided at the party level that those members of the UWP who won their seats (that is the Claimants) herein would not take up their seats unless it was absolutely necessary or until the court ruled on the Petitions.
- [7] The Claimants contend that they and their party colleagues also decided not to take up their seats in Parliament in objection to the first named Defendant being nominated and elected as Speaker of the House in view of her incompetence to efficiently effectively perform her duties as Speaker and her inability to be fair and non partisan in the house. The Claimants therefore did not attend the first sitting of the House Assembly after the elections.
- [8] The Claimants also did not attend the second and third meetings of the House and they contend that pursuant to order number 15 (1) of the Standing Orders of the House they duly informed the Clerk of the House that they were unable to attend the said meetings of the House of Assembly which were scheduled for the 29th March ,2010 and the 29th April, 2010.
- [9] The Claimants in their affidavits stated that they each received a response from the Clerk of the House stating that they did not request leave from the House and they were therefore in breach of the Standing Orders of the House.
- [10] On the 4th May 2010, the claimants were informed by the first named Defendant that they were absent from three consecutive meetings of the House of Assembly and accordingly that their seats had been vacated.

- [11] On the 8th June 2010, the President of the Commonwealth of Dominica issued election writs for the constituencies of Marigot and Salisbury for the conduct of by-elections to be held on the 9th July 2010.
- [12] The Claimants were again nominated by their Party, and they contested the said by-election and were again elected as the representatives for their respective constituencies.
- [13] On the 19th July 2010, the second named Claimant, Mr. Hector John, was sworn in as Leader of the Opposition and on the 28th September, 2010 the Claimants both took their oaths of allegiance as duly elected members of the House of Assembly.
- [14] On the 8th July 2010, the Claimants filed actions in this High Court against the Defendants claiming constitutional relief, administrative orders and other remedies. The Claimants contend:
- (i) That the election writ for the by-election which was issued was illegal, unconstitutional null and void.
 - (ii) That the elections which were to be held on 9th July 2010 (which was subsequently held) was unconstitutional null, void and of no legal effect.
- [15] The Claimants also claim exemplary or aggravated damages and for various declarations to be made against the Defendants.
- [16] The Defendants filed this interlocutory application to strike out the Claimants' claim in part and in the whole and for the Defendants to be struck out as Defendants.
- [17] The parties both filed written submissions with authorities and each addressed the court based on their submissions.
- [18] I now give my ruling based on the written and oral submissions that were made.

THE COURT'S POWER TO STRIKE

[19] Both sides agree that *"...the court is empowered to dismiss an action in a summary way without a trial where the statement of claim discloses no cause of action, or is shown to be frivolous and vexatious or otherwise an abuse of the process of the court. That this summary procedure should only be used in clear and obvious cases, when it can be clearly seen on the face of it that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court."*¹

[20] Part 26 (3) of the Civil Procedure Rules [CPR] 2000 provides that:

"(1) ... the court may strike out a statement of case or part of a statement of case if it appears to the court that –

(a) *there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;*

(b) *the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;*

(c) *the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
..."

¹ **Baldwin Spencer –v-The Attorney General of Antigua and Barbuda** Civil Appeal no 20A Of 1997 per

- [21] It is settled law that the jurisdiction to strike out is to be used sparingly and is appropriate only in plain and obvious cases. *“When dealing with such applications the court’s function is limited to the scrutiny of the statement of claim. It tests the particulars which have been given in each averment to see whether they are sufficient to establish a cause of action. It is not the court’s function to examine the evidence to see whether the plaintiff can prove his case or to assess it’s prospects of success...”*²
- [22] “A person who moves to the court must state a case that is known to, or created by law. The case as stated must disclose sufficient facts that are material to the issue to render the claim viable and which would permit the person who has to answer the case to know what case he has to meet it must disclose a reasonable cause of action which is simply stated as *“a factual situation the existence to which entitles a party to obtain from a court a remedy against another person”*³.
- [23] In considering applications to strike out statements of case the court ought to bear in mind that ... *“so long as the statement of claim or the particulars disclose some cause of action, or raises some question fit to be decided by the judge or jury the mere fact that the case is weak and not likely to succeed is no ground for striking out”*⁴.
- [24] At this stage of the proceedings, the court is not required to carry out a detailed and minute examination of the truth of the facts, allegations and documents in the case to see whether there is a cause of action contained therein. *“...In considering an application to strike out a statement of claim, the truth of the allegations contained in the pleading is assumed”*⁵.

² Per Millet J in the Lonhro Case [1991]4 All E R 965

³ Per Lord Diplock in Letang –v- Cooper [1965] 1 QB 232 at p 242

⁴ Re: Davey –v- Benton [1893] 1 QB 185, Moore –v- Lawson(1915) 31 TLR 48 CA, Wenlock –v- Maloney [1965] 2 All E R 871 (CA).

⁵ Per William JA in M4 Investments –v- Clico (Barbados) Ltd. (2006) 68 WIR 65 at Page 82, paragraph 36.

THE APPLICATION BEFORE THE COURT

[25] The stated grounds for the Defendants' applications are that:

- I. The first and eighth Defendants have no capacities that are amenable to suit and further they cannot be sued in their official capacities.
- ii. The claim form is defective in that it fails to set out briefly the nature of the claim.
- lii. No cause of action is pleaded against the third to the eighth Defendants;
- iv. Further or alternatively, the allegations pleaded against the members of the Electoral Commission are misconceived and are an abuse of process.
- v. No cause of action alleging a constitutional infringement has been pleaded or disclosed.
- vi. Paragraph 2 from the 3rd sentence, paragraphs 3, 4, 5, second 5,6,7,9,10 and 11, of the affidavit in support of the claim are irrelevant to the matters that the court is asked to determine. They are frivolous, scandalous and embarrassing and should be struck out.
- vii. The claim fails to disclose relevant material facts and therefore discloses no reasonable cause of action.
- viii. Is and constitutes an abuse of the process of the court.
- ix. The allegations are misconceived, disclose no cause of action and are an abuse of process in that:
 - a. The Claimant seeks determinations and declarations against the Speaker of the House in a capacity that is not amenable to suit.
 - b. Paragraph 29 of the affidavit sworn in support of the notice of motion should be struck off in part or in the whole because:

- i. The allegations pleaded are vague and are in generalized terms;
 - ii. The alleged breaches of the constitution have not been pleaded with sufficient material particularity;
 - iii. No particulars have been pleaded regarding the Speaker's actions which were without jurisdiction or in excess of her jurisdiction;
 - iv. That part 40(1)(d) of the Constitution is a permissive section and the alleged breaches in paragraph 29(2) does not establish any rights which have been breached.
 - v. That no particulars have been stated or no possible violation of Section 35(1) of the Constitution have been pleaded in paragraph 28 (2) of the affidavit in support of the claim.
 - vi. That the alleged breach of section 8(8) of the Constitution at paragraph 28(4) is misconceived and discloses no cause of action. That the Claimant has not given any particulars of Laws or pleaded any material facts which could establish that the Speaker of the House is an authority prescribed by law for the determination of any civil right or obligation and that any proceeding for determination were instituted for determination by any person before such authority.
- c. That by-elections were held, the Claimant was re-elected to the House of Assembly on the 10th July 2010 and therefore the claims or parts thereof should be struck off as being merely academic or moot.
 - d. That Standing Order 15(2) specifies in what circumstances a member's seat becomes vacant by operation of law and based on the statements made by the Claimant in his affidavit the circumstances existed which would have the effect in law of making the seat vacant.
 - e. That any challenge by the Claimant against the by election could only be challenged by means of an elections petition.

The first and eighth Defendants have no capacities that are amenable to suit and they cannot be sued in their official capacities, that no cause of action has been pleaded against the third to the eighth Defendants and the allegations pleaded against the members of the electoral commission are misconceived and are an abuse of process.

THE DEFENDANTS' SUBMISSION

- [26] Counsel Mrs. Baron-Royer submitted that the first and the second through eighth Defendants are servants and officials of the State appointed to perform public duties and in the circumstances they are not amenable to suit and should not have been joined as parties to the suit. Counsel cited and relied on the cases of **Harry –v- Thom** ⁶, **Kent Garment Factory Ltd. –v-Attorney General** ⁷ and **Ferdinand Frampton-v-Ian Pinard et al** ⁸ in support of her submission.
- [27] In the cases cited, the Chief Education Officer⁹, the Minister of Trade and Tourism¹⁰ and the Returning officer of the Constituency and the Chief Election Officers¹¹ who were each sued in their official capacities, and in each of the cases it was held that the in their official capacities they were “servants or officials of the State (Crown), and ... as such they did not have the capacities that are amenable to suit”.
- [28] Counsel submitted that to be sued successfully you must either be a natural person or have legal personality endowed by legislation; that the Speaker of the House and the Chief Elections Officer do not have such personalities and therefore they should be struck; and all allegations against them in the claim must also be struck out.
- [29] Counsel in her presentation before the court disagreed with Learned Counsel Gildon Richards’ contention in his written submissions that based on the decision of the

⁶ (1967) 10 WIR 348

⁷ (1991) 46 WIR 177

⁸ DOMHCV2005/0149

⁹ Harry –v- Thom supra

¹⁰ Kent Garment Factory Ltd Case supra

¹¹ Ferdinand Frampton Case supra

Court of Appeal in the **Richard Frederick Case**:¹² that the first and eighth Defendants are proper Defendants in this claim. Learned Counsel, Mrs. Baron-Royer, submitted that she did not agree with learned counsel Mr. Gildon Richards' statement that Rawlins JA said anything that was different than in the **Ferdinand Frampton** matter. She contended that in fact the case supports the supposition that has been advanced by her before the court and in that regard she referred to page 9 of the judgment at paragraph 19¹³.

- [30] Counsel Mrs Baron-Royer submitted that this case supports her point that **there must be legislation creating the legal persona** in order for the person to be sued in his official capacity and there is no such legislation in Dominica that endows the Speaker of the House or the Chief Elections Officer with such legal personality. Counsel further said that they are mentioned in the Constitution but submitted that the Constitution does not endow them with the necessary legal persona capable of being sued.

THE CLAIMANTS' RESPONSE

- [31] Learned Counsel, Mr. Richards, contended that the Speaker of the House of Assembly is a proper party to the proceedings before the court even though in her official capacity. Counsel cited the case of **Herbert Sabroche –v- the Speaker of the House and the Attorney General**¹⁴ where the Speaker was sued and that the Court of Appeal made a decision that was binding against the Speaker as a proper party to those proceedings.
- [32] Counsel further submitted that consequently this court being a lower court could not now rule that the Speaker has no capacity to be sued as that would be tantamount to placing the High Court in a superior position to the Court of Appeal.
- [33] Learned Counsel, Mr. Richards submitted that the authorities cited by Counsel for the Defendants in support of her point that the Speaker of the House and the Chief Elections Officer along with the other Defendants (numbers 2-8) were not amenable

¹² ST LUCIA - HCVAP2008/0037

¹³ Per George Creque JA “ The Comptroller is a creature of statute by virtue of the **Customs Control and Management Act** (“the Act”) enjoying various powers there under in relation to the goods falling under the ambit of the Act. Section 133 of the Act to my mind makes it clear that the Comptroller is liable to suit.”

¹⁴ Civil Appeal number 20 of 1997 (Dominica)

to suit are not applicable to the case at bar, that the decisions made in those cases failed to cite any authority in support of their decision and that the State proceedings act does not apply to this matter as this is not a suit in tort or contract.

[34] As it regards the Speaker of the House being amenable to suit, I agree with the submission of Mr. Richards, that the Speaker has been successfully sued before the Court and that there is nothing preventing her from being sued. Redhead JA (as he then was) in the **Sabroche case**¹⁵ agreed with the submission of Mr. Anthony Astaphan when he said:

"The courts have a responsibility and duty to ensure that every authority, inclusive of the House of Assembly act in accordance with legislation, statutory rules and laws ..."

I understand this to mean that the court can review the actions of the Speaker of the house, that is, if there is a cause of action.

[35] Redhead JA went on to say:

"I shall go further and say the constitution of the Commonwealth of Dominica is the supreme law of the land. The House of Assembly gets its authority from the Constitution; the court being the sentinel of the constitution must act and has a duty to act when any authority acts in non conformity with any rules or laws which derives under the very constitution."¹⁶

[36] I align myself with this view that applications can be made to the court where the Speaker of the House is a Defendant. There are a plethora of cases where the Speakers of the House in many jurisdictions with written Constitutions have been brought before the court in a variety of matters. I would therefore rule that the

¹⁵ *ibid*

¹⁶ Civil Appeal number 20 of 1997 (Dominica) page 15

Speaker of the House could be sued in her official capacity as it relates to what has happened in the House of Assembly.

- [37] As it regards the other Defendants, the numbers three through eight; these Defendants are the Chief Elections Officer and the members of the Electoral Commission of Dominica. Counsel Mr. Richards contended that in the **Ferdinand Frampton Case** as cited by Learned counsel for the Defendants as authority that the Chief Elections Officer could not be sued and is improperly joined cannot be relied on in this case as that case (**Frampton**) was an elections petition which attracted different considerations that were not applicable in this case.
- [38] Counsel, Mr. Richards, sought to rely on the **Richard Frederick et al –v- the Comptroller of Customs and the Attorney General**¹⁷ to say that the Chief Elections Officer is properly joined to these proceedings as are the members of the Electoral Commission.
- [39] I agree that the State Proceedings Act does not apply to the case at bar, however, the issue to be resolved is whether the Chief Elections Officer and the members of the Electoral Commission are properly joined in the case at bar.
- [40] Counsel, Mr. Richards, cited the **Jennifer Gairy (as administratrix of the estate of Eric Matthey Gairy (deceased) –v- The Attorney General of Grenada**¹⁸ as authority to say that the Privy Council has in essence held that the State is to be placed on par with any other legal entity and is not immune from suit. Counsel also cited and sought to rely on the **Richard Frederick Case**¹⁹ to say that even if the Attorney General is served with a claim form seeking constitutional redress in accordance with the provisions of CPR 2000 “it does not preclude other persons being joined as Defendants”
- [41] Counsel also submitted that if section 40(4) of the Constitution of Dominica allows the Attorney General to intervene in proceedings which are being brought under this section and it therefore stands to reason that there must be some identifiable person other than the Attorney General who could properly be a Defendant in such proceedings. (It should

¹⁷ HCVAP 2008/037 (St Lucia)

¹⁸ Privy Council Appeal No. 29 of 2000

¹⁹ Supra

be noted that section 40 clothes the High Court with the jurisdiction to hear and determine question of membership of the House, whether a person has been validly appointed as a member of the House, or whether a person has been validly appointed as a Senator, or whether a person who has been elected to be Speaker is qualified to be so elected or has vacated the office of Speaker or whether a Member of the House has vacated his seat or is required to cease performing any of his functions as a Member of the House.) Counsel submits that in the circumstances that the Attorney General could have moved the court on behalf of the Claimants herein and or he could have been appearing on behalf of the Speaker in defence of the speaker in defence of her decision and declaration or announcement.

[42] Learned Counsel, Mr. Richards, submits that based on this and for the purpose of these proceedings the Speaker of the House and the Chief Elections Officer and other named Defendants are proper Defendants.

[43] I agree with learned counsel's submission in part. I agree that if the Attorney General was acting on behalf of the Claimants, as he could have in the circumstances of this case, the Speaker of the House would have been and is in this case the competent Defendant.

[44] Accordingly, I would order that the Chief Elections Officer and the members of the Electoral Commission; Defendants three through eight; are to be struck from this case as Defendants and all paragraphs of the Claim as it relates to them.

[45] Learned Counsel for the Defendants referred to paragraph 27 of the first affidavit of Hector John filed on the 8th July , 2010 and paragraph 25 of the first affidavit of Mr. James filed on the 8th July, 2010 which are in identical terms and contended that there is no cause of action pleaded against Defendants numbers three through to eight. Counsel,²⁰ Mrs. Baron- Royer stated that the Claimants have not said anything that the third to the seventh Defendants have done that was unlawful, they have not identified any

²⁰ Paragraphs 25 & 27 respectively state *"Pursuant to the issuance of the Election Writ by the President, on the premise that I have vacated my seat in the House of Assembly, the Electoral Commission and the Chief Elections Officer by themselves and through their agents and servants have unlawfully embarked upon arrangements and preparations for the said by election in the constituency of Marigot"*.

action that they have taken and that the action was unlawful and so too for the Chief Elections Officer.

[46] Counsel Mrs. Baron-Royer also submitted that there has been a complete failure on the part of the Claimants to disclose any relevant material facts and their pleadings which consists of general comments fails to identify any wrongful action or inaction taken by the Electoral Commission or the members thereof in respect of the Claimants and the Claims are vague, embarrassing and disclose no reasonable cause of action.

[47] Learned counsel, Mrs.. Baron-Royer, contended that the Electoral Commission has not been sued and in fact it has no capacity to be sued. She further contended that reference to the Electoral Commission cannot be said to mean the second through seventh Defendants who are members of the Commission and who have been sued in their personal capacities. Learned Counsel, Mrs. Baron-Royer submitted that subject to the Claimants showing otherwise there are no allegations against these Defendants in the Claim and that they should therefore be struck from the Claim.

[48] Counsel Mrs. Baron-Royer in reviewing the Claimants Claim said that:

- (i) These paragraphs do not disclose a cause of action against the eighth Defendant the Chief Elections Officer even if she were amenable to suit.
- (ii) There are no details stating what it is that the Chief Elections Officer did that was unlawful, or what was the unlawful conduct of the Chief Elections Officer neither were any details given.
- (iii) The court is being asked to declare that the by-elections were unconstitutional null and void and of no legal effect and he submitted that these are not declarations that the Court could make against the 3rd to the 8th Defendants, that *there is no evidence in the claimants' affidavits that the 3rd to 8th Defendants were responsible for calling the by-elections or for issuing a writ for the By-elections to be held.* That Part 3 of House of Assembly Elections Act²¹ deals with the arrangements for elections. That Sections 12-15 deal with the question of the

²¹ Cap 2:01

issuing of writs and nomination of candidates. That once the writ for elections is issued by the President the Chief Elections Officer has certain responsibilities to carry out under the law.

(iv) The members of the electoral commission do not have any direct role or responsibilities in those proceedings and it is the returning officers who are the ones who play the important role in the whole elections process.

[49] Mrs. Baron- Royer further submitted that that the Claimants have not stated anything that the 3rd to the 7th Defendants who are members of the Electoral Commission, could have done that was unlawful, they have not identified any action that they have taken and that the action was unlawful and so too for the Chief Elections Officer .

[50] It was also submitted, that the Claimants have not presented any claim that would justify the court in making a determination or declaration against the third to eighth Defendants on the grounds that they by themselves or through their agents or servants conducted a by-election that was unconstitutional, null and void and of no legal effect.

[51] Counsel further submitted that it may very well be that the claimants may be able to bring a Claim against some person(s) else to seek the declarations but certainly not against the third to eighth Defendants as they are seeking to do.

[52] Mrs. Baron- Royer contends that the Claimants have not put forward a Claim that could justify the court in making a determination of or declaration against the third to eighth Defendants that it is clear that there is no sustainable cause of action against the third to eighth Defendants as such and they should be struck off.

[53] These arguments raise the issue that if numbers three to eight Defendant were properly joined to these proceedings whether the Claim as filed and amended discloses any reasonable cause of action against them, whether any wrongdoing has been properly pleaded against these Defendants.

[54] Learned Counsel, Mr. Richards, on the other hand submits that the Electoral Commission had a duty to ensure that when it moved it moved on sound legal basis, Counsel contended that the Claimants clearly show the Commission acted pursuant to the writ issued by the

President who acted on the advice of the Prime Minister who acted based on the unlawful decision of the Speaker. The Claimants are disputing the legality of the election and as such the Claim cannot be brought by way of election petition as suggested by learned counsel Mrs. Baron- Royer for the Claimants.

- [55] A review of the circumstances as stated, I am of the view that the by elections which were held as a result of the vacancy of the two seats in the House of Assembly was called in keeping with the provisions of the Constitution which provides for elections to be held within three months of the vacancy arising.
- [56] Further that the House of Assembly (Elections) Act directs the Chief Elections Officer as to what to do when a warrant is issued. I find that it would be improper for the Chief Elections Officer or anyone in the Commission to question the issue of the warrant by the President, it is not in their place individually or collectively to question a decision made in the House of Assembly or an action taken by the President and in the circumstances I am unable to agree with Counsel Mr. Richards that there is any wrong doing that could be seen or imputed to the third to eight Defendants.
- [57] As it regards the Chief Elections Officer and the members of the Electoral Commission I am not satisfied that they are fit and proper parties to this matter. The Chief Elections Officer and the members of the Electoral Commission are appointed; I am of the view that were this matter an elections petition then they may be considered proper parties.
- [58] I agree with learned Counsel, Mrs. Baron- Royer, that the Claimants have not presented any Claim that would justify the court in making a determination or declaration against the third to eighth Defendants on the grounds that they by themselves or through their agents or servants conducted a by-election that was unconstitutional, null and void and of no legal effect. In the circumstances I find that there is no cause of action pleaded against these Defendants and would therefore strike them from these proceedings.

BREACHES OF VARIOUS PROVISIONS OF THE CONSTITUTION:

The Defendants' submissions:

[59] Learned Counsel, Mrs. Baron-Royer, in her attractive and cogent presentation of the Defendant's application reviewed the Claimants' Claim that Sections 40, 35 and 8(8) of the Constitution of the Commonwealth of Dominica were breached, by the Speaker causing injury to them.

(I) SECTION 40:

[60] The Claimants contend that the Speaker breached section 40 of the Constitution. This allegation is contained in paragraphs 29(2) of the affidavit of Hector John and paragraph 28(2) of Edison James' affidavit. These paragraphs were expanded in paragraph 4(3) of the second affidavits of both Claimants. The relevant parts of Section 40 of the Constitution provides:

- (1) *"The High Court shall have jurisdiction to hear and determine any question whether*
 - (a) *any person has been validly elected as a Representative of Senator;*
 - (b) *any person has been validly appointed as a Senator;*
 - (c) *any person who has been elected as Speaker from among persons who are not members of the House was qualified to be so elected or has vacated the office of Speaker; or*
 - (d) *any member of the House has vacated his seat or is required, under the provisions of section 35(4) of this Constitution, to cease to perform any of his functions as a member of the House."*
- (2) *An application to the High Court for the determination of any question under subsection (1)(a) of this section may be made by any person entitled to vote in the election to which the application relates or by any person who was a candidate at the election or by the Attorney General and, if it is made by a person other than the Attorney General, the Attorney General may intervene and may then appear to be represented in the proceedings.*

(3) An application to the High Court for the determination of any question under subsection (1)(b) or 1(c) of this section may be made by any elected member of the House or by the Attorney General, or if it is made by a person other than the Attorney General, the Attorney General may intervene and may then appear to be represented in the proceedings.

(4) An Application to the High Court for the determination of any question under subsection (1)(d) of this section may be made-

(a) by an elected member of the House or by the Attorney General; or

(b) in the case of the seat of an elected member of the House, by any person registered in some constituency as a voter for the purpose of selecting Representatives, and, if it is made by a person other than the Attorney General, the Attorney General may intervene and may then appear to be represented in the proceedings.

(5) The circumstances and matter in which and the imposition of conditions upon which any application may be made to the High Court for the determination of any question under this section and the powers, practice and procedure of the High Court in relation to any such applications shall be regulated by such provision as may be made by Parliament.

...

(8) In the exercise of his functions under this section, the Attorney General shall not be subject to the direction of control of any other person or authority..."

[61] Learned Counsel, Mrs. Baron-Royer, first submitted that the allegation is vague and embarrassing in that it fails to specifically state what aspect of Section 40 of the Constitution the Speaker violated. Further she contended, that section 40 of the Constitution confers jurisdiction on the High Court to hear matters and does not create a right, restriction or requirement or any such thing that is capable of being violated by the Speaker; therefore it is impossible that the Speaker could have breached this section of

the Constitution and consequently the allegation is misconceived and no cause of action has been revealed.

[62] Counsel submitted that it is not the intention of the Constitution that it is only the Court that can declare a member's seat vacant pursuant to section 40(1) because if that is so it would accordingly mean that it is only the Court that can determine that a person has been elected as a representative.

(II) SECTION 35

[63] The Claimants also allege that the Speaker breached section 35 (1) of the Constitution²² which provides:

"A Representative or Senator (hereinafter in this section referred to as a member) shall vacate his seat in the House at the next dissolution of Parliament after his election or appointment"

[64] Learned counsel Mrs. Baron-Royer contended that this section is incapable of being breached by the speaker as it merely indicates the circumstances in which a member shall vacate his seat.

[65] In support of this contention learned counsel referred to section 35(3) of the Constitution which speaks to the five other (emphasis mine) instances where a member shall vacate his seat and it was contended that it is improper for the Claimants later in their Claim to seek a declaration that the Speaker declared their seats vacant pursuant to section 35(3) and Standing Order 15 (2). Counsel submitted that the Speaker acted in compliance with Standing Order 15 (2) and declared the Claimants' seats vacant she merely stated that which operated by law.

²² See paragraphs 29(3) of the first affidavit of Hector John, 28(3) of the first affidavit of Edison James and Para 4(v) of the second affidavit of both Hector John and Edison James.

(III) SECTION 8(8)

[66] The Claimants claim that the Speaker violated Section 8 (8) of the Constitution when she failed to give them a fair hearing or an opportunity to be heard on the matter regarding their vacating their seats before announcing the said decision and declaration.²³ Section 8(8) of the Constitution states:

"Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time"

[67] Learned Counsel for the Claimant submitted that the Claimants' Claim should fail in this regard because they have failed to disclose in their case as stated that there were any proceedings instituted before the Speaker and she failed to give a fair hearing and therefore there was an actionable breach of section 8(8). Learned Counsel further submitted that the Claimants were relying on the second half of the section and they have not pleaded that there was no hearing instituted before the Speaker or that the Speaker failed to give a hearing before a reasonable time.

[68] Learned Counsel went on to submit that these alleged breaches as pleaded by the Claimants' in their second affidavits at Paragraph 4(viii) and 4(ix) seems to be asking the court to judicially review the Speaker's decision without seeking or obtaining the Court's leave so to do, and cannot in the circumstances be allowed to stand.

[69] Further, counsel submitted that the Claimants are asking the court to find that the Speaker's actions (in breaching Section 8(8)) were in breach of the rules of natural

²³ See paragraphs 29(4) of the first affidavit of Hector John, paragraph 28(4) of the first affidavit of Edison James and paragraph 4(viii) & 4(ix) of the second affidavits of Hector John and Edison James.

justice. I understand leaned counsel's submission in this regard to be that, this does not arise based on the Court of Appeal of Vanuatu in the **Korman –v- Natapei**²⁴ case, that in circumstances such as this, where a member of Parliament is absent from the sitting of the Parliament for three consecutive sessions, vacation of the seat is automatic according to law, and *"in the circumstances it was not appropriate to seek to apply the rules of natural justice with reference to the respondent being given a right to be heard prior to the speaker making a decision..."*.

[70] The courts in this case held that a seat of a member of Parliament was to be vacated if the Speaker decided that the preconditions as set out in the section of the Members of Parliament (Vacation of Seats) Act 1983 were met. The provisions of the Vanuatu act are in similar terms to Standing Order 15 of the Standing Orders of the Parliament of Dominica which Standing Orders were established by the Parliament of the Commonwealth of Dominica in the exercise of its power and duty of section 52 of the Constitution that provides for the House to make its rules to regulate its own procedure. This was done in 1986 and approved by Parliament.

[71] Learned Counsel, Mrs. Baron- Royer, submitted that at all material times the Speaker acted pursuant to the provisions of Standing Order 15(2) in declaring the seats vacant and there is no issue of breach of natural justice that arises and that part of the Claimants' case should be struck out.

THE CLAIMANT'S RESPONSE:

[72] These submissions were opposed by the Claimant who essentially stated that the First named Defendant breached sections 8(8), 35(1) and 40 of the Constitution.

[73] Learned Counsel for the Claimants submitted that Section 35(1) of the Constitution speaks to the tenure to be enjoyed by persons duly elected to Parliament that is from the date of their election to the date that Parliament is dissolved and a break in that continuity is unlawful and is a sufficient cause of action by itself.

²⁴ **Korman –v- Natpei 2010 VUCA 1.**

[74] Learned Counsel for the Claimants went on to submit that a cause of action and constitutional infringement has been pleaded and disclosed by the Claimants in regards to the alleged breaches of this section of the Constitution by the Speaker of the House of Assembly:

- (i) that the Speaker was in breach when she failed to make a fair and unbiased determination as to whether the Claimants were properly summoned to the sitting of the House of Assembly;
- (ii) that she was also required to make a fair and unbiased determination which she failed to do as to whether the period and circumstances envisaged by Section 35 of the Constitution had truly existed before she made her declaration;
- (iii) that when the Speaker claimed to be the authority and person to act in such a manner that would adversely affect the Claimant's rights under section 35(1) and benefits and legitimate expectations derived there from that she was bound and compelled under section 8(8) of the Constitution or the rules of natural justice to give the Claimants a fair hearing or at least a fair opportunity to be heard²⁵.

[75] Learned Counsel, Mr. Richards, contended that the Claimant correctly and clearly pleaded the failure, further that these allegations are relevant in that they tend to show a pattern of conduct by the Prime Minister with the Speaker of the House of Assembly which shaped the circumstances envisaged by Section 35 of the Constitution by the which the absence of the Claimants from Parliament was or could be explained or justified.

[76] The Claimants also contend that pleadings show that the Speaker failed to show the independence that is required by section 8(8) of the Constitution, in that, she failed to give

²⁵ See paragraphs 8-14 of the claimant's augmented written submissions.

- the Claimants a fair hearing and thereby failed to consider the true and full circumstances of the Claimants' absence from the House before she made her declaration.
- [77] Learned Counsel, Mr. Gildon Richards, on behalf of the Claimants submitted further that what the Speaker did was she was seeking to determine that the members of the House had vacated their seats which is a jurisdiction held only by the High Court as provided for in Section 40(1), he further submitted that, the Constitution does not point to anybody with that jurisdiction. Counsel, urged that there is no where in the Standing Orders that she (the Speaker) has been given that jurisdiction. The Claimants are contending that when the Speaker and not the Court determined the extent of the Claimants right to be in Parliament the Speaker violated the specific provisions in the Constitution. Counsel made reference to the **Sabroche case**²⁶ as authority for his submission.
- [78] The Claimants also contended that the Speaker made herself a judge in her own case and that these are issues which must be fully argued at a trial for the Court's consideration and determination.
- [79] The Claimants asserted that their allegations are not misconceived and that they do disclose a cause or causes of action against the Defendants and that the Claims do not constitute an abuse of the process.
- [80] Further, they submitted that the Defendants failed to cite any specific material particular which was omitted by the Claimant to establish a sufficient cause which is necessary to establish a sufficient case.
- [81] The Claimants contend that the Defendants focus is somewhat misdirected and they have disregarded the purpose of their affidavits and have wrongly focused on the Claim form only.
- [82] The Claimants submitted that the affidavits filed provide sufficiently detailed particulars of material facts to establish a reasonable cause of action.

²⁶ supra

ANALYSIS AND CONCLUSION:

- [83] I am of the considered view that at this stage of the proceedings the Court is concerned whether or not there is a cause of action pleaded by the Claimants and not whether the Defendant(s) committed any wrong doing or whether the Defendant (s) is liable for any alleged wrong doing. Accordingly, the Court is not concerned at this time whether the Speaker's decision was flawed in any way. The Court has to determine whether there are any causes of action pleaded or established by the Claimant.
- [84] I have perused the terms of Section 40 of the Constitution and find that the arguments advanced by Learned Counsel Mrs. Baron-Royer are correct. This section does not create a right that is capable of being violated by the Speaker as alleged by the Claimants.
- [85] I find the statement of the Supreme court of Vanuatu in the *Tari v. Natapei*²⁷ to be instructive in this regard:

"In as much as the Standing Orders of Parliament have an effect and influence upon the Constitutional rights of all members of Parliament, in accordance with Clause 6 of the Constitution any person aggrieved, is at liberty to apply to the Supreme Court.....The Constitution does not provide that what happens in Parliament is to be treated differently than any other breaches of lawful rights guaranteed by the Constitution.

It necessarily follows therefore that the Supreme Court is the body which under the Constitution is charged with determining whether rights have been infringed or responsibilities disregarded."

- [86] I am of the view that the Court derives its jurisdiction from section 40 ... to determine whether rights have been infringed or responsibilities disregarded. It is clear that Section 40 of the Constitution establishes the jurisdiction of the Court to entertain applications, to hear matters and does not create a right, restriction or requirement or any such thing that is capable of being violated. I do not read this section as capable of being breached by the Defendant(s) and accordingly agree with the submissions of Counsel for the Defendant. I

²⁷ [2001] VUCA 18 Civil Case No 11 of 2001 (1 November 2001)

- reject the Claimants' submission that section 40 of the Constitution is capable of being breached as described in their statement of case.
- [87] As it regards the alleged breach of Sections 35 and 8(8) of the Constitution, I am of the view that from the facts as stated in this case there is an issue as to whether the Speaker's action in declaring the Claimants' seat vacant warrants judicial intervention.
- [88] I am of the view that there are issues raised and matters that are justiciable and should be answered. The first question requires the interpretation of the Standing Orders of the House of Assembly of Dominica as against sections 8(8) and 35(1). The second issue would be the applicability of the legal doctrine of legitimate expectations as it regards the Claimants rights and benefits as elected members of the House. The third question would be whether or not the correct procedure was utilized by the Claimants in informing the Speaker of their intended absence from the House, or whether the Speaker used the correct procedure in all the circumstances of the case.
- [89] A decision on these questions will have the practical effect of settling the issue once and for all as to whether the Speaker acted within the rules of natural justice or not and whether the correct procedures were used.
- [90] There is no other forum in which these legal questions could be determined in an authoritative manner and accordingly I am of the view that there is a Claim for the Speaker to answer as to whether her actions in declaring the Claimants' seats vacant were in breach of sections 8(8) and 35(1) of the Constitution.

THE CLAIM IS MOOT OR ACADEMIC:

- [91] This Claim was filed one day before the by-election was held to fill the seats declared vacant and the Claimants' both participated in the by-elections and emerged successful and were returned as the elected representatives of their respective constituencies and were subsequently sworn in and have taken up their seats in the Parliament.
- [92] Counsel for the Defendant therefore contends that the declarations sought by the Claimants are now moot in that the Claimants have both been re-elected and that they

have both taken up their seats in Parliament and are in the House and therefore there is no live issue to be tried by the courts.

[93] The issue in the case at bar is essentially whether the Claimants seats were properly vacant and given the factual circumstance that the seats are no longer vacant does this render the case moot and therefore should the court decline to deal with the issue or is there a collateral issues or issue of great public importance that would justify the court hearing this matter?

[94] The question to be answered is, "is there a live controversy existing which affects the rights of the Claimants herein? Counsel for the Claimants submits that the seats are no longer vacant but in fact occupied by the Claimants and in the circumstances the dispute has disappeared and the issue has become academic, further that this is not a situation where the court could or should exercise its discretion to continue hearing the case, that there is no collateral issue or issues of great public importance that would justify the Court in expending scarce judicial resources to hear these Claims.

[95] Counsel submitted that it is a general rule that the Court will decline to hear a case where the decision of the Court will not have the effect of resolving some controversy which affects or may affect the rights of the party. Further, that is, if the decision of the court will have no practical effect on such rights the court will decline to decide the case. Counsel relied on the statement of Lord Justice-Clerk in the **Macnaughton Case**²⁸ where he said:

"Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic question, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau."

²⁸ Macnaughton –v- Macnaughton’s Trustees (1953) SC 387

[96] The Supreme Court of Canada in the **Borowski –v- Canada (Attorney General)** ²⁹ discussed the doctrine of mootness and outlined the considerations that ought to be made by the court where the subject matter of the case has become moot.

[97] The court described a matter as being moot when “a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision”.³⁰ The court in this matter recognized that the court can hear a matter that is moot however in doing so the court must:

- (i) “... determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic.
- (ii) If so it is then necessary to decide if the court should exercise its discretion to hear the case”³¹
- (iii) ... consider whether it should exercise its discretion decide the merits of the case despite the absence of the live controversy.”³²

[98] The court in the **Barowski case** stated three basic factors that the court ought to consider. That in exercising its discretion whether to continue a matter that is considered academic or moot the court ought to look at the extent of which each of these factors is present. They are:

- (i) “That the “court’s competence to resolve issues is deeply rooted in the adversarial system and a full adversarial context in which both parties have a full stake in the outcome which is fundamental to our legal system”

²⁹ [1981] 1 S.C.R. 342

³⁰ Page 3 of the judgment;

³¹ Page 3 of the judgment

³² Page 4 of the judgment

- (ii) "...To examine" the circumstances of the case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue"
- (iii) " to be sensitive to the effectiveness or efficiency of judicial intervention and demonstrate a measure of awareness of the judiciary's role in the political framework"

[99] Learned Counsel, Mrs. Baron- Royer, made reference to the cases from our jurisdiction that have declined to decide on issues which were purely academic in nature in support of her submission in this regard³³.

[100] Counsel's further submission raised the following issue: whether there were collateral consequences of the outcome which will provide the necessary adversarial context? In other words, do the circumstances of the case at bar "*have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action?*"³⁴

[101] Learned Counsel, Mrs. Baron- Royer, submitted that the Claimants are asking to the court to declare that the Speaker's action of declaring their seats vacant was unconstitutional null and void and of no effect, they are also asking this court to quash that decision and to declare that they have not ceased being lawfully elected members of the House as returned on the 19th December, 2009. Further that the Claimants are asking that the subsequent election writ issued by the President of Dominica was unconstitutional null and void. The factual situation in this regard is that the Claimants have since taken part in the said by-elections and won their respective seats and have taken up their positions in the House. That if the court were to make the declaration sought then the court would in effect be setting aside the by-election which has taken place as the consequence of the declaration that the elections writ for the by-elections was null and void. That in essence this would be challenging the validity of the by-election which could

³³ Attorney General of St Lucia, Monica Joseph –v- Dr Vaughn Lewis, Civil Appeal no 12 of 1997 (St Lucia), Lalibai Pagarani et al –v- I Choithram International S.A. et all Civil Appeals numbers 10,11 and 15 of 1997 of the Virgin Islands.

³⁴

only be done by means of Elections Petition in accordance with the law and rules in that regard.

- [102] Learned Counsel for the Defendants also submitted that it was open to the Claimants prior to the holding of the by-election to contest the validity of the Speaker's declaration of their seats as being vacant; that they could have made their application and request a speedy hearing of their application, that they, however tolerated the Speaker's declaration and participated in the process of preparing for the by- elections and it was only on the day before the by election that they approached the court.
- [103] Counsel Mr. Richards on behalf of the Claimants disagreed with the Defendants and contends that there are live controversies outstanding for the consideration and determination by this court.
- [104] Counsel contended that the root issue to be decided by the court as to whether the "Speaker acted lawfully in all respects when she decided to declare/announce and did declare/announce that the claimants' seats were vacated"³⁵ is a matter of great public importance with great potential for injurious repetition unless clarified and resolved by the court and that the Claimants suffered damages as a result of the Speakers unlawful actions in that they lost their salaries and rights of enjoyment of their seats as members of the House of Assembly elected on the 18th December , 2009 and in the circumstances the case cannot be deemed moot when there are issues still outstanding.
- [105] Counsel cited a number of cases in support of his contention that there was a live issue to be tried even though "the events spawned by it had expired."³⁶
- [106] In my judgment the answer to the question of whether the issue before the court given the factual situation of the Claimants having contested the by-election successfully and them having taken up their seats in Parliament has become moot is simply this, the facts as they exist to my mind have virtually removed the "bedrock" of the Claim, I find that indeed

³⁵ Paragraph 20.4. of the claimants Submissions in Opposition (Augmented).

³⁶ R (on the application of Bushell and others –v- New castle Upon Tyne Justices and others)[2006] UKHL 7, Memphis Light, Gas and Water Div. V Craft 436 U.S. 1 1978, and Rodenhurst-v- Chief Constable of Grampian Police 1992 SLT 104; 1992 SC1; [1991] ScotSC SC1H 5, Southern Pacific Terminal Co –v- ICC 129 US 498 VOI 219, 1911 and Friend of Earth Inc et al –v- Laidlaw Environmental Services (TOC), Inc 528 U.S. 167 (2000)

the matters before the court are not academic in nature and I fail to see any legally justifiable reason for the court to involve itself in the merit of the elements of this case.

[107] Therefore, even though I have found that the Speaker is a proper Defendant in this matter and that there is a cause of action pleaded by the Claimants as it regards whether or not there are breaches of Sections 35 and 8(8) of the Constitution. I find that the whole issue is moot given that there was a by-election that the Claimants took part in and regained their seats. One cannot help but wonder, in the circumstances, why the Claimants did not take steps to have the by-elections suspended or why they did not take steps earlier to file their Claim as this may have had a different out come in those circumstances.

[108] For the foregoing reason I find that the matter is moot and academic and ought not to be entertained by the court and accordingly this matter is dismissed.

.....
Birnie Stephenson-Brooks
High Court Judge