EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

SAINT LUCIA

CLAIM NO. SLUHCV2018/0272

BETWEEN:

URBAN ST BRICE

Claimant

And

ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:

Ms Natalie DaBreo and Dr Collis Barrow for the Claimant
Mr. Seryozha Cenac for the Defendant

2018: August 7, 9, 14
October 29

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** On 12th June, 2018 the claimant, Urban St Brice, filed an originating motion albeit not in proper form[1] seeking the following relief:-

1. A declaration that his rights under section 1, 3, (1-6), 5, 7, 8(1), 8(2)(a), 8(10) and 10 of the Constitution of Saint Lucia[2] have been infringed
2. A declaration that his common law right to disclosure has been infringed or denied
3. A declaration that his common law right to a fair trial has been infringed or denied
4. A declaration that his common law right to a trial without unreasonable delay has been infringed or denied
5. A declaration that his has been falsely imprisoned
6. An Order that the indictment be quashed, the proceedings stayed and he be discharged immediately
7. An order that a writ of habeas corpus be issued
8. Vindicatory, aggravated, exemplary and general damages.
9. Costs and any other order the court deems fit be made.

[2] Some 33 grounds were stated in the application, which in the interest of time will not be reproduced, except to say that in general they concerned allegations that the claimant has not been afforded a fair trial within a reasonable time and that several of his constitutional rights have been infringed or denied.

The Issues

[3] The matters for the Court's determination are:-

1. Whether the claimant's constitutional right to a fair trial within a reasonable time has been infringed?
2. Whether the claimant has been subjected to inhumane and degrading treatment?
3. Whether the right to disclosure has been infringed?
4. Whether the claimant has been falsely imprisoned?
5. Are any of the matters raised in 1-4 above are res judicata?
6. **Is** the claimant is entitled to the remedies sought?

[1] CPR 56.7 (1) & (2) stipulate that such application should be by way of fixed date claim headed "Originating Motion"
[2] CAP1.01 of the Revised Edition of Laws of Saint Lucia

Background

[4] In summary the claim arises out of the shooting death of Dwain Andrew on 22nd October, 2002. In November 2002 the claimant was arrested and charged and in March 2005 indicted to stand trial for the offence of murder.

[5] His first trial commenced in November 2005 which resulted in a mistrial, with retrial ordered. The second trial in March 2006 resulted in a conviction and he was sentence to life imprisonment. The claimant appealed and in October 2007 the conviction and sentence were overturned, with retrial left to the discretion of the Director of Public Prosecutions ("DPP"). A third trial commenced in October 2008 which ended in another mistrial and retrial ordered. A fourth trial commence in November 2009 which ended in a mistrial and retrial ordered.

[6] Between 2008 and 2011 there were numerous adjournments for various reasons including absences and changes of defence counsel, two applications to stay the proceedings and other applications by the claimant to exclude evidence and to have him evaluated by a psychiatrist.

[7] In May 2011 the claimant file a constitutional motion for stay of the fifth trial which was scheduled to commence in July 2011. That motion was struck out in July 2012. The claimant appealed the decision and the Court of Appeal in May 2016 dismissed the appeal. Written reasons for the dismissal were delivered in October 2016. During that time it appears that there were two further mistrials and several other applications were filed by the claimant.

[8] In July 2017 the claimant filed two further applications in the administrative court, for leave to file a claim for judicial review of the decision of the DPP to retry his case and for an order that all transcripts of criminal proceedings to date be made available to him free of charge, for the use in the substantive judicial review claim. Both applications were dismissed, the claimant appealed and that appeal was dismissed in December 2017.

[9] In April 2018 the claimant filed a notice of application to quash the indictment and to permanently stay the proceedings before the criminal court and that application is still pending.

[10] In June 2018 this motion was filed because the claimant contends that the criminal court has been closed since May 2018 with no indication as to when his case will be heard and from all indications the Court is closed for trials until further notice. In the end result the claimant says he has been incarcerated from 2002 and it is now approaching 16 years.

The Claimant's Evidence

[11] The motion is supported by 5 affidavits of which two were deposed by the claimant. The first was filed on 12th June 2018 and contains an extensive account of the historic and factual background of the matter. His second affidavit filed on 19th July 2018 contained responses to the affidavits filed by the defendant and further matters pertaining to the criminal trial held thus far.

[12] Two affidavits were deposed by the claimant's mother Marietta Joseph and filed on 2nd and 19th July, 2018 in which she alluded to matters concerning her circumstances since the claimant's incarceration and outlines an account of a personal relationship gone bad between herself and retired Inspector Jeremy Chicot who is the investing officer in the criminal case.

[13] The fifth affidavit was filed by Titus Albert, who described himself as the Legal Clerk who has been filing and serving document on behalf of the claimant. His affidavit exhibited several witness statements and other records, seemingly from the claimant's criminal file.

The Defendant's Evidence

[14] The defendant filed 4 affidavits in response, two of which were deposed by the Deputy DPP, Mr Stephen Brette and filed on 3rd July and 13th August, 2018. The third was deposed by retired Inspector Jeremy Chicot in response to the affidavit of Marietta Joseph

and was filed on 4th July, 2018. The fourth affidavit was deposed by Kurt Thomas Legal Officer in the Attorney General's Chambers, in which he exhibited several applications filed by the claimant in the civil court in 2017. It was filed on 31st July, 2018. These affidavits speak largely to the chronology of events which have transpired in relation to this matter.

[15] At the hearing Counsels agreed to forego cross examination on the evidence of the various deponents and addressed the court on the issues to be determined, in written and oral submissions.

Has the claimant's right to a fair trial within a reasonable time been infringed?

Delays from 2002 to 2012

[16] It is not disputed that the claimant has been incarcerated for almost 16 years which is no doubt a considerable period but the defendant argues that attribution of delay is the determining factor for infringement of the claimant's constitutional rights. It is submitted that for the period 2002 to 2012 that issue has already been determined in the earlier proceedings and the Court is precluded from pronouncing upon it for a second time.

[17] Counsel for the defendant Mr Cenac referred the Court to the first instance decision of Wilkinson J in **Urban St Brice v Attorney General** delivered on 26th July, 2012[3] where the judge dismissed the claimant's constitutional motion on the grounds that he had not established that the State was responsible or substantially contributed to the delay of trial. On appeal the Court of Appeal upheld the findings of Wilkinson J having also formed the view that that the claimant was responsible for the majority of the delays such that his right to a fair trial had not been infringed and dismissed the appeal.

[18] The defendant submits that consideration of delay for that period is res judicata and to find otherwise would have the effect of a subordinate court reviewing and overturning the findings of a superior court, which power is not available to a court of first instance. Counsel for the claimant Ms DaBreo did not resist these submissions.

[3] SLUHCV2011/ 0479 at para 88

[19] I accept on the authority of pronouncements made in **Prospere v Prospere**[4] that these issues have been tried between the same parties and decided by a court of competent jurisdiction, culminating in a definitive judgment between the claimant and the defendant. Therefore the issues cannot be reopened, thus attribution for delay and the implications for a fair trial within a reasonable time, for the period 2002 to 2012 is res judicata.

Delays from 2013 to present

[20] It is evident that since the decision of the Court of Appeal in 2016 delay has continued and the Court must of necessity pronounce on the causes for delay in the post 2012 period. It is the law that the Court must determine who is responsible for these delays by assessing the conduct of the parties. The length of delay, reasons given by the prosecution to justify the delay, the responsibility of the accused for asserting his rights, and prejudice to the accused are all factors to be taken into account.

[21] Ms DaBreo stated that the Court should note that this motion has been filed whilst there are also extant proceedings before the criminal court, with good reason. She argued vigorously on behalf of the claimant that the time has come when the cause of delay is no longer material and the question has become whether the claimant can have a fair hearing after such lengthy delay. She relied on dicta of Saunders J in **Gibson v Attorney General of Barbados**[5] in support of the position. Counsel also relied on the case of **Herbert Bell v Director of Public Prosecution**[6] in which the Privy Council allowed an appeal in a case where the delay to trial was only 2 years, in circumstance where the guarantee to a trial within a reasonable time was enshrined in the constitution, similarly to Saint Lucia. She also relied on several other judicial authorities dealing with the length of time that courts have generally considered as sufficient to constitute an infringement of the right to a fair hearing within a reasonable time. I note that several of these cases were assessed by the

[4] [2007] UKPC 2
[5] [2010] CCJ 3
[6] Privy Council Appeal No. 44 of 1984

Court of Appeal its October 2016 decision on October 2016. I observe that there is some divergence based on the applicable law and its application to the peculiar facts of the case.

[22] Mr Cenac countered by stating that the appellant in the **Herbert Bell** case had not in any way attributed to the delay contrary to the history of the claimant in the present case and as such that case should be distinguished on the facts. He contends that while the defendant accepts that there has been delay, attribution remains a critical issue for the determination in the post 2012 period and the court must consider who is principally responsible for that delay. Perusal of the case history in the chronology presented by the defendant will show that the majority of adjournments continue to be at the behest of the claimant and has been listed for trial on eight (8) occasions from April 2013 to June 2016. On each occasion the claimant chose not to proceed whether for having filed various applications, for changes of legal practitioners, for entering and withdrawing a guilty plea to manslaughter or filing pre-trial applications in the criminal court, alongside concurrent applications for judicial review in the administrative court followed by an appeal of the judge's decision. There is a pending application on these very same issues before the trial judge and at this stage the defendant is not resisting bail as it is the first remedy afforded by sub-section 3(5) of the constitution, in circumstances where there has been delays in trial.

[23] Counsel submitted further that nowhere in the case history can it be said that the prosecution has not been ready for trial nor can it be said that the State as a whole has contributed substantially to delay in the post 2012 period. The few months where the court has recently been unable to have sittings is minimal when considered against the totality of the causes for delay in that period. He invited the court to find that the claimant remains substantially responsible for these delays and as such his right to a fair hearing within a reasonable time under subsection 8 (1) of the Constitution has not been infringed.

[24] I observe from the evidence that since the Court of Appeal decision in 2016 the claimant has continued to file numerous applications in both the civil and criminal courts inclusive of an application to quash the indictment and a permanently stay of the trial (filed in April

2018) which is still pending before the criminal court. In July 2017 two further applications for judicial review and delivery of transcripts were filed in the administrative court and in June 2018 this motion was filed.

[25] The preponderance of the evidence on this issue still points to the claimant's persistent applications and requests for adjournments. There is ample evidence of adjourned dates and the reasons for same in the evidence from both sides. With the exception of the brief period from June 2018 to present when the criminal court experienced security breaches and suspended sittings to undertake corrective measures (which excludes the court's long vacation from August to mid-September 2018), it is clear that the claimant still remains substantially responsible for the delays occasioned during the post 2012 period. I therefore conclude that attribution for delay during the said period continues to rest on the shoulders of the claimant and his legal practitioners.

Fair hearing within a reasonable time

[26] On this point the claimant has complained that (1) the sheer length of delay (almost 16 years); (2) inherent weaknesses in the prosecution's case, (3) unavailability of witnesses, (4) the memory of witnesses can be compromised or confused by the effluxion of time, (5) the non-disclosure of documents, records and transcripts for previous proceedings, (6) in recent time the DPP who was previously his Counsel has addressed the court as DPP in the case, (7) that a soured relationship between his mother and the investigating officer before his arrest has tainted the investigations and all these matters will preclude him from receiving a fair trial. He contends that in 2014 and 2015 while he awaited the Court of Appeal's decision, two more trials commenced which were also declared mistrials. Taking into account the overturned conviction in 2007 and the subsequent mistrials he is now being asked to answer the case for the 7th time.

[27] Counsel remained adamant that a time can be reached when a court will agree that the delay has been too long and the right to a fair hearing within a treasonable time has been breached. To this day, she says there is no disclosure of transcripts and without this the

case cannot go to trial, the claimant's witnesses are not available and added to that the criminal court has not been having any sittings. The last court hearing for the claimant was on 7th March, 2018. He was to appear twice after that date but the court has been closed. The next schedule date is 26th October, 2018 and it is not possible to commence trial on that day as there are still several pending pre-trial matters to be addressed.

[28] Ms DaBreo submitted further that in view of all these infractions of the claimant's rights this case is not ground-breaking and all the issues have been considered in the several decisions cited up to the level of the highest appellate courts. The claimant simply asks that his constitutional rights be observed and that he be compensated in damages for the breaches committed. In that regard she stated that the pronouncement in **The Maya Leaders Alliance v Attorney General of Belize**[7] is instructive. There the Caribbean Court of Justice ("CCJ") said:-

> *"Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."*

[29] In response Mr Cenac submits that all of the issues raised by the claimant are best placed to be heard by a trial judge who can look at all of the evidence and arrive at a correct and appropriate determination. The claimant is at liberty to raise all these issues in pre-trial applications or to make a no case submission at the close of the prosecution's case in the criminal court. Alternatively the entitlement to an appropriate direction by the trial judge to the jury on any inherent weaknesses of the prosecution's case is mandatory at trial. Counsel cited the decision in **Taibo (Ellis)** v **R**[8] in which the Privy Council opined that even if the prosecution's case "*is thin, very thin*" if there is some evidence that can be left to the jury upon which they can convict without irrationality, the judge is duty bound to leave it to the jury. All the judge is then required to do is to give an adequate direction.

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[7] [2015] CCJ 15 (AJ) at para 47

[8] (1996) 48 WIR 74,

[30] To this Ms DaBreo says the binding judicial precedents say that the claimant need not wait to prepare for trial and should immediately take his grievances to the constitutional court.

[31] Mr Cenac submitted further that to now call upon the constitutional court to review the same matters, on the same grounds and on the basis of the same arguments, supports the contention that the criminal court is already fully seized of these matters and this application is an abuse of the court's process. This is compounded by the existence of the pending application to quash the indictment in the criminal court. Moreover, to invite the constitutional court to perform the task of the criminal court in disposing of a serious criminal matter when the Court would not have had the benefit of seeing the witnesses or of hearing all the evidence and being deprived of the ability to review the several documents referred to by the claimant is highly irregular. He asserts that there is nothing new in this motion other than the allegations against the investigating officer and DPP, which follow the ruling by Cenac-Phulgence J that mala fides would amount to an exceptional circumstance to warrant review of decisions of the DPP to prosecute or retry a case. These matters are being raised for first time and the claimant has only filed an affidavit from himself and his mother to show impropriety on the part the officer. This ought to have been a live issue from inception at the first trial in 2005, as the trial judge would have had all the information and be best placed to address this issue. With respect to the DPP it is not unusual that the a legal practitioner may be appointed to that position and there are methods for dealing with conflicts of interest in matters that he has previously been retained as Counsel. In this case the claimant's file has been assigned to the Deputy DPP Mr Brette who has full conduct of the case. The claimant has not indicated what was said on the day the DPP addressed the Court, which was adverse to him and the Court is placed in the untenable position of having to make finding of fact without examining any of these witnesses.

[32] Mr Cenac referred the Court to paragraph 67 of the earlier decision of Wilkinson J for guidance on these matters, where she said:-

> "…………………… *it appears to the Court that all of the authorities cited say firstly, that at common law the Claimant in his criminal trial has a right to seek a stay of*

proceedings where he feels there has been an abuse of process, secondly, that he ought to exercise his common law right first before his trial judge and exhaust his appeals in the criminal court, thirdly, that it is only in extreme and urgent circumstances can a constitutional motion be filed while the trial is ongoing, fourthly, they caution the Court against allowing itself under the guise of a constitutional motion from being used as an appellate Court and fifthly, the Court has a discretion whether or not to allow a constitutional motion."

[33] In addition to the above I have reviewed the applicable law on this issue and I am also guided by the pronouncements of the Court of Appeal, in the claimant's earlier appeal[9] in which Webster JA writing for the Court helpfully distilled the law in this jurisdiction as follows:-

> *"Where there is an alleged breach of a specific provision of the Constitution, for example the right to a fair hearing within a reasonable time in section 8(1) of the Constitution of Saint Lucia, the courts will be more inclined to allow a constitutional motion to proceed because the applicant should not have to prepare for a trial, or retrial, that will take place after an unreasonable delay. However,* ***the right to use the constitutional procedure is not automatic and the judge retains his or her discretion under section 16 of the Constitution to decline to hear the complaint as a pre-trial application. It is clear from the proviso to the section that the power is discretionary. Thus, the Court may decline to hear a motion if adequate means of redress are or have been available to the applicant.*** *In the case at bar, the appellant's previous attempts to stay the trial following the common law procedures were unsuccessful and the current application appears to be an attempt by a different procedure to achieve the result that he failed to get in the previous applications. The learned judge was therefore correct to strike out the appellant's motion on this basis.*[10]

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[9] Urban St Brice v Attorney General SLUHCVAP2012/0027- delivered on 31st October, 2016 - see para 27 (c), 28, 30,31,33, 34 35 of the judgment

[10] See Bell v Director of Public Prosecutions of Jamaica and another [1985] 32 WIR 317 and Director of Public Prosecutions and another others v Jaikaran Tokai and others [1996] UKPC 19

In determining whether the overall delay is so great that the guarantee of a trial within a reasonable time has been breached, much will turn on the length of and reasons for the delay, and the resulting impact on the trial of the applicant. *Where the applicant's contribution to the delay is attributable to his or her pursuit of relief before the trial judge or another court or tribunal, the court may be minded to view the delay with some sympathy notwithstanding the applicant's contribution. However,* ***where the applicant's contribution to the delay is so significant and some of the delay was brought about by unsatisfactory reasons, the court will be less likely to find that even a long delay breaches the applicant's constitutional rights….***[11]

A breach of the right to a trial within a reasonable time is not fatal to the continuation of the trial if the appellant can still receive a fair trial…….."[12]
[Emphasis added]

[34] Applying the above principles to the facts as they have played out in the post 2012 period and having earlier concluded that the claimant is still substantially responsible for the further delays I am not persuaded on the evidence that even the long delay has breached the claimants constitutional right and that the time has come where claimant will not be in a position to receive a fair trial in the criminal court, given that the criminal trial process is well equipped to deal with all the complaints raised by the claimant through pre-trial applications, case management orders and even at a trial. As I understand it the court must look at the investigation and proceedings as a whole to see if the claimant has been denied justice and all these complaints can be competently dealt with by the trial judge in the pending applications before that court, without prejudice to the claimant.

[35] I am fortified in this view by the words of Saunders J in the **Gibson** case where he said:-

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[11] See Bell v Director of Public Prosecutions of Jamaica and another [1985] 32 WIR317 and Frank Errol Gibson v Attorney General of Barbados [2010] CCJ 3 applied.
[12] See Frank Errol Gibson v Attorney General of Barbados [2010] CCJ 3

"A permanent stay or dismissal of the charge cannot be regarded as the inevitable or even the normal remedy for cases of unreasonable delay where a fair trial is still possible."[13]

[36] He went on to say that:-

"Given the high level of public interest in the determination of very serious crimes, however, it will only be in exceptional circumstances that a person accused of such a crime will be able to obtain the remedy of a permanent stay or dismissal for the breach only of the reasonable time guarantee. Of course, such a remedy will be readily granted in cases where the delay has rendered it impossible to hold a fair trial."[14]

[37] It is true that final disposition of the case has been delayed for a very long time but it is the claimant who still bears the brunt of the responsibility for these delays. The Court must be mindful in not appearing to condone the ability of a party to use the court's own processes to bring about delay and then seek to assert that constitutional rights have been infringed on account of these delays.

[38] Accepting that breach of the right to trial within a reasonable time is not fatal if the claimant can still receive a fair trial, I am satisfied that the safeguards built into the criminal trial process still affords the claimant the opportunity to receive a fair hearing before the trial judge, who would be better placed to undertake the full assessment of the proceedings as a whole.

[39] Concerning the allegations of arbitrary arrest and search, false imprisonment, impropriety of the DPP and Inspector Chicot and inhumane and degrading prison treatment Mr Cenac submits that the claimant is now raising them for the first time and is estopped from raising them at this time. He had ample opportunity to do so before the criminal and constitutional

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[13] At para 62 of the judgment

[14] At para 63 of the judgment

courts in his earlier applications and more recently before the administrative court but that was never done. Counsel relied on **Henderson** v **Henderson**[15] in which a court said:-

> *"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

[40] I have perused of the earlier judgments in the case and it is correct to say that these issues are being raised for the first time. The claimant has navigated through the criminal trial process, a previous constitutional motion, multiple applications in the same vein before the criminal court and a judicial review application and appeal and may very well be estopped from raising these issues at this very late stage, having not done so the earlier proceedings. In any event some of these issues may still be canvassed in the criminal court, where the trial judge will have the opportunity to weigh these matters in the full context of the case to determine their treatment and impact on the case.

[41] Regarding disclosure of transcripts of previous criminal proceedings, the claimant asserts that he has not received all transcripts to enable him to adequately prepare for trial and in response the defendant indicated that the Registrar of the Court has confirmed that all available transcripts have been provided to the claimant through his several legal representatives and that some older transcripts and records may no longer be available.

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[15] (1843)

Mr Cenac stated that the matter is currently being addressed in one of the pending applications before the criminal court. I agree that in these circumstances the trial judge is well placed to dispose of that issue with due regard to the claimant's right to disclosure, which goes to the root of the fairness of the trial.

[42] I have considered the explanations provided by the defendant in relation to issues raised by claimant on matters concerning the evidence in general, unavailability of witnesses, use of depositions at retrial, defence of alibi, identification versus recognition, and find merit in the argument that all these matter should be disposed of in the criminal court and are not matters to be adjudicated upon by constitutional court at this time, as these matters still fall squarely within the purview of the trial judge.

[43] Consequently I conclude that the claimant has adequate means of redress in the proceedings in the criminal court, where several applications are already afoot. Considering that a trial judge has wide powers within the ambit of the new Criminal Procedure Rules to dispose of all the matters being canvassed here, I am is satisfied that the several of the issues raised in the motion can competently be taken before the trial judge and appealed if the defendant is not satisfied with the outcome. The authorities suggest that fairness of a trial is a matter to be determined by a trial judge. It is for that judge to determine whether there has been an abuse of process and whether a defendant's right to a fair trial can be preserved at the hearing.[16]

[44] In concluding, I am mindful of the dictates of sub-section 3 (5) of the Constitution which states:-

> "*3. (5) If any person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him or her, he or she shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later*

[16] The Queen v Kuanda RudolphTuitt Claim No.SLUHCR2005/0041-delivered on 11th May, 2009, unreported

date for trial or for proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive."

[45] On that basis I accept the recommendation that bail be granted to the claimant on suitable terms.

[46] I therefore make the following orders:-

1. The motion, as a pre-trial action is denied.

2. Bail is set in the sum of XCD$25,000.00 cash or suitable surety.

3. The claimant is to have a fixed place of abode at Dennier Rivere, Dennery.

4. The claimant is to surrender all travel documents and report to the Dennery Police Station every Monday and Friday at 8:00am and 6:00pm respectively.

5. The claimant shall first obtain permission from the court before filing any further applications on the same issues in this matter and in the absence of permission such application will automatically stand dismissed.

6. There is no order for costs.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar