IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

DOMHCV2014/0291

BETWEEN:

ELLEN LAWRENCE

Claimant/Respondent

and

[1] GARY BENJAMIN
[2] THE ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Defendants/Applicants

Appearances:

Ms. Nuraiyah Sebastian for the Defendants/Applicants
Ms. Dawn Yearwood-Stewart for the Claimant/Respondent

2015: June 19
2016: August 20

RULING

[1] Stephenson, J.: There are two interlocutory applications before the court by the defendants/applicants ("the applicants"). The first is an application for extension of time and relief from sanctions and the other for leave to strike out parts of the claimant's/respondent's ("the respondent")claim form and statement of claim.

[2] Both parties have filed their respective affidavits, that is; the applicants have filed two affidavits in support of their applications and the respondent has filed two affidavits in response to both applications.

[3] The parties have filed extensive submissions in support of their respective positions on the applications.

[4] I will consider first the application for the extension of time and relief from sanctions and should I not grant the order sought on that application, there will be no need to consider the second application for strike out as it would be rendered redundant.

Application for Extension of Time and Relief from Sanctions

[5] On 8th August 2014 the respondent commenced legal proceedings against the applicants claiming damages including aggravated and exemplary damages for false imprisonment, malicious prosecution and breach of her fundamental rights pursuant to section 3(6) of the Constitution of Dominica.

[6] Pleadings were duly closed and Case Management was conducted on 26th November 2014 and the Learned Master ordered *inter alia* that "… witness statements shall be filed by the 16 January 2015"and that "The deadline for making applications is the 16th February 2015"[1]

[7] On the 11th March 2015, the /applicants filed a notice of application for extension of time for filing an application to strike out parts of the claim form and statement of claim pursuant to Part 10.3(9) of CPR 2000. This application is being vigorously opposed by the claimant.

The /Applicants Application

[8] The /applicants apply for an extension of time to make an application to strike out the claimant's/ claim[2]. This application is made pursuant to Part 10.3(9) of CPR 2000. This application was filed after pleadings were closed, after the Case Management hearing was heard and a detailed Case Management order was made which included a deadline for the filing of any further applications in the matter, and the current application is after that deadline date.

[9] The issue to be decided at this time is whether the court will grant the applicants' application for relief from sanctions and an extension of time for failure to file their application to strike before the deadline for filing all applications. It is noted that

[1] Case Management Order of the 26th November 2014 and filed on the 7th April 2015.
[2] Filed on the 11th March 2015

the application to strike has already been filed so in the event that the court is minded to grant their first application, the order would be to deem the said application properly filed.

[10] The applicants filed an affidavit in support of their application[3] and in that application they made the following statements that are pertinent to their application:

> (i) "That the failure to file the application within the stipulated time in the case management order was not intentional and was due to Counsel who has conduct of the matter prepared the application in a timely manner but inadvertently the said application remained in Counsel's file and was not filed;
> (ii) That the application was being made promptly that is three days after realizing that the application was in Counsel's file and was not filed;
> (iii) That the defendants/applicants have made all other relevant rules practice directions orders and directions;
> (iv) That the application to strike has been filed on March 11th 2015 and has already been served on the claimant/respondent;
> (v) That Pre Trial Review has not yet taken place and a trial date has not been set and there will be no prejudice to the claimant/respondent if the application is granted;
> (vi) That the administration of justice would best be served if the defendants/applicants are relieved from sanctions and grated an extension of time to file the application to strike out parts of the claim form ad statement of claim;
> (vii) That to allow the parts to remain in the claim form and statement of claim would perpetuate an abuse of process of the court and there exists a parallel and adequate law remedy available to the claimant/respondent."

[11] The respondent filed an affidavit in reply to the application for the extension of time[4] and the opposition to the application was stated as follows:

(i) That the application to strike out parts of the claim form and statement of claim is an abuse of process and without merit;

[3] Filed on the 11th March 2015
[4] Filed on the 25th March 2015

(ii) That a claim for relief of breach of constitutional rights can be made in an ordinary claim form.

The Law

[9] Applications for relief from sanctions are governed by Part 26.8 of CPR 2000 which states

> " *Relief from sanctions*
>
> *26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –*
> *(a) made promptly; and*
> *(b) supported by evidence on affidavit.*
>
> *(2)The court may grant relief only if it is satisfied that –*
> *(a) the failure to comply was not intentional;*
> *(b) there is a good explanation for the failure; and*
> *I the party in default has generally complied with all other relevant rules, practice directions, orders and directions."*

[10] In the exercise of my discretion in matters such as these I am required consider parts 28.3. This section is an important provision which states the factors to be taken into consideration by the judge in deciding whether or not to grant the relief sought. This provision has to be considered in matters such as this application. The section states:

> *"(3) In considering whether to grant relief, the court must have regard to –*
> *(a) the effect which the granting of relief or not would have on each party;*
> *(b) the interests of the administration of justice;*
> *I whether the failure to comply has been or can be remedied within a reasonable time;*
> *(d) whether the failure to comply was due to the party or the party's legal practitioner; and*
> *(e) whether the trial date or any likely trial date can still be met if relief is granted."*

[11] The court must however, also deal with the application in accordance with the overriding objective that is to deal with cases justly. In doing so, it must consider all relevant factors[5].

[12] The court is required to embark on an analysis of all the important factors, evaluate them as is suitable having regard to all the circumstances of the case and thereafter to conduct the necessary balancing act amoung the competing objectives.

[13] The first consideration is; was the failure to file the application intentional? The applicant says no, that the failure was not intentional but purely by accident. There is no evidence before the court to the contrary.

[14] Secondly, is there a good reason for the failure to file the application? The reason given in the affidavit sworn in support of the application at paragraph 3 was that the application to strike was prepared by counsel who had conduct of the matter and due to an oversight the said application was left in the applicants' attorney's file and not filed.

[15] In as much as it is clear from the applicants' affidavit that the failure to make the application was not intentional, I am not convinced that the excuse proffered is sufficient to meet the threshold of a good explanation for the delay.

[16] It is not enough for counsel to aver that the documents remained forgotten in another lawyers file. This is against the background that the applicants have filed a defence in the matter, attended and participated in the case management. They also filed witness statements in the matter and to belatedly come with an application to strike parts of the claim form and statement of claim surely this should have come to their realization long before this belated time.

[17] However, I must consider all the facts before coming to a conclusion on the application.

[18] Thirdly, was the application made promptly? Miss Williams the deponent stated at paragraph 4 that the application was made promptly, She said "three days after it

[5] See Part 1 of CPR 2000

was realised that the application to strike out parts of the claim form and the statement of claim had remained in a file at the chambers and was not filed."

[19] Learned counsel for the respondent submitted that the question of promptness should be considered not from the date of the discovery of the unfiled application but from the deadline that was missed. I am of the considered view that in fairness to both parties it is incumbent upon me to consider the question of promptness from both points of view.

[20] Learned Counsel for the respondent Ms. Yearwood Stewart drew it to the court's attention that more than three (3) weeks had passed after the date ordered to file further application and that this is not an application to set aside a default judgment or to amend the statement of case. Further that the test is not when it became known but whether there is a good reason for failure to comply with the order.

[21] The applicants submit that they have complied with all other relevant rules and orders and that there will be no prejudice to the respondent in that, if the application is granted, as pretrial review has not been heard or a trial date has not yet been set and that failure to file the application will be remedied shortly as the application to strike has already been filed and served on the respondent.

[22] The respondent agrees that there has been compliance by both parties with all the orders of court thus far in the proceedings. It is noted that the claimant/respondent has also responded to the application to strike and made submissions on same and indeed there would be no delay in the proceedings by allowing the application.

[23] The applicants submit that the administration of justice will best be served if the d/applicants are relieved from sanctions for failing to file their application within the time stated in the Case Management Order and granted an extension of time to file their application to strike out part of the claim form and statement of claim within the time stipulated to do so. That to allow these parts of the statement of claim would perpetuate an abuse of process of the court as there exists a parallel and adequate common law remedy available to the respondent.

[24] In deciding to grant the extension of time to file the application and in so doing deeming the application to strike which has already been filed, responded to and submitted on by both sides properly filed, I am mindful of the fact that even though the excuse proffered by the applicants is unacceptable there was a prompt filing of the application, that the application has been dealt with by both parties and in reality there would be no delay in the matter should the application be dealt with now.

[25] It is trite law that the granting of an extension of time is a discretionary power of the court which can be exercised in favour of the applicant for good and substantial reasons. In exercising my discretion I have given due consideration to the length of the delay, the reason for the delay, the chances of the application succeeding if the extension is granted and the degree of prejudice if the application is granted.

[26] I am also cognizant of the fact that I must deal with the application in accordance with the overriding objective to deal with cases justly. I have decided that I will grant the applicants application for relief from sanctions and extension of time to file the application out of time.

[27] Seeing that the application to strike out has already been filed and both parties have filed their submissions on the application I would therefore deem the application properly filed and will now proceed to deal with said application.

Application to Strike

[28] The applicants have applied to the court to strike out paragraphs (a)(iii) of the claim form, paragraphs 30(iv) under the heading of particulars and paragraph 32(a)(iii) of the statement of claim on the basis that:

(i) The respondent has made a claim for constitutional relief and has failed to do so by way of fixed date claim form as is required by Part 56.7 of CPR 2000;

(ii) That the respondent's claim for damages for breach of constitutional rights is an abuse of process of court since there are adequate, alternative

parallel remedies available to the claimant/respondent as is pleaded in paragraphs (a)(i) and (ii) of her claim form and paragraph 32(a) (i) and (ii) of her statement of claim.

Incorrect Procedure

[30] Learned StateCounsel Miss Sebastian submitted that claims for constitutional relief must be made by way of fixed date claim form and in the case at bar the respondent has incorrectly brought her claim by claim form and in so doing she has failed to comply with part 56.7 of CPR.

[31] Learned counsel cited the case of Antonio Webster –v- the Attorney General of Trinidad & Tobago[6]where the procedure adopted by the claimant was similar to that of the claimant in the case at bar. In that case the claimant sought declarations for alleged breach of his constitutional rights and it was held *inter alia* that "The appellant was wrong to make his claim in Form 1. He should have made itin Form 2 as a fixed date claim form …"

[32] Miss Sebastian submitted that under the Civil Procedure Rules (CPR2000) of the Eastern Caribbean Supreme Court the rules and same principles apply. That the claim for damages for breach of section 3(3) (b) of the Constitution is an application under the Constitution of the Commonwealth of Dominica and is an administrative order in accordance with Part 56.1(2) which pursuant to the provision of Part 56.7 of CPR must be made by a Fixed Date Claim Form.

[33] Learned counsel urged the court to find that the respondent has failed to comply with Rule 56.7(1) of CPR and in the circumstances the respondent's claim for the administrative relief should be struck out as being procedurally incorrect.

[34] Learned Counsel Ms. Yearwood Stewart for the respondent quite correctly submitted that in circumstances where the action is wrongly instituted by way of an ordinary claim form that the court can issue appropriate directions under Part 26.8 (3) of CPR. Learned counsel made reference to the Antonio Webster

[6] [2011]UKPC 22 (Trinidad & Tobago)

Case[7]relied on by the applicant to say that based on the decision in this case the respondent can ask the court to treat the whole claim as a claim form and to give directions under Part 26 of CPR.

[35] Learned Counsel Ms. Yearwood Stewart referred the court to the dicta of Lord Wilson who delivered the opinion of the Council in the Antonio Webster Case[8], he said

> *"But the appellant's error in that regard was likely to be of no consequence. So far as is material Rule 26.8 provides as follows:*
>
> > "(3) Where there has been an error of procedure of failure to comply with a rule, practice direction, court order or direction the court may make an order to put matters right"
>
> Had it been appropriate for the claim for declarations to remain as part of the appellants claim, Rule 26.8(3) would, albeit probably on terms. As to costs surely have rescued him from his error."[9]

[36] Ms. Yearwood Stewart is correct to submit that the court can make a case management order to put things right in terms of the procedural error subject to a costs order being made against the errant party.

[37] Part 26.9 (3) & (4) of CPR 2000 states

> "(3) If there has been an error of procedure of failure to comply with a rule, practice direction, court order or direction the court may make an order to put matters right.
>
> (4) The court may make such an order on or without the application by a party"

[38] Applying this provision to the case at bar the court can therefore make an order regularizing the procedural error made by the respondent herein and will do so if necessary.

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[7] ibid
[8] Ibid
[9] Ibid para 14

[39] It is noted that the in the Antonio Webster Case it was decided that it was more appropriate for the court to decide whether the constitutional declarations should remain as part of the appellants claim[10]. I am of the considered view that the same applies to the case at bar. It is more important for a decision to be made as to whether the respondent's claim for administrative orders could be pursued in the circumstances of her case.

[40] Abuse of Process and the Claim for Parallel Remedies by the Respondent Learned State Counsel Ms. Sebastian for defendants submitted that the respondent in the case at bar is seeking damages for false imprisonment, malicious prosecution and breach of her constitutional rights and that in doing this, the respondent is in fact pursuing parallel remedies which ought not to be allowed.

[41] Ms. Sebastian referred the court to the decision of the Privy Council in Jaroo – v- The Attorney General of Trinidad and Tobago[11] in that case, the police impounded a motor car which the claimant had purchased and they detained it for seven months on suspicion that it had been stolen. The claimant applied for relief by way of originating motion under section 14(1) of the Constitution. The response of the police to the motion was that they were diligently proceeding with their enquiries and that, until they had completed them, they were entitled to continue to detain the car. The Board upheld the conclusion of the Court of Appeal that the motion under section14(1) was an abuse of process. For the appropriate claim had been an action in detinue at common law. The board reiterated, that:

> "The right to apply to the High Court which s.14(1) of the Constitution provides should be exercised only in

[10] Ibid para 15
[11] [2000] UKPC 5,[2002] 1 AC 871

exceptional circumstances where there is a parallel remedy."[12]

[42] Learned counsel Ms. Sebastian also relied on the Privy Council Case of The Attorney General of Trinidad & Tobago –v- Ramanoop[13]. In that case the claimant had been the victim of egregious violence at the hands of the police. He framed his action as being solely for infringement of his constitutional rights and, in that he issued it prior to the coming into force of the Rules of 1998, he did so by way of originating motion. He claimed declarations that his rights had been infringed and damages. There was no dispute as to the facts in the case.

[43] In the Ramanoop judgment Lord Nicholls of Birkenhead who delivered the Council's opinion stated

> "… *where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power."*

[44] Learned counsel for the applicants submitted that in Dominica where there is a parallel remedy, the right to apply to the High Court under the provisions of Section 16 of the Constitution should be exercised only in exceptional circumstances in accordance with the Jaroo Case[14]. In that case, Jaroo had been assaulted over a prolonged period of time by the police in fact the police actions were described as being "*quite appalling[15]*" and the court said "Police officers are endowed by the state with coercive powers. This case involves a shameful misuse of this coercive power…"

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[12] Ibid para 29
[13] [2005] UKPC 15
[14] Op cit
[15] ibid at paragraph 2

[45] Ms. Sebastian submitted that it was considered that the Jaroo Case[16] contained features which rendered it appropriate for the claimant to claim damages in tort and to seek constitutional redress and in that case the claim was allowed to proceed by way of constitutional motion.

[46] Learned State Counsel Ms. Sebastian in relying on the cases cited that it is clear that a constitutional claim should not be brought where there exists a parallel legal remedy and if it is to be allowed it would have to be where there clear exceptional circumstances as existed in Jaroo.

[47] Ms. Sebastian submitted that in the case at bar the respondent is making two claims which the applicants contend are parallel claims. And should not be allowed. The respondent's claim is based on her contention that she was arrested and held in custody for a period in excess of 72 hours after her arrest. The respondent is claiming damages for breach of section 3(3)(b) of the Constitution of Dominica[17] as well as damages for the tort of false imprisonment for the entire period of her detention.

[48] Learned counsel for the applicants further contend that the tort of false imprisonment and the breach of section 3(3)(b) of the Constitution are parallel remedies and contends that the claimant/respondent would have to prove the same elements of the tort for her constitutional claim, that is she would have to prove the fact of imprisonment and the absence of lawful authority to justify the imprisonment.

[49] Learned counsel submitted that in the case at bar there are no exceptional circumstances as was present in the Ramanoop case which would allow for the two parallel claims to be claimed.

[50] Learned counsel also submitted that the respondent is claiming exemplary damages and that the issue of the breach of her rights would be adequately

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[16] ibid

[17] (3) Any person who is arrested or detained –

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Dominica, and who is not released, shall be brought before a court without undue delay and in any case not later than seventy – two hours after such arrest or detention.

compensated by an award of exemplary damages if the respondent's claim is successful and this constitutional right has been breached.

[51] Ms. Sebastian submitted that her submission is based on authority of Rookes –v- Bernard,[18]that the court has the power to make a finding that the respondent's constitutional rights have been infringed and make an additional award reflecting this. The court can make an award of exemplary damages where there is "oppressive, arbitrary or unconstitutional action by the servants of the government"[19]

[52] Learned counsel submitted that in the case at bar the respondent is quite clearly seeking damages for tort and a parallel constitutional remedy and that there are no exceptional circumstances present and by doing so she is in essence claiming alternative parallel remedies in the same claim and is effectively seeking to be compensated twice.

[53] Learned Counsel Miss Sebastian on behalf of the applicants submitted that the respondent relied on the case of Merson –v- Cartwright et anor[20] which went to the Privy Council on the issue of damages. In that case the claimant claimed damages for the nominate tort of false imprisonment as well as damages for breach of her rights under the Constitution of the Bahamas. She was awarded damages for both. The defendants appealed the finding of the high court on the ground that the claimant was compensated twice for the same unlawful act in relation to the awards for the nominate torts and her constitutional rights. The Court of Appeal agreed with the appellant and withheld the award for breaches of her constitutional rights.

[54] The claimant appealed the decision of the appeal court to the Privy Council who upheld her appeal. The Privy Council held that there was a potential for overlap between the tort and the guarantees under the constitution but decided that there was not a complete overlap and in the circumstances of the case the appellant was entitled to the damages claimed both for the breach of her constitutional rights and her _ortuous remedy. It was decided in that case that the tort of false

[18] [1964] AC 1129
[19] Ibid Per Lord Devlin at page 1126
[20] (Bahamas) [2005] UKPC 38

imprisonment was not a parallel remedy provided for breach of section 19(3)[21]of the Bahamas Constitution. Counsel noted that this section of the Bahamian Constitution was similar to the Section 3(3)(b) of the Dominican Constitution.

[55] Miss Sebastian noted that the section of the Bahamian Constitution is to be distinguished from the Section 3(3)(b) of the Dominican Constitution in that in Dominica if a person is held for more than 72 hours and is not taken before the court the detention of that person becomes unlawful and the person would then be unlawfully imprisoned. In Bahamas the provision of the Constitution does not provide a specific time but states that the person is to be brought before the court "without undue delay" which is wider than that of the Dominica Constitution and discretionary. Further, that the provision in the Bahamian Constitution does not in and of itself create and unlawful imprisonment or touch on the tort of false imprisonment. Learned Counsel Sebastian submitted that there is no certainty as to at what point the delay in bringing a person before the court becomes undue ad therefore unconstitutional or unlawful to constitute the tort of false imprisonment.

The Respondent**'s** Case

[56] Learned Counsel Ms. Yearwood Stewart for the claimant/respondent submits that a claim for both constitutional relief and private law relief can be claimed in the same claim and submits that "even if the action was wrongly instituted by way of ordinary claim form the court can issue appropriate directions under part 26.8(3) of CPR.

[57] Ms. Yearwood Stewart went on to submit that the court should however consider whether it is appropriate for the constitutional relief sought to remain part of the respondent's claim[22].

[58] As it regards the applicant's reference to the case of Antonio Webster[23] where a claim was made for both constitutional and private law remedies, Ms. Yearwood

[21] Section 19(3) of the Constitution of the Bahamas "*Any person who is arrested or detained in such as case as is mentioned in sub-paragraph (1)(c) or (d) of this Article and who is not released shall be brought without undue delay before a court …"*

[22] Paragraph of claimant/respondent's submissions filed on the June 19,2015

[23]Op cit

Stewart noted that in that case the court struck out the constitutional relief sought in that case on the ground that it was found to be redundant in the face of the tortuous claims in the matter.

[59] Learned counsel also made reference to and noted the findings of the court in the Jaroo and the Ramanoop Cases[24] and submitted that in the case at bar that those cases could be distinguished. Learned counsel submitted that there is clearly no redundancy in the respondent's claim though she sought both false imprisonment and breach of constitutional right not to be deprived of her liberty beyond 72 hours. Ms. Yearwood Stewart contends that they are not in a similar vein.[25]

[60] Learned counsel contends that the respondent in regard to the claim of false imprisonment claims that she was detained, prosecuted and released. That the constitutional relief is that her detention exceeded the constitutional requirement under Section 3(3) of the Constitution.

[61] Counsel submits that the respondent claims that the police displayed a high handed attitude toward her which is an exceptional circumstance warranting an award of vindicatory damages which would high light the importance of the constitutional right and a deterrent that such behaviour would not be tolerated. That in those circumstances there is no redundancy.

[62] Ms. Yearwood Stewart made reference to the two Trinidadian cases of Paul Chotalal –v- The Attorney General of Trinidad and Tobago[26] and Steve Singh –v- Attorney General[27]. In the Chotalal Case the claimant sought constitutional relief as well as private law remedies. The defendant applied to strike out the constitutional aspect of the case on the grounds that the claimant should have come by way of fixed date claim form. The court examined the Webster[28]case and the Jaroo[29]case particularly the dicta of Jamadar JA when he said *inter alia*

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[24] Op cit
[25] Para 17 of Ms. Yearwood Stewart's submissions.
[26] Claim CV2014—00155 Trinidad & Tobago (Unreported)
[27] Claim CV2007-04155 Trinidad & Tobago (Unreported)
[28] Op cit
[29] Op cit

> "… the fact that a matter giving rise to a constitutional relief is commenced by claim form is not necessarily fatal to the action and does not necessarily render the matter an abuse of the process or a nullity"

and also the dicta of Rajkumar J in dealing with a claim for damages for false imprisonment as well as a declaratory relief in an ordinary claim in the Steve Singh[30] case of when he stated

> "I find that the Claimant is not precluded from seeking constitutional relief as well as private law relief in the same action even if it is commenced by Claim Form."

[64] Learned Counsel Yearwood Stewart made reference to the Paul Chotal case[31] where the court stated that it was possible to permit a claim for constitutional relief as well as private law relief in the same action and that even if wrongly instituted the court can issue the appropriate direction under CPR 26.8(3). That the question was whether it was appropriate for the declaratory relief sought to remain in an ordinary claim.[32]

[65] Learned Counsel for the respondent submitted that there is no redundancy in the reliefs being sought and in the case at bar the constitutional claim should not be struck out.

[66] Learned Counsel Ms. Yearwood Stewart submitted in the alternative that if the court is not satisfied that the two forms of relief should not coincide then leave should be granted to the respondent for the claim to continue without regard to the constitutional relief.

The Courts Findings

[67] The most significant issue in the application before the court is whether the respondent's claim for reliefs in tort and for constitutional redress arising out of her arrest should be allowed to co-exist in the same claim.

[68] The applicants' contention that the constitutional claim should be struck out on the ground that it is a claim for a parallel remedy which should not be allowed to

[30] Op cit
[31] Op cit
[32] Paragraph 21 of Ms Yearwood Stewart's submission

continue as it would mean that the respondent would be permitted to claim for the same offence twice. Further that if the respondent were to succeed in the claim for exemplary and aggravated damages that award would take into account any constitutional actions by the servants of the government, and in those circumstances the claimant/respondent could be successfully challenged in bringing both the constitutional claim and the claim in tort for false imprisonment.

[69] The respondent contends that it is possible for the two claims to be entertained by the court, that the claims are not redundant and that the case for the respondent is that the police alleged high handed attitude towards the her amounts to an exceptional case warranting an award of vindicatory damages which would high light the importance of the constitutional right and serve as a deterrent that such behaviour would not be tolerated.

[70] I do not accept the argument of the respondent. Having reviewed the authorities presented to the court by both parties herein it is important for the court to consider the true nature of the right which has allegedly been contravened. It is necessary for me to consider the circumstances of the case as pleaded and having regard to same decide what the best procedure available to the respondent is.

[71] Counsel for the applicants was correct to submit that if the respondent was to secure an award for exemplary damages reflective of the breaches of her constitutional rights it would be an alternative to a declaration that there was a breach of constitutional rights and there is no real need for that in this case.

[72] I am of the view that based on the facts as pleaded this case does not reach the threshold in the Jaroo case that would allow for both the claim in tort and the claim for constitutional redress to be pursued.

[73] The case at bar also does not reach the threshold of the Merson Case[33]. In the Merson Case like the Ramanoop case the behaviour of the officers were found to be egregious in fact the Privy Council made the following note that

[33] Op cit

> *"the judge irresistibly found that the police had behaved in a callous, unfeeling, high-handed, insulting and malicious and oppressive manner both with respect to the arrest and false imprisonment as well as the malicious prosecution, the latter on the basis that the police falsely alleged that she had abetted the commission of the alleged offences of illegally operating a bank. The charges were clearly a ruse to justify the arrest. All the charges were subsequently withdrawn."*[34]

It was also noted that the Privy Council also endorsed the words of the trial judge who described it in the following words

> "… the sole reason for the arrest of [Ms Merson] was to force her father who had been named in the search warrant to return to the Bahamas to check his daughter's welfare – a Gestapo-type tactic if ever there was one."[35]

[74] I note and am guided by the statement of Lord Nichols of Birkenhead in delivering the opinion of the Privy Council in the case of The Attorney General **–**v-Siewchand Ramanoop[36]when he said

> *"… Where there is a parallel remedy constitutional relief should not be sought unless the circumstance of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse or abuse, of the court's process. …"*

[75] There is no doubt in my mind that the respondent has available to her the parallel remedy as claimed for damages including aggravating and exemplary damages for false imprisonment and malicious prosecution to enforce her rights. The appropriate remedy for her to pursue is at common law as pleaded. I find for the respondent to proceed in this case to seek constitutional redress would amount to an abuse of process. In the circumstances I would grant the applicants their application to strike out paragraphs (a)(iii) of the claim form and paragraphs 30(iv) under the heading "PARTICULARS" and paragraph 32(a)(iii) of the statement of claim.

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[34] Merson op cit at paragraph 7
[35] ibid
[36] [2005] UKPC 15

[76] It is noted that Learned Counsel Mrs. Yearwood Stewart submitted in the conclusion of her submissions that leave should be granted by the court to allow the proceedings to continue without regard to the constitutional relief, and I agree with her whole heartedly in that regard.

[77] Due to the fact that both parties in this matter erred in that the applicants' application was out of time and beyond the time granted to make any further applications, and upon the court stating that even though I allowed the application to proceed this court is in no way condoning the excuse proffered by State Counsel as to her failure to file the application in a timely manner. The application would have attracted costs to be awarded to the respondent. On the other hand the applicants have been successful in their application to strike and would have been entitled to costs in their favour so I am of the view that the possible costs orders would cancel out each other and accordingly I will decline to make any order as to costs.

[78] Save and except for meeting the deadline for filing any further applications in this matter the case management order of Master Corbin-Lincoln has been complied with and this matter is now ready for Pre Trial Review. Pre Trial Review is fixed for the next available date which would be 6th October 2016. I have reviewed the statements of case made in this matter and the witness statements and I am of the view that the parties should consider settling this matter and the court is prepared to make a mediation order in the matter.

[79] I would like to thank learned counsel on both sides for their very helpful submissions in this case, and apologise to them and to their clients for the delay in the delivery of this ruling this was due to other pressing work commitments and thereafter the ruling was literally sitting on my computer since December 2015 forgotten and I wish to thank Counsel for the respondent for her gentle reminder that this ruling was outstanding.

M E Birnie Stephenson
M E Birnie Stephenson
High Court Judge