

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

SLUHCV2020/0084

**IN THE MATTER of Section 8(8), of the
Constitution of Saint Lucia**

And

**IN THE MATTER of an Application for
declaratory relief by LEOZANDRAE
DELEON pursuant to section 16(1) of
Constitution of Saint Lucia.**

And

**IN THE MATTER of an Application by
THE ATTORNEY GENERAL OF SAINT
LUCIA to decline jurisdiction pursuant
to section 16(2) of Constitution of
Saint Lucia and to strike out the
originating motion and affidavit in
support as an abuse of process.**

BETWEEN:

LEOZANDRAE DE LEON

Claimant

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Peter I Foster QC with Ms. Ann-Alicia Fagan for the Claimant
Mr. Rene Williams with Mrs. Antonia Charlemagne and Mrs. Rochelle John-Charles for the Defendant

Present:

Deputy Commissioner of Police, Dorian O'Brian

2020: October 12;
December 2.

DECISION

Introduction

- [1] **CENAC-PHULGENCE, J:** This decision is in respect of an application filed by the defendant/applicant, the Attorney General of Saint Lucia (“the Defendant”) seeking a declaration that the Court ought not to exercise its jurisdiction to try the claim herein, pursuant to rule 9.7 of the **Civil Procedure Rules 2000** (“the CPR”) and section 16(2) of the **Constitution of Saint Lucia**¹ (“the Constitution”); and further or alternatively, an order that the originating motion and affidavit in support filed by the claimant/respondent, Leozandrae De Leon (“the Claimant”), on 14th February 2020 be struck out as an abuse of process.

Background

- [2] The Claimant, on 10th October 2019 filed a claim, being Claim No. SLUHCV2019/0456, naming four persons as defendants, seeking damages for libel and an injunction restraining them from publishing, or causing to be published, words defamatory of him (“the defamation proceedings”). The third named defendant in the defamation proceedings is Deputy Commissioner of Police Dorian O'Brian (“Mr. O'Brian”), who is alleged to have made defamatory statements concerning the Claimant at

¹ Cap 1.01 of the Laws of Saint Lucia.

a press conference on 30th October 2018. The Defendant, representing Mr. O'Brian in the defamation proceedings, on 20th November 2019 filed an application to strike out the claim against him on the grounds that:

- (1) the claim could not be maintained against Mr. O'Brian in his personal capacity, as the alleged wrong occurred during the exercise of his duties as a police officer pursuant to sections 4(1) and 13(2) of the **Crown Proceedings Act**² ("the CPA");
- (2) the claim was prescribed by virtue of article 2124 of the **Civil Code**³, more than six months having elapsed from the date of the alleged defamatory statements being made; and
- (3) the Claimant failed to serve a notice of suit as required by article 28 of the **Code of Civil Procedure**⁴ ("the CCP").

[3] On 25th November 2019, the Claimant filed a notice of opposition to the application to strike out in the defamation proceedings, and on 17th January 2020, the Claimant filed an affidavit and submissions in opposition. The hearing of the application was adjourned to 17th February 2020. On 14th February 2020, one working day prior to the date scheduled for the hearing of the said application, the Claimant filed the originating motion and affidavit herein ("the constitutional claim") seeking declarations that section 4(1) of the CPA, article 2124 of the **Civil Code** and article 28 of the CCP are inconsistent with section 8(8) of the Constitution. The application in the defamation proceedings to strike out the claim against Mr. O'Brian has not been heard.

The Application

² Cap 2.05 of the Laws of Saint Lucia.

³ Cap 4.01 of the Laws of Saint Lucia.

⁴ Cap 4.01A of the Laws of Saint Lucia.

- [4] It is on the basis of the foregoing that the Defendant filed this application for a declaration that the Court should not exercise its jurisdiction to try the constitutional claim pursuant to rule 9.7 of the CPR and section 16(2) of the Constitution; and/or an order that the constitutional claim be struck out as an abuse of process.
- [5] The grounds of the application are that:
- (1) the Defendant's application to strike out the claim against Mr. O'Brian in the defamation proceedings has not yet been heard; therefore, no judicial determination has been made as to whether the defamation proceedings against him should be struck out on the basis of the statutes that the Claimant asks the Court to declare unconstitutional;
 - (2) if the application to strike out the claim against Mr. O'Brian in the defamation proceedings is not determined in the Claimant's favor, the Claimant has a right of appeal;
 - (3) the Claimant also has the option to amend his statement of claim in the defamation proceedings to cure any perceived defects highlighted by the application to strike out therein;
 - (4) the constitutional claim is therefore premature, as the Claimant has not exhausted all alternative remedies available to him before invoking the Court's constitutional jurisdiction; and
 - (5) the Claimant has failed to comply with the legislative provisions he seeks to have declared unconstitutional, thus amounting to an abuse of process.

Defendant/Applicant's Submissions

Jurisdiction

- [6] The Defendant in submissions filed on 17th December 2019 submits that while section 16(1) of the Constitution allows a person to apply to the High Court in respect of an alleged contravention, or likely contravention, of the

rights contained in sections 2 to 15 thereof, section 16(2) contains a proviso, which limits the right of access to the court. Section 16(2) states:

“Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.”

- [7] The Defendant submits that section 16(2) of the Constitution grants the High Court a discretion whether to exercise its jurisdiction to hear a constitutional claim, which has been confirmed by the Privy Council in the case of **Jaroo v The Attorney General of Trinidad and Tobago**:⁵

“Nevertheless, it has been made clear more than once by their Lordships' Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy. In **Harrikissoon v Attorney General of Trinidad and Tobago** [1980] AC 265, 268, Lord Diplock said with reference to the provisions in the Trinidad and Tobago (Constitution) Order in Council 1962:

‘The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value 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 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 for unlawful

⁵ [2002] UKPC 5.

administrative action which involves no contravention of any human right or fundamental freedom.”⁶

- [8] The Defendant submits therefore that the Court should decline to hear the constitutional claim pursuant to section 16(2) of the Constitution on the ground that there have been alternative remedies available to the Claimant in the ongoing defamation proceedings.

Alternative Remedies

- [9] The Defendant submits that there are or have been adequate alternative remedies available to the Claimant in the defamation proceedings, which do not require him to resort to the Court’s constitutional jurisdiction. The Defendant identifies the following as such alternative remedies:
- (1) an interlocutory appeal pursuant to section 26(2)(g) of the **Supreme Court Act**⁷ and CPR 62.10, if the Court should rule against the Claimant in the strike out application in the defamation proceedings;
 - (2) amendment of the Claimant’s statement of claim in the defamation proceedings before the date fixed for case management, pursuant to CPR 20.1(1); or
 - (3) amendment after the date fixed for case management, pursuant to CPR 20.1(2).
- [10] The Defendant notes that the Claimant had nearly one month from the date of Mr. O’Brian’s application to strike out in the defamation proceedings to the first case management conference to make any amendments to its statement of case but chose not to avail himself of this opportunity. The Defendant submits that the Claimant still has the opportunity to apply to the court to amend his statement of claim. Furthermore, the Privy Council has ruled, in the case of **Real Time**

⁶ At para. 29.

⁷ Cap 2.01 of the Laws of Saint Lucia

Systems Ltd v Renraw Investments Ltd and others,⁸ that it is possible for the court to allow an amendment of pleadings rather than striking out. However, the Claimant, thus far, has failed to take steps to make such amendments and has instead commenced this constitutional claim.

- [11] In support of its position, the Defendant also relies on the case of **The Attorney General of Trinidad and Tobago v Ramanoop**,⁹ where the Privy Council stated:

“In other words, 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.”¹⁰

- [12] The Defendant submits that there is no special feature of the constitutional claim which renders the alternative remedies of an appeal or amendment to the statements of case inadequate. The Defendant disagrees with the Claimant’s assertion that the remedy of a civil appeal is inadequate because the Claimant is seeking to strike down the legislative provisions themselves. The Defendant submits that the alternatives identified give the Claimant the opportunity to proceed with his claim against Mr. O’Brian without striking down legislation.

Abuse of Process

- [13] The Defendant submits that the constitutional claim is an abuse of the Court’s process as there has been no decision by the Court on the strike out application in the defamation proceedings that has resulted in the

⁸ [2014] UKPC 6.

⁹ [2005] UKPC 15.

¹⁰ At para. 25.

Claimant's rights being infringed. The Claimant has also failed to demonstrate that his constitutional rights are likely to be infringed, as the Court has given no indication as to how it might rule on that application.

[14] Further, it cannot be said that the Claimant has conceded Mr. O'Brian's application to strike out in the defamation proceedings, as he has resisted that application by filing an affidavit and submissions in opposition. The constitutional claim appears therefore to have been filed in anticipation of an unfavorable decision on the pending strike out application in the defamation proceedings; and use of the Court's constitutional jurisdiction in such a manner has been consistently held to be an abuse of process. The Claimant cannot simultaneously argue that the legislation complained of infringes his rights under section 8(8) of the Constitution whilst he is able and continues to advance his claim against Mr. O'Brian in the defamation proceedings, wherein, notably, he advances the posture that the provisions of the legislation being challenged on the constitutional claim are inapplicable to the defamation proceedings.

[15] The Defendant relies on several cases in support. The Defendant relies on the Court of Appeal's statement in **David Brandt v The Commissioner of Police et al**,¹¹ that it must guard against the use of constitutional motions to derail or delay proceedings in the civil and criminal Divisions of the High Court. The application before the criminal division of the High Court in that case involved the construction to be given to section 141 of the Penal Code, which it held to be a matter eminently suitable for resolution by a judge of the High Court, and that it was wholly inappropriate for the Court of Appeal, or the High Court in its constitutional jurisdiction, to be made to tread upon the criminal jurisdiction of the High Court. It was therefore held that the procedure

¹¹ MNIHCVAP2019/0009, delivered 14th February 2020, unreported.

used by the appellant to bring the matter to the High Court as a constitutional claim was entirely wrong and improper.

- [16] In **Richard Hinds v The Attorney General and another**,¹² the appellant who argued that he was denied free legal representation in his criminal trial sought to challenge a decision of the Court of Appeal affirming his conviction, pursuant to the provision equivalent to section 16 of the Constitution. The Privy Council warned:

“... A claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The appellant’s complaint was one to be pursued by way of appeal against conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on section 24.”¹³

- [17] The Defendant also cites **Chokolingo v Attorney General of Trinidad and Tobago**,¹⁴ wherein it was held that the procedure for redress for breach of constitutional rights is not to be used as a means of collateral attack on the judgment of a Court acting within its jurisdiction. The Defendant submits that here, the Claimant has mounted a collateral attack on a decision of the Court even before the decision has been rendered.

- [18] The Defendant submits that based on the foregoing, the Claimant should either concede Mr. O’Brian’s application in the defamation proceedings and then pursue the constitutional claim; or defend the application to strike out in the defamation proceedings and withdraw the constitutional claim. However, continuation of the constitutional claim, as it stands, inhibits the just disposal of the defamation proceedings and is therefore an abuse of process.

¹² [2001] UKPC 56.

¹³ At para. 24.

¹⁴ [1981] 1 All ER 244.

Claimant/Respondent's Submissions

Jurisdiction

- [19] The Claimant submits that the Court in **Davidson Ferguson v Sarah Anita Ferguson**¹⁵ has defined 'jurisdiction' as used in CPR 9.7 in the following manner:

“The word “jurisdiction” in CPR 9.7 is used in two different senses. One meaning is “territorial jurisdiction” which governs service of the claim form out of the jurisdiction and the other is “jurisdiction” or “authority” to try the claim.”¹⁶

- [20] The Claimant submits that the Defendant has failed to set out in its notice of application to strike out and/or affidavit in support, any reason why the Court would not have 'territorial jurisdiction' or the relevant 'authority' to try the constitutional claim. The Claimant argues that, to the contrary, the nature of the claim before the Court is one that is constitutional in nature and it is widely recognized that the High Court holds inherent and original jurisdiction to hear and ventilate constitutional proceedings between the State and its citizens, pursuant to section 105 of the Constitution. Further, the Court has universal and unrestricted control over its own jurisdiction, and this includes the power to decide when it will not exercise jurisdiction as established in the case of **Canada Trust Co. v Stolzenberg and Gambazzi**.¹⁷

- [21] Therefore, the Claimant submits that CPR 9.7 is not applicable to the instant case, as both parties are obviously within the Court's territorial jurisdiction, and the High Court has express original jurisdiction to try constitutional claims.

¹⁵ SLUHCv2012/0387, delivered 22nd October 2015, unreported.

¹⁶ At para. 25.

¹⁷ [1997] 1 W.L.R. 1582.

Alternative Remedies

- [22] The Claimant submits that the constitutional court of Saint Lucia is the only tribunal that holds the jurisdiction to declare an otherwise enforceable statutory provision unconstitutional and to strike down same on the basis of its non-conformity with the Constitution. Therefore, a civil appeal against the strike out application in the defamation proceedings, as suggested by the Defendant cannot provide the Claimant with the remedies he seeks, which are, in effect, declarations of unconstitutionality and striking down of the legislative provisions themselves. Such an appeal would have the mere effect of reviewing the decision of the High Court as to whether it applied the correct legal principles with respect to striking out. To this extent, an interlocutory appeal against any decision made on the strike out application is not and cannot be viewed as an alternative remedy of any kind.
- [23] The Claimant submits also, that the matters raised on the strike out application in the defamation proceedings could hardly be addressed by amendment, since the same do not relate to the content of the pleadings but rather to procedural, and more importantly constitutional issues, which affect the Claimant personally, and other persons in a similar position. An amendment of the Claimant's statement of case, whether before or after case management conference, cannot therefore provide the remedies sought, which are declarations of unconstitutionality, and a striking down of pre-independence legislative provisions.
- [24] Additionally, the Claimant submits that courts have held that, even in cases where an alternative remedy would effectively exist, recourse to the constitutional court would not be denied, where the means of legal redress otherwise available would not be 'adequate'. The Claimant relies on the

same paragraph of **The Attorney General v Ramanoop**, cited by the Defendant:

“In other words, 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.”¹⁸

[25] The Claimant submits that the position was confirmed in **Matthew McMillan v Alonzo Carty et al**:¹⁹

“Ramanoop adds a gloss on the Harrikissoon principle when Lord Hope stated that notwithstanding the existence of a parallel remedy an applicant might still use the originating procedure if the circumstances of which he complains contain some feature that makes it appropriate so to do. That feature must arguably indicate that the means of legal redress otherwise available would not be adequate....”²⁰

[26] The Claimant therefore submits, in the alternative, that should the Court find that a civil appeal is an available alternative remedy, such remedy would not be one that is “adequate”, because it would not provide the nature of relief for which the Claimant has petitioned this Court, being declarations of unconstitutionality.

Abuse of Process

[27] The Claimant submits that, whereas in the defamation proceedings, he brought a claim against four named defendants for untrue statements made by them in relation to him; in the current matter, he challenges section 4 of the CPA, article 2124 of the **Civil Code** and article 28 of the CCP as being in violation of the Constitution, on which provisions the Defendant relies to defeat his claim in the defamation proceedings. The Claimant’s claim in the defamation proceedings is therefore one that is

¹⁸ At para. 25.

¹⁹ SKBHCV2017/0380, re-issued 13th November 2019, unreported.

²⁰ At para. 13.

entirely of a private nature; while the constitutional claim is one that contains a public element. Should he be successful, the result is that the law would be amended, future litigants are likely to be affected, and it is also an exercise of his right to 'redress' pursuant to section 16(1) of the Constitution.

- [28] The Claimant relies on the House of Lords case of **Johnson v Gore Wood & Co.**²¹ where it was held that when considering whether a second claim is an abuse of process, a 'broad, merits-based judgment' has to be made taking into account all the public and private interests involved and all the facts. There it was stated:

"... That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not... it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice".²²

- [29] The Claimant also relies on the statement of Lord Bingham in **The Attorney General v Paul Evan John Barker**,²³ where he described an abuse of the court's process as "a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".²⁴ The Claimant submits that the constitutional claim is an ordinary and proper use of the Court's process in accordance with

²¹ [2002] 2 A.C. 1.

²² At para. 31.

²³ [2000] EWHC 453.

²⁴ At para. 19.

the redress clause in section 16(1) of the Constitution. Thus, it is not an abuse of the Court's process.

[30] The Claimant submits that his constitutional claim is distinguishable from the criminal cases cited by the Defendant in support of its position that it is an abuse of process, as the circumstances of those authorities are not analogous to the extant matter. In the case of **David Brandt v Commissioner of Police**, Mr. Brandt made three separate attempts to delay his criminal trial by filing appeals challenging decisions of the courts below on constitutional grounds, all of which were dismissed. The Claimant in the present case has not sought to make multiple constitutional challenges, nor has the Claimant attempted to delay a trial or any proceedings by virtue of his constitutional claim.

[31] In the case of **Richard Hinds v The Attorney General**, the appellant made what amounted to a 'collateral attack' on his criminal conviction on constitutional grounds. It was held that the proper route for the applicant in that case was to make a further appeal to Her Majesty in Council. The appellant did not pursue that further appeal; instead he filed fresh constitutional proceedings. The Court ruled that if, for whatever reason, he did not or could not pursue that further appeal, it was not open to him to return to the High Court of Barbados and advance arguments which had been advanced or could and should properly have been advanced at an earlier stage. The Court held that it was to such a case that the proviso to section 24(2) of the Barbados Constitution applied. The Claimant states that in the extant circumstances, he has not sought to bring a constitutional claim to avoid a final appeal to the Privy Council or any appeal for that matter. On the contrary, the Claimant is challenging a set of pre-independence and clearly discriminatory provisions.

[32] The Claimant further submits that striking out is a power that should be used 'sparingly', and in exercising its powers to strike out, the Court

should consider the cardinal principles as delineated by Pereira CJ in **Cedar Valley Spring Homeowners Association Inc. v Hyacinth Pestaina**; **Cedar Valley Spring Homeowners Association Inc. v Kenneth Meade et al**²⁵ as follows.

“From these authorities the following principles may be distilled:

(a) This summary procedure which calls for the exercise of a discretionary power, should only be used in clear and obvious cases as it is a drastic step. The result of such a measure is that it deprives a party of his right to a trial and his ability to strengthen his case through the process of disclosure and other procedures such as requests for information.

(b) This procedure should only be used where it can be seen on the face of the claim that it is obviously unsustainable, cannot proceed or in some other way is an abuse of process of the court. This has been expressed in terms that the claim should not be struck out if there is a ‘scintilla’ of a cause of action.

(c) In treating with an application to strike out made pursuant to CPR 26.3(1)(b), the trier of the application should proceed on the assumption that the facts alleged in the statement of case are true.

(d) The employment of this procedure is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about, or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognizable claim against the defendant.

(e) Conversely, this procedure would be inappropriate where the argument involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the strength of the case may not be clear because it has to be fully investigated.”²⁶

Judicial Support: Prima Facie Case Made Out

[33] The Claimant submits that he finds support for the constitutional claim in dicta emanating from this very Court in the case of **Catherine Sharon**

²⁵ ANUHCVP2016/0009; ANUHCVP2016/0010, delivered 18th January 2017, unreported.

²⁶ At para. 6.

Peter-Mercner v Attorney General of Saint Lucia,²⁷ where Belle J highlighted the discriminatory nature of the provisions which are now being challenged and indirectly hinted that the time would come when a litigant would effectively contest these provisions on the basis of their non-conformity with the Constitution and its guaranteed rights. In relation to article 28 of the CCP he observed:

“The representatives of the Crown are quite aware that when the shoe is on the other foot the Crown faces no such restrictions. Perhaps the Crown does not have to bring such actions very often, but the fact is that the law clearly discriminates in the Crown's favour. Discrimination is frowned upon by the law and the Constitution...”²⁸

[34] In relation to article 2124 of the **Civil Code**, he noted its discriminatory nature, highlighting:

“Indeed, in most if not all of the Constitutions of the Eastern Caribbean the concept of fairness is enshrined in the Constitution in terms stated in section 8 (8) of the Constitution of Saint Lucia....The restrictions on filing a suit against the Crown are already discriminatory. Article 2124 of the Civil Code provides that actions against public officers, (not the Crown nor agents of the Crown) in respect of acts done by them in good faith and in respect of their public duties are prescribed by six months”.²⁹

Procedure

[35] The Claimant submits that constitutional issues which may affect the viability of pleadings or decisions to be made by the Court are often heard ahead of other applications in civil proceedings. The Claimant brought to the Court's attention, two decisions that illustrate this approach.

[36] In the case of **Shorn Braveboy et al v Richard Daniel et al**³⁰ the applicant obtained a judgment sum with interest and costs against the Government of Grenada. The Government failed to promptly satisfy the

²⁷ SLUHCv2011/1292, delivered 26th February 2015, unreported.

²⁸ At para. 15.

²⁹ At paras. 33-34.

³⁰ GDAHCv2010/0247, delivered 12th July 2019, unreported at paras. 1-3.

judgment debt, causing the applicants to apply under rule 50 of the CPR for a provisional garnishee order in respect of funds belonging to the Government held in accounts at the garnishees. Faced with the obstacle that CPR 50.2(3) and CPR 59.7 prohibited an attachment of debts order against the State and section 21(4) of the Act forbids the enforcement of money judgments against the Crown, the applicants contended that those provisions violated section 8(8) of the Constitution of Grenada. The learned judge ruled that a challenge to the constitutionality of those provisions could not be made within the application for a charging order and had to be brought by way of an originating motion. On appeal against that ruling, the Court of Appeal set it aside, and gave directions for the hearing and determination of the constitutional challenge. Accordingly, the High Court heard the constitutional challenge and struck down section 21(4) of the Crown Proceedings Act and rules 50.2(3) and 59.7 of the CPR as being in breach of section 8(8) of the Grenada Constitution, thereby paving the way for the application for enforcement of the judgment debt against the Crown to proceed.

- [37] Similarly, in **Allen Chastanet v Ernest Hilaire**,³¹ which concerned a defamation action, the defendant applied to strike out the claimant's statement of claim on the basis that the words complained were not capable of bearing the meaning attributed to them. The claimant thereafter applied to strike out the defendant's defence on the basis that it disclosed no reasonable defence to the claim, as the defence was predicated on the United Kingdom Defamation Act 2013 which had no application to Saint Lucia. At the hearing of these applications, it was agreed that the issue as to the applicability of the United Kingdom Defamation Act 2013 should be taken separately since the viability of each party's pleadings rested on the outcome of that issue. The Court

³¹ SLUHCVP2019/0005, delivered 16th January 2020, unreported at paras. 1-9; see also *Ernest Hilaire v Allen Chastanet* SLUHCVP2017/0190, delivered 29th November 2018, unreported at paras. 1-5.

would first hear extensive arguments on the applicability of the United Kingdom Defamation Act 2013; and if found applicable, whether article 917A of the **Civil Code**, in so far as it purports to allow the importation of UK statutes and laws into the jurisdiction, was in breach of sections 40 and 120 of the **Constitution of Saint Lucia**. The Claimant suggests that a similar approach should be taken in the instant matter

- [38] The Claimant submits that it is not desirable for the Court to strike out the constitutional claim as an abuse of process, being guided by the authorities cited above and the procedure adopted by this Court in the past. The Claimant submits that his constitutional claim is clear, focused, and sustainable; makes proper use of the court's process; and is important as it raises substantial issues that have prevented litigants in the past from gaining access to the courts, where the Crown continues to be treated as not being equal before the law, and as a result should not be struck out.

Analysis

- [39] I agree entirely with the submissions of the Claimant and therefore dismiss the Defendant's application asking the Court not to exercise its jurisdiction to hear the constitutional claim and/or to strike out the constitutional claim, for the reasons which are stated below.

Jurisdiction

- [40] From the outset, rule 9.7 of the CPR has no relevance to the present application. The Defendant, I believe, recognizes this as it has not pursued CPR 9.7 in the submissions filed, its only mention being in the notice of application. I would merely reiterate, as pointed out by the Claimant, that both parties are within the Court's territorial jurisdiction, and this Court has the express authority to hear and determine constitutional

motions, over which the High Court holds original jurisdiction pursuant to section 16(2)(a) of the Constitution.

- [41] The only question that arises is whether the Court ought to decline to exercise its jurisdiction to hear this claim under section 16(2) of the Constitution. Section 16 of the Constitution, so far as relevant, provides as follows:

“16. Enforcement of protective provisions

- (1) If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or **is likely to be contravened in relation to him or her ... , then, without prejudice to any other action with respect to the same matter which is lawfully available, that person ... may apply to the High Court for redress.**

- (2) The High Court shall have **original jurisdiction—**

- (a) **to hear and determine any application made by any person in pursuance of subsection (1); and**

- (b) ...,

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive):

Provided that the High Court **may** decline to exercise its powers under this subsection if it is satisfied that **adequate** means of redress for the contravention alleged are or have been available to the person concerned under any other law.”... (my emphasis)

- [42] It is clear from the wording of section 16 that the Court has a discretion whether or not to exercise its jurisdiction to hear a constitutional claim. The Defendant acknowledges this in its submissions. The basis on which the Court may decline to exercise its powers, according to the proviso, is where the Court is satisfied that adequate means of redress for the alleged contravention is available under any other law. Thus, in deciding whether to exercise its discretion, the Court must not only consider the existence of alternative redress, but whether such alternative redress would be adequate in the circumstances. The wording of the section also reveals that even where adequate redress is otherwise available, the court

retains a discretion. The cases cited by both the Claimant and Defendant support this position. In **Jaroo v Attorney General**, the Board acknowledged that the right to apply pursuant to the equivalent of section 16 may be exercised where there is a parallel remedy only in exceptional circumstances. The Board in **Attorney General v Ramanooop** explained that such 'exceptional circumstances' or 'special feature' should arguably indicate that the means of legal redress otherwise available would not be adequate. It is worth taking a closer look at the cases.

[43] In **Jaroo v Attorney General**, the appellant's case was that his vehicle had been unlawfully detained by the police. He sought an order for its return together with damages for contravention of his rights under section 4(a) and 4(b) of the Constitution, for being deprived of enjoyment of his property without due process and not being afforded protection under the law, respectively. Their Lordships considered that the right in section 4(a) was in principle a right that the appellant was entitled to assert in relation to the motor car and noted that the facts suggested that the police were unlawfully abusing their common law powers.

[44] In addition to the passage herein quoted by the parties, their Lordships noted that section 14(1) permitted a person to apply to the High Court for redress by originating motion without prejudice to any other action in respect of the same matter, and that this procedure enabled persons who seek a quick judicial remedy to avoid the delay and expense which a trial by means of an ordinary civil action would involve. They found that the appellant having not received any replies to his several inquiries concerning his motor car could not reasonably have been criticized for regarding the constitutional route as the best way to make rapid progress in his efforts to obtain the return of the motor car. There was no doubt, however, that a parallel remedy was available to him to enforce his rights, being an action for delivery in detinue.

- [45] On the question of whether it was appropriate for him proceed by originating motion under the Constitution where there was an obvious available recourse under the common law, their Lordships considered the affidavit of the Crown's witness filed in response to the motion. It revealed issues of fact that were required to be tested by evidence, in particular, whether the police had the right to continue to detain the vehicle. Their Lordships stated that the originating motion procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue; it is unsuitable in cases that depend for their decision upon resolution of disputes as to fact, which must be resolved by procedures which are available in the ordinary courts of the common law.
- [46] Their Lordships approved the Court of Appeal's suggested approach to determining the question of whether a claim ought to be brought by way of constitutional motion - that before a claimant resorts to constitutional procedure, he must consider the true nature of the right allegedly contravened; whether having regard to all the circumstances, some other procedure, either under the common law or pursuant to statute, might not more conveniently be invoked; and if another such procedure is available, resort to procedure by way of originating motion will be inappropriate and an abuse of process. In this case their Lordships held that when it became apparent that there was a dispute of fact, the claimant ought to have withdrawn the constitutional motion.
- [47] In **Attorney General v Ramanooop**, the respondent alleged that he had been badly beaten and imprisoned by a police officer. He instituted proceedings against the Attorney General by way of originating motion, claiming declarations that the assault, arrest and imprisonment were in breach of his constitutional rights, and damages including exemplary

damages. His treatment was described by their Lordships as a shameful misuse of the coercive powers of the state. The Attorney General did not dispute any of the facts, and the declarations sought were made with the consent of the Attorney General.

- [48] Their Lordships noted that the Attorney General had not raised any objection to the proceedings taking the form of an originating motion seeking constitutional relief rather than a common law action for damages for unlawful detention and assault. They commented that the Attorney General was right to do so. As to such choice, they reiterated their position in **Jaroo v Attorney General**, that an originating motion is a summary procedure and save in the simplest of cases, it is ill-suited to decide substantial factual disputes, which usually requires pleadings, discovery and oral evidence. They held this was not such a case. Their Lordships agreed that the starting point was as established in **Harrikissoon v The Attorney General of Trinidad and Tobago**, but clarified:

“... 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 courts process.”³²

- [49] However, their Lordships did not end there, but continued:

“That said their Lordships hasten to add that the need for the courts to be very vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived

³² At para. 25.

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.'"³³ (my emphasis)

[50] Their Lordships also made the point that the fact that proceedings brought by way of originating motion for constitutional relief are less costly and lead to a speedier hearing than proceedings brought by way of writ is not a sufficient ground for invoking the constitutional jurisdiction and does not constitute a reason why a parallel remedy is to be regarded as inadequate. Proceedings brought in such manner are a misuse of the section 14 jurisdiction.

[51] In addition to what their Lordships have stated in relation to the **Harrikissoon** principle, I would comment that **Harrikissoon** related specifically to cases that did not involve any contravention of any human right or fundamental freedom. The case made the point that not every failure by a public authority to comply with a law amounts to a breach of one's constitutional rights and freedoms for which constitutional redress could be sought. It observed that if use of constitutional redress as a general means of judicial control of executive action, whether or not it involved breach of constitutional rights and freedoms were permitted, it would devalue or diminish the redress clause. Therefore, where a constitutional motion is brought for the sole purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action, which involves no contravention of any fundamental right or freedom, the Court ought to decline to exercise its jurisdiction. As expressly stated by their Lordships, the principle did not preclude a litigant from bringing a constitutional motion where there was indeed breach of a constitutional right, and certainly not in circumstances where there is no adequate alternative form of redress.

³³ At para. 26.

- [52] In **McMillan v Carty**, the claimant filed a fixed date claim seeking declaratory and compensatory relief under section 18 of the Constitution of Saint Christopher and Nevis, claiming a declaration that his arrest and/or detention for suspicion of invasion of privacy for approximately 11 hours: was unreasonable and unlawful: was unconstitutional as it violated his right to personal liberty in contravention of sections 5(1), 5(1)(f) and 5(6) of the Constitution and his right to freedom of movement in contravention of sections 14(1), 14(2) and 14(3) of the Constitution. He also claimed a declaration that the seizure of his property violated his constitutional right to protection from arbitrary search in contravention of section 9(1) of the Constitution.
- [53] The defendants filed an application pursuant to CPR 26.3(1)(c) to strike out the originating motion as an abuse of process of the court. The basis of the application was first that the claimant had an alternative means of redress, namely, false imprisonment and trespass, which adequately protects individuals who have been unlawfully arrested and detained by police officers. Second, the claimant sought a declaration that he was entitled to compensatory and exemplary damages, which would be available to him if he were to succeed in an action for false imprisonment. Third, there were facts in dispute - the defendants disputed that the arrest/detention of the claimant was unlawful because there was reasonable suspicion that the common law offence of watching and besetting was committed or about to be committed. The search carried out in relation to his possessions was done pursuant to police procedure properly to identify and secure the claimant's possessions and the devices required for further investigations pending the application for a production order. This meant that the claim should more properly be tested under the ordinary civil procedures, with discovery of documents, witness statements and cross-examination at trial. Fourth, the claimant had not set out in his affidavit any feature which made the originating motion

procedure more appropriate and there are no allegations in his affidavit indicative of any heavy handed and arbitrary actions by the police officer.

[54] The claimant in an affidavit in response averred that the relief sought in his originating motion extended beyond a claim for false imprisonment. The actions of the defendants prevented him from boarding a scheduled flight to depart Saint Christopher and Nevis, and that he was wrongly detained at the airport and at the Basseterre Police Station. The defendants unlawfully searched and confiscated his personal property and attempted to conduct an unlawful examination of his electronic devices in a fishing expedition to determine whether he held any pictures or documents concerning the complainant, in a clear abuse of authority, in breach of his constitutional rights and on the basis of suspicion of committing an act that is not an offence under the laws of Saint Christopher and Nevis. Therefore, he submitted his originating motion was properly brought before the court and should not be struck out. His case could not be described as a “mere allegation” or one being done for the “sole purpose of avoiding the necessity of applying in the normal way” as stated in **Harrikissoo** and **Jaroo**. He submitted his case fell within the **Ramanoop** exception, noting that the factors mentioned above were special features which render it appropriate for him to seek constitutional redress.

[55] Ventose J held that the tort of false imprisonment was apt to describe the circumstances in the case, therefore the claimant had a parallel remedy in the tort of false imprisonment at common law. Further, the defendants disputed the claimant’s version of events. The only feature to which the claimant referred was the unlawful search and seizure of his personal property during the time in which he was detained. The defendants also disputed that there was any unlawful search and seizure and provided an alternative explanation. These substantial disputes of fact required

examination and determination at trial making the originating procedure ill-suited for such a claim.

[56] Having examined closely the cases cited by the parties, I have no doubt that the 'alternative remedies' identified by the Defendant cannot be accepted as such. The Claimant could not raise the alleged unconstitutionality of section 4 of the CPA, article 2124 of the **Civil Code** and article 28 of the CCP on a civil appeal to the Court of Appeal from any decision of the Court on the Defendant's application to strike out his claim in the defamation proceedings. The Court of Appeal would be bound to consider the matters raised in the Court below which would not have included such allegations and limited to determining whether the judge applied the correct legal principles relevant to striking out. Amending the statement of claim in the defamation proceedings would not permit the Court to consider the constitutionality of the legislative provisions which the Defendant argues were not followed by the Claimant and operate as a complete bar to bringing his claim.

[57] Thus, (without assessing the merits) it is arguable that the Claimant's right under section 8(8) of the Constitution is likely to be contravened by virtue of the legislative provisions being challenged for which it is also arguable that there is no adequate alternative means of redress, as neither a civil appeal nor amendment to the pleadings in the defamation proceedings could result in the provisions being declared unconstitutional. Unlike the cases in which the Court has declined to exercise its jurisdiction on the basis of the existence of alternative remedies, the Claimant is not alleging some state action/abuse of state power carried out personally against him, which in addition to infringing a right enshrined in sections 2-15 of the Constitution, properly gives rise to some other common law cause of action. The Claimant here is alleging that statutory provisions enacted by Parliament contravene the Constitution and the only avenue to challenge

same is via a constitutional motion asking the Court to declare them unconstitutional and to strike them down as such.

- [58] Therefore, given the nature of the claim, there is no more convenient alternative remedy under common law or statute by which the Claimant could obtain the relief sought, such that bringing his claim by way of originating motion is not inappropriate or to be considered an abuse of process. It also cannot be said that the claim is frivolous or vexatious. To the contrary it raises legitimate questions of law, worthy of being ventilated by the Court. This has been acknowledged in the judicial authority **Catherine Sharon Peter-Mercner v Attorney General of Saint Lucia** and scholarly sources cited by the Claimant. Further, it cannot be said that the Claimant has brought the constitutional motion for the sole purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy or to save costs or time. There is absolutely no dispute of fact involved and is solely a question of law. There is therefore no reason for the Court to decline to exercise its jurisdiction.

Abuse of Process

- [59] In the circumstances, it also cannot be said that bringing this constitutional claim amounts to an abuse of process, justifying the claim being struck out. As discussed above, there is no adequate or more convenient alternative remedy available to the Claimant to obtain the relief he seeks. It is clear that the legislative provisions he seeks to have declared unconstitutional are likely to infringe his rights by operating as a bar to bringing the defamation proceedings against Mr. O'Brian, the very point propounded by the Defendant therein. Whilst it is the case the Claimant has argued on that application that the provisions do not apply to him, there is the possibility that the Court may not rule in his favour and the provisions he contends are unconstitutional would thus prejudice him. To bring the constitutional claim in these circumstances is different from the

circumstances in the cases cited by the Defendant which have been held to amount to an abuse of process.

[60] The Claimant has adequately distinguished the cases in his submissions and there is no need to repeat it, save to say I am in agreement with the analysis. The constitutional claim is not being used to delay or derail the defamation claim. The unconstitutionality of the legislative provisions could not be dealt with in the defamation proceedings so as to be treading upon the civil jurisdiction of the High Court as in **David Brandt**. An appeal from an unfavorable decision on the strike out application in the defamation proceedings could not provide the Claimant the relief sought such that the Claimant could be said to be misusing the constitutional jurisdiction of the court to circumvent the normal processes available to him or lay a collateral attack on a decision of the court as in **Chokolingo** or **Hinds**.

[61] It is also well known and accepted that the court may decide the order in which proceedings or applications are dealt with. Whilst it is customary to deal with applications in the order in which they are filed, the Court may deal with a later application first where the outcome may affect, or effectively dispose of another application or the claim. This is demonstrated by the cases of **Shorn Braveboy v Attorney General of Grenada** and **Allen Chastanet v Ernest Hilaire** cited by the Claimant, which need no further explanation.

[62] I would just note in this regard that the Court is granted wide case management powers pursuant to CPR 26.1(2) which provides so far as relevant as follows:

- “(2) Except where these rules provide otherwise, the court may –
 - (a) adjourn ... a hearing to a specific date;
 - (b) consolidate proceedings;
 - ...
 - (d) decide the order in which issues are to be tried;

- ...
- (i) dismiss or give judgment on a claim after a decision on a preliminary issue;
- ...
- (q) stay the whole or part of any proceedings generally or until a specified date or event;
- ...
- (t) try two or more claims on the same occasion;
- ...
- (w) take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective.”

[63] The overriding objective as contained in CPR Part 1 is also relevant and should guide the Court in its treatment of such an application as this.

“The Overriding Objective

- 1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
- (2) Dealing justly with the case includes –
- (a) ...
 - (b) saving expense;
 - (c) dealing with cases in ways which are proportionate to the –
 - (i) amount of money involved;
 - (ii) importance of the case;
 - (iii) complexity of the issues; and
 - (iv) financial position of each party;
 - (d) ensuring that it is dealt with expeditiously; and
 - (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

Application of Overriding Objective by the Court

- 1.2 The court must seek to give effect to the overriding objective when it –
- (a) exercises any discretion given to it by the Rules; or
 - (b) interprets any rule.

Duty of Parties

- 1.3 It is the duty of the parties to help the court to further the overriding objective.”

[64] The Defendant submits that the Claimant should either concede Mr. O’Brian’s application in the defamation proceedings and then pursue the

constitutional claim or defend the application to strike out in the defamation proceedings and withdraw the constitutional claim, as to maintain both is an abuse of process.

[65] I do not find that this is the case. The reality is that if the Claimant is unsuccessful on the constitutional claim, the defamation proceedings would proceed as normal including hearing and determination of the strike out application as pleaded. If the Claimant were successful on the constitutional claim, the strike out application in the defamation proceedings would become otiose and the claim would proceed as if that application had not been filed or had been dismissed. There would be no real harm or loss.

[66] On the other hand, if the Claimant were made to withdraw this claim and he was unsuccessful on the strike out application in the defamation proceedings, he would be entitled nonetheless to bring this constitutional claim to ask the Court to declare the provisions which defeated him unconstitutional and would likely at that time do so. Thus, that very constitutional claim having already been instituted, if it were struck out and then had to be refiled, would amount to a colossal waste of time, costs and resources. This would not be in keeping with the overriding objective to deal with cases justly and expeditiously. If the Claimant were successful in the strike out application in the defamation proceedings it may mean that the constitutional claim would not have been strictly necessary, however the issues to be decided are legitimate issues of public importance apt for the Court's determination.

[67] Therefore, in the circumstances, given the Court's wide case management powers including to determine the order in which matters are to be heard and to stay proceedings; and in light of the overriding objective to deal with cases justly by saving expense; dealing with cases proportionate to

the importance of the case and the complexity of the issues; expeditiously, and by allotting to the case an appropriate share of the court's resources having regard to other cases, I am of the view that the most appropriate course is to stay the defamation proceedings and to hear and determine the constitutional claim.

[68] Whilst the Court has the power to strike out a party's statement of case as an abuse of process pursuant to CPR 26.3(1)(c), the manner in which the power to do so is to be employed has been dealt with time and again. I would not examine all the authorities that treat with the issue, as the Claimant has extracted very comprehensive and instructive dicta of the learned Chief Justice in **Cedar Valley Spring Homeowners Association Inc. v Hyacinth Pestaina**.³⁴ I will merely apply the principles stated therein to the circumstances of this case.

[69] The Claimant's constitutional claim is not one which on the face of it is obviously unsustainable, cannot proceed or, as discussed above, is an abuse of the process of the Court. It is not a case where there is not even a scintilla of a cause of action. It is not incoherent, or a claim that makes no sense or discloses no legally recognizable claim against the Defendant, all of which would justify striking out the claim. To the contrary, it is a claim that raises legitimate issues of public importance, being the constitutionality of legislation that affects all citizens of the State. It involves substantial points of law that do not admit of a plain and obvious answer; thus, the strength of the case is not immediately clear and remains to be fully investigated. These are the circumstances which render striking out inappropriate. Thus, bearing in mind that striking out is a discretionary and summary procedure that should only be used in clear and obvious cases because it is a draconian step which has the effect of depriving a party of his right to a trial, I refuse to strike out the Claimant's

³⁴ ANUHCVP2016/0009.

constitutional claim and will give directions to facilitate the speedy conduct of the hearing of the constitutional claim.

Conclusion

[70] In light of the foregoing, I hereby order as follows:

- (1) The application filed on 13th March 2020 to strike out the originating motion is dismissed.
- (2) Costs to the claimant on the application in the sum of \$1,500.00.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar