

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV 2023/0193

IN THE MATTER of Sections 9, 12, 16(9), 18, 19, 31 and 97 (1) of the Virgin Islands Constitution, 2007

BETWEEN

CAROLYN O'NEAL MORTON

CLAIMANT

AND

[1] THE GOVERNOR

1st DEFENDANT

[2] DEPUTY GOVERNOR

2nd DEFENDANT

[3] THE DIRECTOR OF HUMAN RESOURCES

3rd DEFENDANT

[4] THE PUBLIC SERVICE COMMISSION

4th DEFENDANT

Appearances: Terrence Williams and Karlene Thomas-Lucien for the Claimant
Nicosie Dummett and Shonice Warner for the Defendants

2024: February 7th

ORAL DECISION

[1] YOUNG J: This is the decision on an application to strike out a constitutional motion as an abuse of process or that it discloses no reasonable cause of action.

- [2] The Claimant claimed that on 6th May, 2022, she had been sent on indefinite administrative leave by the 2nd and 3rd Defendant on an allegation of misconduct for obstructing the Auditor General sometime in or around June, 2020.
- [3] She was also ordered not to attend at any government office or facility or to have any discussions with any civil servant. Her actions were ordered to be investigated by a committee appointed by the 4th Defendant and this investigation was announced by the 1st Defendant as being of a criminal nature. This decision to investigate was irrational and made with neither notice or an opportunity to be heard and the announcement seriously injured her reputation and caused her to suffer distress and public embarrassment.
- [4] She was also ordered to provide answers to certain allegations before receiving a copy of all the evidence which had been presented to the 4th Defendant or the report and a brief statement of the allegations, made against her. To compound matters the investigation by the committee had not been pursued with diligence.
- [5] She alleged that her right to equal protection of law, to be heard within a reasonable time, to privacy and to freedom of movement have all been breached. She sought relief by way of various declarations, an order of certiorari quashing the decision for compulsory leave and the commencement of investigations, an order prohibiting the conduct of any investigation or disciplinary hearing in relation to the allegations of obstructing the Auditor General and damages (compensatory, vindicatory and exemplary) with costs.
- [6] The Applicant postured that as a constitutional motion, the claim ought to have been brought against the Attorney General only as representative of the Crown. Be that as it may, the Claim was in fact more in the nature of a judicial review, where leave should have been sought, masquerading as a claim for constitutional relief. Since the Claimant obviously had alternative forms of redress and constitutional claims ought not to be entertained for trivial breaches or where issues of fact are to be determined the Court should find little difficulty in striking it out.

- [7] The Claimant amended her originating motion on 21st September, 2023 to add the Attorney General as a party. She relied on her original affidavit filed in support and maintained that there was no reason whatsoever to strike out her claim.

The Issues

- [8] Whether the Claim form/Originating motion ought to be struck out:
- A. Was the Claim misconceived - a masquerade and/or an abuse of process
 - B. Was the Claim brought against the wrong parties

Striking out:

- [9] Civil Procedure Rule (CPR) 26.3 assures that the Court has the power to strike out a claim where there has been an abuse of process or where the claim is unmeritorious i.e. no reasonable grounds for bringing same. It is clear that it is the pleading which must be impugned as unsustainable on its face and that striking out is a most draconian step which must be taken only in the clearest of cases.

A. Was the Claim misconceived - a masquerade and/or an abuse of process

- [10] The Applicant was of the view that the Claim was rightly one for judicial review and having been filed in June 2023, the Claimant would have needed to have sought leave to file under the Old Civil Procedure Rules. The main pillar of this argument was that the claim for relief by certiorari and prohibition actually revealed the true nature of the claim. Seeking constitutional protection was but a disguise to “oust the decision making processes of the Defendants..... stymie any disciplinary proceeding by seeking to subvert the process by substituting this Court’s decision for those of the four (4) named Defendants.”
- [11] It is perhaps understandable why the Applicant would view this claim in the way that they have but it is a view with which this Court is unable to abide. There is no doubt that the Claimant seeks prerogative writs which are customarily sought in judicial review. But there is nothing which precludes the court from issuing such writs in a constitutional matter. The constitution, by section 31(2)(b), gives the courts wide power to fashion orders as seem appropriate, including issuing writs.

- [12] There is no doubt either that the use of a constitutional motion to circumvent the judicial review process could amount to an abuse of process and the Court must be vigilant to guard itself against this - **Andrew Titarenko et al v The Attorney General et al**¹ citing **Harrikisson v The Attorney General**². But such circumvention must be the sole purpose for which the motion is brought - **Belfonte v Attorney General**³.
- [13] In **Attorney General of Trinidad and Tobago v Ramanoop**⁴ the Privy Council gave texture to when the failure to proceed by way of the alternate remedy would amount to an abuse of process: "Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in **Ahnee v Director of Public Prosecutions**⁵, and see Lord Cooke of Thornton in **Observer Publications Ltd v Matthew**⁶."
- [14] **Durity v AG**⁷, agreed that "(t)he choice of remedy is not simply a matter for the individual, to decide upon as and when he pleases. As Lord Diplock observed in **Harrikissoon v Attorney General of Trinidad and Tobago**⁸, the value of the safeguard that is provided by section 14 will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In **Jaroo v Attorney-General of Trinidad and Tobago**⁹, the board said that if another procedure is available, resort to the procedure by way of an originating motion will be inappropriate and it will be an abuse of process to resort to it."
- [15] However, the alternative remedies must not only exist, they must be adequate. At paragraph 32 the board concluded:
32. The Harrikissoon principle on which Mr. Dingemans relies to defeat the Appellant's constitutional motion is based on the assumption that there was another procedure for obtaining a sufficient judicial remedy for the unlawful administrative action of which the person complains. If there was, he ought to have invoked it. For the reasons just given,

¹ BVIHCOM2021/0214

² [1980] AC 265

³ (2005) 68 WIR 413 (TT CA) at paragraph 18

⁴ (2006) 1 AC 328

⁵ [1999] 2 AC 294,307

⁶ (2001) 58 WIR 188, 206

⁷ [2008] Privy Council Appeal No. 83 of 2007 at para 28

⁸ [1980] AC 265, 268

⁹ [2002] UKPC 5, [2002] 1 AC 871, para 39

however, that cannot be said to be the situation in this case. The appellant is not to be criticized for not resorting to the uncertain procedure of judicial review as a means of enforcing the Commission's obligation to deal with his case promptly. It was for the Commission to ensure that it adhered to that standard, not for the appellant to prompt it to do so. Their Lordships have concluded that there was a breach of his constitutional right to due process – the essence of his right to the protection of the law under the procedure that regulation 90 lays down – and that he is entitled to relief against it by invoking the constitutional.

- [16] What also is certain is that the difference between the judicial review process and that for constitutional relief have blurred with the new Civil Procedure Rules (August, 2023). Those rules mercifully thrashed the initial leave process for judicial review which most times served only to delay the process. This means that both may now be commenced through the filing of a fixed date claim form. This court prays that the strike out application does not rapidly become its replacement.
- [17] To my mind, the end to the difference in process is a reflection of the changing time and attitude where, as was reminded in **Sears v Parole Board**¹⁰, the alternative of judicial review proceedings ought to take no precedence over a constitutional motion where the judicial review claim involves allegations of constitutional violation.
- [18] Paragraph 35 of **Sears v Parole Board** (above) proclaims “(t)he Court continues to caution against the unnecessary reliance on strict rules of procedure to shut out citizens from seeking constitutional relief, especially in the face of serious allegations of constitutional violations. The focus of this Court, as is the clear intention of the Constitution, is to provide flexible and effective access to justice for the peoples of Belize so that they can seek full vindication of their constitutional rights.”
- [19] The Constitution is no longer expected to be kept behind secluded doors (**Observer Publications v Matthew**¹¹). It is not some treasured family heirloom to be placed in a vault but the living pulsing heart of a nation. Its people must familiarize themselves with its contents and be easily able to seek its relief when it is appropriate to do so.

¹⁰ [2022] CCJ 13

¹¹ [2001] 58 WIR 188

- [20] In this case the Applicants have not demonstrated that the Claimant's sole purpose for bringing the constitutional motion was to circumvent the ordinary judicial review procedure. The series of events began in about May, 2022 they continued on until the Claimant received a letter of invitation to a meeting with the Investigative Committee scheduled for 20 June, 2023.
- [21] The Claimant says that even then she had received no reports which would inform her of the case she was to answer. She again wrote to the Attorney General on the 13th June, 2023 stating this. She filed this claim on the 23rd June, 2023. Issues of delay would have been non-existent and it is highly unlikely that the leave process would have been difficult to surmount by this Claimant. The Applicants have in fact not pointed the court in any particular direction which would support their allegation of circumvention and the Court has found none.
- [22] Moreover, the Claimant says she did much to ensure that the alleged breaches did not persist, but claims that each breach was compounded by a later one. She has identified a number of constitutional breaches. The most serious of which seem to be the arbitrary use of state power, delay and the constitutional remit of the Services Commission. The declarations she seeks are intended to send loud clear messages which, with all respect, the writs on their own will be unable to do.
- [23] In these circumstances the remedies on judicial review seem insufficient. There is nothing frivolous, vexatious or contrived. This Court simply could not find that the Claim had been misconceived or an abuse of process and would decline the invitation to strike it out on this ground.

Was the Claim brought against the correct parties:

- [24] The Applicant relied on section 13(2) of the Crown Proceeding Act and **Maharaj v the Attorney General**¹² for the principle (as applied in **Daniel Forde and Anor v The Attorney General**¹³) that the state is the proper party to be held liable for the actions of the judiciary. Since a High Court judge enjoys immunity from suit the Claimant would have been unable to get a remedy otherwise. She also asked the court to consider **Audrey Titarenko et al v Attorney General et al** where Ellis J as she

¹² (No.2) [1979] A.C. 385

¹³ SLUHCV 2017/0276

then was, followed **Maharaj** (above) and found that the Attorney General was the proper party to a constitutional motion. This matter also concerned the actions of members of the judiciary.

[25] The Respondent asked the court to note that neither the Constitution nor the CPR provided that the Attorney General was the only party to a constitutional claim. Where the constitution was silent on this issue, unlike the Trinidad constitution, the CPR in Rule 56.9(2)(d) anticipates there being more than one defendant by making reference to “additional defendants.” Counsel also referred to Rule 56.7 which required service of the constitutional motion on the Attorney General and surmised that this rule would not be necessary if the Attorney General was the only possible Defendant.

[26] He urged the court to disregard, as per incuriam, **Titarenko**, and cases that followed **Maharaj**, for an interpretation of the Crown Proceedings Act as being applicable to constitutional motions and other public law actions. And instead to properly construe “Crown” and Crown Proceedings under the Act to mean the Crown distinctly and not the Governor or any other public figure.

Court’s Consideration:

[27] Generally, a claim will not fail because the wrong party has or a party has not been added to a claim (CPR 8.5(1)). It is therefore highly unlikely that this claim would be struck out in its entirety if the Court finds that any of the stated parties should not have been added. In any event, the Attorney General has been added so that the thrust of the applicants’ argument loses some of its momentum.

[28] In determining the correct party to a claim for constitutional redress, the Privy Council in **Attorney General of Trinidad and Tobago v Smith (Trinidad and Tobago)**¹⁴ reviewed section 14 of the Trinidad and Tobago constitution which gave expressed effect to the State Liability and Proceedings Act. This effect had already been interpreted in **Durity v Attorney General of Trinidad and Tobago**¹⁵ as being not the entire Act but only “such provisions as are capable of being applied for this purpose.”

¹⁴ [2009] UKPC 50

¹⁵ [2003] 1 AC 405

- [29] It was also noted that Section 76(2) of the Trinidad and Tobago Constitution specifically stated that civil proceedings against the state shall be taken in the name of the Attorney General. Although neither ‘the state’ nor ‘civil proceedings’ were defined in the constitution, the Privy Council found, through an analysis of various pieces of indigenous legislation, that the Attorney General is to represent the state (in effect Central Government). The Attorney General is also to represent (except in judicial review proceedings) only those statutory bodies, which presumably because of their core functions, are deemed by section 19(8) and (9) to be part of the state.
- [30] This perhaps gave a clearer understanding of the limited application of the **Maharaj** principle in the British Virgin Islands. Unlike Trinidad and Tobago, the British Virgin Islands constitution is silent on the effect of the Crown Proceedings Act and it does not explicitly or impliedly state that the only defendant must be the Attorney General.
- [31] Counsel for the Respondent asked the Court to begin by considering the origins of the English Crown Proceedings Act which is the model for the Crown Proceeding Acts of the Caribbean, including the British Virgin Islands. It had in fact been passed to fill an existing gap in the private liability of the crown and its history shows it was never intended to be applied to public law - **Davidson v The Scottish Ministers**¹⁶.
- [32] He also relied on **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd.**¹⁷ which admittedly turned on section 18 of the Jamaican Crown Proceedings Act and its own restrictive definition of civil proceedings. There the Privy Council agreed that the Minister, not the Attorney General, was the proper party for judicial review.
- [33] While BVI does not have a definition similar to Jamaica’s section 18, in the Crown Proceedings Act I am drawn to the interpretation offered by Counsel for the Respondent. More importantly section 19(2) of the British Virgin Islands Crown Proceedings Act “limits “civil proceedings against the Crown” to actions previously under the Crown Suits Act, actions against the Crown under the Act and against His Majesty in *monstran de droit*. As stated in **Davidson** (above) all of these are private law actions.

¹⁶ [2006] SCLR 249

¹⁷ (1989) 39 WIR 270

We must not forget that the Act was intended to enable civil proceedings against the crown and its servants.

- [34] In **Richard Frederick et al v Comptroller of Customs and AG**¹⁸ the Court of Appeal considered the St. Lucian Crown Proceeding Act which is similarly worded to that of the BVI. They found at paragraph 32 that claims for constitutional redress “may fairly be regarded as “sui generis” A particular specie of civil proceedings falling outside the ambit of ordinary types of ‘civil proceedings’ contemplated by the CPA.” The Court of Appeal went on to state that even the CPR recognised this when it placed public law matters under its own particular regime.
- [35] In fact if we take a proper look at the CPR it mandates that the Attorney General must be served with the constitutional motion once filed. If the Attorney General was indeed the only possible party why would this be necessary. It certainly does not preclude any other person from being joined as a party.
- [36] The Court of Appeal in the BVI case of **Quorum Island (BVI) Limited v Virgin Islands Environmental Council and Minister of Planning**¹⁹ a judicial review matter, considered the BVI CPA and found that in judicial review matters the Attorney General need not be a party and certainly not the only party. This Court can fathom no reason why it would be any different for a constitutional matter.
- [37] Since the first, Second and Third Defendants have all been alleged to have taken some action which has caused harm to the Claimant. they are the parties who ought correctly to have been joined particularly where quashing orders are also being made against decisions made by them. There is none amongst them who is immune from suit.
- [38] The Court will therefore dismiss this application in its entirety and make orders for the progress of the matter.

¹⁸ HCVAP 2008/037 (St. Lucia)

¹⁹ HCVAP 2009/021

[39] **Disposition:**

1. The Application is dismissed with costs in the sum of \$3,500.00.
2. The Defendants are to file their defence on or before 11th March, 2024.
3. The Claimant may file a reply on or before the 27th March, 2024.
4. Any additional evidence may be filed by 3rd April, 2024.
5. Any notice to cross examine witnesses may be given to the court on the 10th April, 2024.
6. Skeleton Arguments are to filed and exchanged by 7th May, 2024.
7. Any additional skeletons from either party may be filed on or before the 21st May, 2024.
8. The matter is adjourned for trial on the 23rd September, 2024.
9. The parties have agreed to a possible earlier trial date on short notice (no less than one week) from the court office.

**Sonya Young
High Court Judge**

By the Court

Registrar