THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2017

CLAIM NO. SKBHCV2016/0072/0073/0075

BETWEEN:

KYAM VEIRA
JOEL PHILLIP
KEITHROY PHILLIP

Applicants

And

THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS
THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

Appearances:-

Mr. O'Grenville Browne and Ms. Marissa Hobson-Newman for the Applicants
Ms. Nisharma Rattan-Mack and Ms. Eshe Hendrickson for the Respondents

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2017: 24th March

JUDGMENT

[1] **WARD, J**.: In May 2011, the respondent, Kyam Veira, was arrested and charged with murder. At his trial in June 2015 his lawyer successfully made a no case submission on his behalf. In March, 2016 Veira commenced an action against the Attorney General and the Director of Public Prosecutions seeking several declarations that his constitutional rights were breached arising from his arrest and incarceration on said murder charge.

[2] The respondent Joel Phillip was arrested and charged for murder on or about 20 June, 2012. On 30, June, 2015 the Director of Public Prosecutions discontinued proceedings against him. In March 2016, he commenced an action against the Attorney General and the Director of Public Prosecutions seeking several declarations that his constitutional rights were breached arising from his arrest and incarceration on said murder charge.

[3] The respondent Keithroy Phillip was arrested for murder on 7 July, 2012. He was formally charged on 10th July, 2012. At his trial, on 2nd March 2015 his lawyer successfully made a no case submission on his behalf.

[4] On 10, March 2015, the DPP lodged an appeal against the decision of the learned trial judge to discharge the applicant. In March, 2016 he commenced an action against the Attorney General and the Director of Public Prosecutions seeking several declarations that his constitutional rights were breached arising from his arrest and incarceration on said murder charge.

[5] All three respondents commenced their actions by way of fixed date claim form together with a statement of claim and an affidavit in support.

[6] By agreement, these matters were consolidated.

[7] The applicant applies to have the cases struck out pursuant to **CPR 2000 Part 26.3(1) (a) and (c)** and the Court's inherent jurisdiction. Specifically, the applicant seeks to have the statements of case struck out for failure to comply with Rules **8.1 (1); 56.7(2), 56.7(3) and 56.7(4)**; and an order that the statements of claim be struck out as an abuse of process.

[8] The applicant contends that this being an application for an administrative order, **Part 56** mandates that the application be made by fixed date claim form which must be headed "Originating Motion" supported by evidence on affidavit. **Part 56.7(4)** prescribes the contents of the supporting affidavit.

[9] The applicant contends that the respondents' applications are non-compliant with these requirements because the applications are not headed "Originating Motion". Further the respondents' affidavits are defective because they do not state the provisions of the constitution said to have been breached, the nature of the relief sought, the grounds on which the relief is being sought, the claimants' address for service nor the names and addresses of all the defendants to the claim.

[10] Additionally, the respondents have filed a fixed date claim form, a statement of claim and an affidavit. It is said that the filing of a statement of claim is an abuse of process since it is in addition to an affidavit and seeks reliefs that are not included in the respondents' affidavit.

[11] Counsel further posited an additional basis for saying that the respondents' case should be struck out as an abuse of process. Counsel submitted that an alternative remedy, namely, an action in tort was available. Additionally, a constitutional motion was ill-suited to cases where there is a substantial dispute as to the facts, as is the instant case.

[12] In reply, Learned Counsel for the respondents, Mr. O'Grenville Browne, took issue with the timing of the application. He submitted that the applicant, having filed an acknowledgement of service and a defence had the opportunity then to make the application to strike instead of filing a response and making a belated application to strike more than 6 months later. This he contends is an abuse of process.

[13] Counsel for the respondents further submitted that in any event, the Court has the discretion to rectify any procedural errors under Part 26.9. It was further submitted that the Court's case management powers permitted it to direct the applicant as to whether it should respond to the respondents' case as particularized in either the statement of claim or the affidavit, without striking out one or the other.

[14] Learned Counsel for the respondents did concede, however, that **Part 56.7** mandates that in claims of this nature, an affidavit, and not a statement of claim, should be filed.

[15] In response to the applicant's criticisms of the content of the affidavit, Mr. Browne submitted as follows:

(i) The reason for requiring that the affidavit state the name, address and description of the defendant is to allow the identity of the defendant to be clearly ascertained. Where the defendant is the Attorney General, there can be no ambiguity as to the identity of the defendant;

(ii) The header of the affidavit is part of the affidavit. Accordingly, the document must be read as one. So read, the claim form is compliant with the requirement under 56.7 (2) which requires the claim form to be headed 'Originating Motion'.

(iii) As it relates to the abuse of process argument, an alternative remedy is not available because the limitation period has expired for an action in tort.

[16] As the Court sees it, the issues for resolution are:

(i) Whether the respondents' case should be struck out for non-compliance with **Rules 8.1** and **56.7.**

(ii) Whether an alternative remedy is available to the respondents.

[17] One matter is capable of being disposed of quite easily. Applications of this nature must be commenced by application headed "Originating Motion" and supported by affidavit; not a statement of claim. The respondent conceded this point in oral argument.

[18] Rule 26. 3(1)(a) and (3) empower the Court to strike out a statement of case or any part of it if there has been a failure to comply with a rule, practice direction or

order or if the statement of case or the part to be struck out is an abuse of the process of the court. Accordingly I hold that it is an abuse of process to file a statement of claim when applying for an administrative order. The entire statement of claim is therefore struck out.

[19] The question is whether this necessarily leads to the entire case being struck out. I am of opinion it does not. The respondents have filed an affidavit each in support of his application as required by **Rule 56.7**. Provided this affidavit is itself compliant with the rules, then subject to my determination of the other issues raised by the applicant, the respondents' case may yet be salvageable.

[20] The power to strike out is one that must be used sparingly. The rationale for this cautious approach was explained by Mitchell, J.A. in ***Tawney Assets Limited v East Pine Management***[1]:

> *"The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial."*

[21] **Part 56.7 (2)** provides that the claim form in an application under a relevant Constitution requiring an application to be made by originating motion should be headed "Originating Motion". I note the language employed here is *"Should"* not must. I'm therefore not persuaded that this requirement is expressed in mandatory terms such that strict non-compliance is fatal.

[22] **Part 56.7 (4)** provides that where an administrative order is sought in the case of a claim under the constitution, the supporting affidavit must state, *inter alia*, the provision of the constitution which the claimant alleges has been or is likely to be

[1] Civil Appeal No. 7 of 2012 (Unreported)

breached; the grounds on which such relief is sought; the names and addresses of all defendants to the claim.

[23] In construing this rule in **Homer Richardson v the Attorney General[2],** Bruce-Lyle, J held that these requirements of **Rule 56.7(4)** are mandatory. He stated:

> *"Secondly, the mandatory nature of Part 56.7(4) leaves me with no doubt that its provisions should or must be complied with strictly before a Claimant can raise the Court's jurisdiction. The overriding objectives in my view should not be used as an excuse to come before the constitutional court in a cavalier manner, where strict provisions laid down are a requisite."*

[24] This issue was further considered in **Attorney General v Franklyn Dorset and Bernard Richards[3].** Thomas, J held that the provisions of Rule 56.7(4) were conjunctive and as such there must be total compliance. In that case he held that there was non-compliance with sub-paragraphs (b) and (c) of rule 56.7(4) and held this to be fatal.

[25] Accordingly, I have examined the respondents' affidavit closely in order to assess whether they are compliant with the requirements of these rules.

[26] I find that in some respects they are not. In each case, they do not state the provision of the constitution said to have been breached as required by Rule 56.7(4)(c); merely an assertion that their constitutional rights were violated.

[27] Nonetheless, I am satisfied that on a proper reading of the affidavits, they sufficiently particularised to enable the applicant to know the grounds on which relief is sought.

[28] The respondents each aver that their arrest was unlawful and without good cause because the evidence against him was manifestly incapable of supporting the

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[2] Claim No. AXAHCV/2005/0031
[3] SKBHCV2012/0399

charge. While they do not descend into precise particulars of what this evidence was they all reference the deposition as the source from which the nature of this evidence may be derived.

[29] In my view, there can be no doubt on a reading of the affidavits that the respondents are alleging the unlawful deprivation of their liberty occasioned by what they allege to be their unlawful arrest and detention.

[30] These defects notwithstanding, I do not consider them to be fatal. I derive support for the proposition that non-compliance with Rules 56.7(4) is not necessarily fatal from the Court of Appeal's decision in ***Attorney General v Giselle Isaac***[4].

[31] In considering an argument that the judge below had erred in striking out the claim for non-compliance with **Part 56,** Blenman, J.A. squarely addressed the issue of the effect of non-compliance with **Rule 56.7(4)** and had this to say:

> *"For the sake of completeness, it is worthy to mention that the learned judge was quite correct in holding that any omissions in the supporting affidavit did not make the proceedings a nullity. Even though the affidavit failed to comply with CPR 56.7(4), the omission could have been remedied by the filing of a supplemental affidavit. Indeed, to accede to the Attorney General and Minister's request on this basis would have been draconian as opined by the judge."*

[32] To similar effect is the decision in ***Savita Indira Salisbury v The Director of the Office National Drug and Money Laundering Control Policy (ONDCP)***[5]***.*** The appellant instituted a claim against the respondent in the form of a fixed date claim and, instead of filing with the fixed date claim form affidavit evidence in support as stipulated by rule **56.7(3) CPR 2000**, filed a statement of case. The respondent filed a defence to the claim. At the hearing of the matter the respondent objected to the appellant's claim on the basis of non-compliance with rule **56.7(3)** and made an oral application to strike out the matter. The learned trial judge struck out the

[4] ANUHCVAP2015/0014
[5] ANUHCVAP2012/0044

claim on the basis that the appellant had failed to file an affidavit in support of the claim or to apply for relief from sanctions. The appellant appealed alleging that the learned trial judge erred in striking out the claim on the basis of the alleged breach of the rules since in the circumstances of the case **rule 26.9** was applicable.

[33] The Court of Appeal held that in circumstances where the rule or order of court does not provide for sanctions where there is a default in procedure it is not open to the court to read any sanction into the rule. The CPR provides no sanction for non-compliance with rule **56.7(3).** Therefore, the appellant's non-compliance with that rule did not require the appellant to file relief from sanctions. It was further held that **Rule 26.9(3)** of the CPR confers jurisdiction on a judge to make an order to put matters right if there has been an error of procedure or a failure to comply with a rule, practice direction, court order or direction. This the court may do on o*r* without an application by a party. The failure of the appellant to file affidavit evidence in support with the fixed date claim was a procedural error. Hence, the learned trial judge would have been clothed with jurisdiction to give an appropriate direction to put matters right. Considering that the respondent would not have been prejudiced by an order to put matters right and that doing so would only further the overriding objective of the CPR, the learned trial judge did err in his refusal to do so.

[34] In light of the foregoing, I respectfully decline to follow ***Homer Richardson.*** I consider that such defects as are present in the respondents' affidavit are curable by filing supplemental affidavits and are not fatal to the respondents' case. I am fortified in this view when I call to mind the learning that the discretion to strike out a case should be exercised sparingly.

[35] Additionally, to hold that non-compliance with **56.7(4)** is fatal, would sit oddly with the provisions of **Rule 56.11** which empowers a court at the first hearing to, inter alia, allow amend any claim for an administrative order.

[36] Accordingly, I hold that it would be draconian to strike out the respondents' case

owing to these defects in the affidavit and I decline so to do. I am satisfied that **Rule 26.9** empowers the court in circumstances such as these to put right any procedural misstep.

Alternative Remedy

[37] The only remaining issue is whether an alternative remedy is available to the respondents such that they should not be permitted to access the court by the constitutional motion route.

[38] It is well settled that an application for constitutional relief should not be used as a general substitute for the normal procedures for invoking judicial control of administrative action and where there is a parallel remedy unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course: ***Attorney General v Ramroop***[6]

[39] It is also true that it is ill suited to decide substantial factual disputes. Nonetheless, where on the information available to an applicant for constitutional relief a constitutional motion is properly launched, it is recognized that the subsequent emergence of substantial factual disputes does not render the proceedings an abuse where the alleged facts, if proved, would call for constitutional relief: **Ramroop.**

[40] As Lord Hope said in **Jaroo v The Attorney General of Trinidad and Tobago**[7] at paragraph 38:

> *"The appropriateness or otherwise of the use of the procedure afforded by [s.18] must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future."*

[41] In this case, the applicant submits that an action in tort for malicious prosecution is

[6] [2005] UKPC 15
[7] [2002] UKPC 5

available to the respondents. Thus it is an abuse of process to seek constitutional redress.

[42] Counsel for the respondents contends that an action in tort for malicious prosecution is statute barred since such a cause of action accrued at the time of arrest which was May 2011, June 2012 and July 2012 respectively.

[43] The applicant counters that the cause of action would have accrued when the respondent was vindicated by the High Court's ruling on the no case submission in June 2015.

Discussion

[44] Section 4 of the **Limitation Act**, Chap. 5:09 provides that actions in tort shall not be commenced after the expiration of 6 years from the date on which the cause of action accrued.

[45] In an action for malicious prosecution, the cause of action accrues when there is a favourable outcome or acquittal.

[46] The evidence before me is that though the no case submission in the case of Veira was upheld in June 2015, this ruling was the subject of appeal which was pending at the time of this appeal. Accordingly, if the appeal is determined in the respondent's favour, the cause of action in this case will accrue from the date that the appeal is determined. It follows that an action in tort for malicious prosecution is not statute barred. The same may be said for the other respondents.

[47] There being an alternative remedy available to the respondents, resort to the procedure by way of originating motion is inappropriate and an abuse of the process and would diminish the value of section 18 if it were allowed to be used as a general substitute for the normal procedures that are available under common law or statute.

[48] As Lord Diplock stated in **Harrikissoon v A-G of Trinidad and Tobago [1980]**

AC 265 with reference to the Trinidad and Tobago Constitution :

> *"In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened, is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy…"*

[49] For these reasons, the claim by way of originating motion is struck as an abuse of process. There shall be no order as to costs.

Trevor M. Ward QC
High Court Judge