

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SVGHCV2019/0069

BETWEEN:

OKENO FERGUS

Claimant

and

THE ATTORNEY GENERAL
OFFICER MOHOMMID LAVIA

Defendants

Appearances:

Mr. Jomo Sanga Thomas for the Claimant

Mrs. Cerepha Harper-Joseph with her Ms. Gabrielle Myers for the Defendants

2020: June 8, 9
July 29.

RULING

- [1] **GILL, M. (Ag.):** By Notice of Application filed on January 20, 2020, the defendants sought to strike out the claim on the ground that the claimant has failed to comply with section 3 of the Public Officers' Protection Act, CAP. 276 of the Revised Laws of Saint Vincent and the Grenadines, 2009 ("the Act").

Background

- [2] The 2nd defendant, Mohommid Lavia, is a police officer, a member of the Saint Vincent and the Grenadines Royal Police Force. The claim, filed on November 15, 2019, alleges that on March 3, 2019 at about 3:00 a.m. the claimant was leaving a fete and bingo in Sandy Bay and heading

towards a friend's vehicle when Officer Lavia pelt a bottle at him. The bottle missed him and the officer pulled out his gun from his waist and shot the claimant in his left leg thereby causing injury to the said leg. The claim stipulates that Officer Lavia was acting in the purported performance of his duties as an officer of the Police Force. Consequently, the claim is also brought against the 1st defendant, the Attorney General, pursuant to section 15 of the Crown Proceedings Act, CAP. 85. The claimant seeks damages including aggravated and exemplary damages.

- [3] The defendants admitted that they were served with the claim form and statement of claim on November 15, 2019 but contended **initially** that neither defendant was served with a notice in accordance with section 3 of the Act. By an affidavit sworn by the 2nd defendant, Officer Mohommid Lavia, he deposed that he was never served with the notice of intention. He disputed the contents of the affidavit of service of Marvin Mulcaire, a High Court bailiff who also performs professional bailiff services for several law chambers. Mr. Mulcaire swore that on August 29, 2019 he personally served Officer Lavia with the notice of intent at his place of work, the Ottley Hall Mobile Police Station.
- [4] At the hearing of the application, in a turn of events, Learned Crown Counsel for the defendants, Mrs. Harper-Joseph, told the court that the defendants were not disputing the evidence of Mr. Mulcaire. Therefore, in effect, the evidence of Mr. Mulcaire that he served the 2nd defendant with the notice is unchallenged.
- [5] Mrs. Harper-Joseph maintained, however, that the 1st defendant was not served with the notice and submitted that the failure of the claimant to serve one defendant is fatal to the claim against both. In that case, she submitted the claimant is unable to prove under section 5(a) that the notice required under section 3 has been given to the 1st defendant. Counsel contended that this failure must result in the claim being dismissed or otherwise terminated.
- [6] I am of the view that the claimant has failed to show that the notice was served on the 1st defendant, the Attorney General. The claimant sought to rely on an affidavit sworn by a clerk employed by counsel for the claimant. The affidavit reveals that the clerk was informed by a former secretary of counsel's chambers that a former office attendant served the notice on the Attorney General's Chambers on April 24, 2019. At the hearing of the application, the court excluded this evidence as inadmissible hearsay. Therefore, the affidavit evidence on behalf of the Attorney

General that the Attorney General was not served with the notice remains unchallenged. The claimant has failed to prove that the Attorney General was served with the notice as is required by section 3 of the Act.

- [7] It is of some moment, however, that the claimant filed the Notice of Intent on April 24, 2019 as evidenced by the court's time stamp.

Issue

- [8] The court must determine whether the claim should be struck out.

The Law

- [9] Rule 26.3(1) of the Civil Procedure Rules 2000 governs a striking out action. It reads:

26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) There has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;*
- (b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim;*
- (c) The statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or*
- (d) The statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.*

- [10] Bryon CJ (Ag.) (as he then was) in **Baldwin Spencer v The Attorney General of Antigua and Barbuda** discussed the principles of striking out a claim when he declared as follows:

“This summary procedure should only be used in clear and obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.”¹

The court has taken a similar approach in decisions that are more recent.²

¹ Civ. App. No. 20A of 1997, at page 5 of the judgment

² See **Julian Prevost v Rayburn Blackmore** DOMHCV2005/0177, per Rawlins J. (as he then was) at para. 6; see also **Tawney Assets Limited v East Pine Management Limited et al** BVIHCVAP2012/007, per Mitchell JA (Ag.) at para. 22

Defendants' Submissions

[11] The defendants submitted that the failure to serve the notice as mandated by statute is an abuse of the process of the court and the claim should be struck out as such.

[12] Section 3 of the Act makes the notice mandatory. It reads:

No action shall be brought against any public officer for anything done, or purported to be done, in the exercise of his office unless and until two calendar months after notice in writing has been delivered to him or left at his usual place of residence with some person there, by the party who intends to bring such action or his legal practitioner or agent, and in every such notice shall be clearly and explicitly stated –
(a) the cause of action;
(b) the name of the person who is bringing the action; and
(c) the name and address of his legal practitioner or agent, if any,
and no evidence of the cause of action shall be produced, except in so far as the cause of action has been spelt out in the notice.

[13] Section 4 sets a time limit for action as follows:

Every action as set out in section 3 shall be brought within 12 calendar months after the cause of action stated in the notice arose and no such action shall be maintained after the expiry of the said period.

[14] Section 5 mandates the dismissal or other termination of an action in certain cases. It states:

In every proceeding for an action as referred to in section 3, it shall be incumbent on the party bringing the action to prove –
(a) that the notice as required under section 3 has been given;
(b) that the action has been brought within the time specified in section 4; and
(c) the cause of action,
and upon the failure to establish any of the same, the action shall be dismissed or otherwise terminated and a verdict shall be given against the person who brought the action, with or without costs.

[15] The defendants maintained that the Attorney General was not served with the required notice and that the claimant has failed to prove such service. In the circumstances, learned counsel for the defendants, Mrs. Harper-Joseph argued that the failure to serve the Attorney General is fatal to the claim against both defendants. Mrs. Harper-Joseph cited a line of authorities on the issue.

- [16] In **Peter Clarke v The Attorney General et al**,³ the claimant brought an action for damages for false and wrongful imprisonment and assault against the defendants, including three police officers. The required notice was not personally served on the officers nor was it left at their domicile. The notice was addressed to the Attorney General and carbon copied to the three officers, referring to the three officers by name, and specifying the grounds of the action. Having considered the applicable law, at paragraph 40 of the judgment, Edwards J. (as she then was) stated, “It is evident therefore that the consequences of giving a defective Notice or no Notice is fatal to Mr. Clarke’s action against all the defendants.” Her Ladyship struck out the claim.
- [17] The cases of **Cumberbatch v Weber**⁴ and **Castillo v Corozal Town Board and another**⁵ were cited and applied in the **Peter Clarke** case. In **Cumberbatch**, at first instance, it was held that an action against the Commissioner of Police must fail, as the prescribed notice was not given. The Court of Appeal upheld the ruling of the trial judge and reinforced that it was obligatory to give notice and so, the claim was barred in the absence of the notice. In **Castillo**, the Court of Appeal held that the legislation made provision for a mandatory condition precedent to the institution of the suit. It was made clear that where the plaintiff fails to prove that he has given such notice, a trial judge has no discretion in the matter and must enter judgment for the defence with costs.
- [18] The masters of the Eastern Caribbean Supreme Court have addressed this issue repeatedly. Lanns M. (as she then was) in **Ricardo Bascombe (Administrator of the Estate of Patrice Bascombe) v The Attorney General et al**⁶ stated:
- “When proceedings are instituted against a public officer and the claimant fails to prove at the hearing that he has given notice of the proceedings under section 3 of the Public Officers’ Protection Act the Trial Judge has no discretion in the matter and is bound to enter judgment for the defendant with costs.”
- [19] In **Bryan James v Attorney General**,⁷ Taylor-Alexander M. (as she then was) dismissed the claimant’s action against the Attorney General for failure to serve the Attorney General with notice of the claim. At paragraph 20 of the judgment, the learned master had this to say:

³ SLUHCV1999/0475

⁴ (1965) 9 WIR 143

⁵ (1983) 37 WIR 86

⁶ SVGHCV2007/0302

⁷ SLUHCV2009/0532 (heard together with James Enterprises Limited v Attorney General SLUHCV2009/0542)

“The authority of Castillo is one either embraced or dreaded by practitioners of public law depending on the side you stand on. Its implications are dire for a person caught not in compliance. There is no latitude for flexibility or the exercise of a discretion, its provisions are inviolable. I am without flexibility and must dismiss the action for the failing of the claimants in this preemptive step.”

[20] On appeal,⁸ the decision of the learned master was upheld. Blenman JA had no hesitation in reiterating that failure to comply with the mandatory provisions that require notice is fatal.

[21] Actie M. (Ag.) (as she then was) refused to strike out the claim in **Michael Richards v The Attorney General of St. Vincent & the Grenadines et al**⁹ on an application based mainly on the Act. At paragraph 27 of the judgment, the learned master stated:

“It is settled law that the failure to comply with the mandatory provisions of section 3 of the Public Officers Protection Act is fatal to a claim being brought against a public officer. It is a condition precedent to the filing of proceedings against public officers performing a public function.”

The master’s refusal of the application is relied on by learned counsel for the claimant and will be discussed in his submissions.

[22] Also in support of this principle, the defendants cited the following cases:

- (i) **Richard MacLeish and Others v Donald John and the Attorney General**¹⁰
- (ii) **Leonet Anderson v The Attorney General et al**¹¹
- (iii) **Kiyeh Anderson v The Attorney General et al**¹²

[23] In summary, the defendants asserted that the claim cannot stand due to the claimant’s non-compliance with section 3 of the Act to serve notice of the suit on the defendants and in the circumstances of this case, to prove service as required by section 5. They urged on the court that the claimant’s contravention of the provisions of the Act must automatically result in the termination of the action at bar as such non-compliance is fatal to the claim.

⁸ SLUHCVP2013/0023

⁹ SVGHCV2009/0152

¹⁰ SVGHCV1998/0305

¹¹ SVGHCV2019/0161

¹² SVGHCV2019/0162

Claimant's Submissions

- [24] In the face of the mountain of authorities relied on by the defendants, the claimant strenuously opposed the application. Learned counsel for the claimant Mr. Thomas frowned on what he referred to as a mechanical submission by counsel for the defendants. He posited that the State is using the law as a shield to protect itself from the egregious actions of State officials.
- [25] Mr. Thomas urged the court to take an equitable route as was done by the learned master in the **Michael Richards** case. In that case, a claim was brought against the Attorney General, the Commissioner of Police and 4 police officers for damages for assault, battery, wrongful arrest and unlawful detention. The claimant served the Attorney General and the Commissioner of Police with a notice of action but failed to do so in relation to the 4 police officers in accordance with the Act. The notice was delivered to Police Headquarters and endorsed as having been received for and on behalf of the 4 officers. The court found that service on the officers was defective.
- [26] The claim was filed on November 17, 2009. Thereafter, the parties engaged in discussions for possible settlement of the claim. Over 3 years after filing the claim, on July 29, 2013, the Attorney General's Chambers entered an acknowledgment of service. By notice of application dated November 12, 2013, the Attorney General applied to strike out the statement of case relying on the provisions of sections 3, 4 and 5 of the Act. Taking into consideration the plethora of cases decided in this jurisdiction, the learned master was "of the view that it would be inequitable and unjust in the circumstances to defeat the claimant's claim for failure to satisfy personal service on the 3rd to 6th defendants".
- [27] In the matter at bar, Mr. Thomas implored the court to depart from the rigid mandatory requirements of the Act and carve out an equity to do justice in this case. He drew the court's attention to the reasoning the House of Lords in **R v Soneji and another**¹³ relied on by the claimant in **Michael Richards**. At paragraph 23 of the judgment, Lord Steyn, dealing with the issue of non-compliance with statutory procedural requirements opined:

"Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's*

¹³ [2006] 1 AC 340

Reference (no 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction....”

[28] Mr. Thomas contended that there has been substantial compliance by the claimant in that the 2nd defendant, Officer Lavia, was served with the notice of intent. He relied on the case of **The Queen v The Secretary of State for the Home Department ex parte Singarajah Jeyanthan**¹⁴ in which the issue was the consequence, if any, of the failure of the Secretary of State to use the prescribed form for applying for leave from the Special Adjudicator to the Tribunal. The prescribed form was not used but it was accepted that the only practical omission was the absence of a declaration of truth. Whereas the Tribunal decided in favour of the Secretary of State, Sedley J. held that the failure to use the prescribed form meant the Tribunal’s decision was a nullity. On appeal, it was held that “notwithstanding the failure of the letter from the Secretary of State substantially to comply with the requirements of the said form, the notice of application for leave to appeal was not a nullity, but an irregularity, which was capable of being cured by the IAT [Immigration Appeal Tribunal]”. The Secretary of State’s appeal was allowed.

[29] Lord Woolf MR made the flowing pronouncement:

“Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal’s task will be to seek to do what is just in all the circumstances (see *Brayhead (Ascot) Ltd v Berkshire County Council* [1964] 2 QB 303, applied by the House of Lords in *London & Clydeside Estates Ltd. v Aberdeen District Council* [1980] 1 WLR 182).”¹⁵

[30] Mr. Thomas posited that there is a clear and distinct movement away from declaring the failure to adhere strictly to mandatory statutory requirements fatal to a cause. Counsel urged that creative judges could find a way to achieve justice. He maintained that the principal architect of the assault on the claimant was properly served and it would be a travesty of justice not to require the State to

¹⁴ [1999] EWCA Civ 3010, heard together with *The Secretary of State for the Home Department v Athiroobasingham v Ravichandran*

¹⁵ See pages 3 to 4 of the Transcript of the Handed-Down Judgment of Smith Bernal Reporting Limited

defend this claim when there has been substantial compliance with the relevant provisions of the Act.

Analysis

- [31] Since learned counsel for the defendants evidently abandoned the assertion in the affidavit Officer Lavia that he was not served, and advanced no challenge to the affidavit of Mr. Mulcaire that he served Officer Lavia, I have no choice but to accept that Officer Lavia, the 2nd defendant herein, was properly served with the notice required under section 3 of the Act. However, the defendants maintained that the Attorney General was not similarly served and, as stated earlier, there is no evidence before this court that the Attorney General, the 1st defendant herein, was served. Therefore, the claimant has failed to comply with section 5 of the Act.
- [32] I appreciate the argument of learned counsel for the claimant, Mr. Thomas, that the service on Officer Lavia, the main player for the reason for the institution of the proceedings, constitutes substantial compliance. I have considered with great interest the authorities cited in support of counsel's contention that there appears to be a trending departure from nullifying proceedings for breach of mandatory procedural requirements. In some cases, it makes good sense and augers well for the administration of justice that seemingly trivial procedural irregularities are not upheld as detrimental to a *prima facie* good claim.
- [33] The apparent tide towards flexibility in relation to strict compliance with procedural provisions seems to flow against a claimant found wanting in adherence to satisfying the mandatory statutory requirements in actions against the Crown and its officers. The authorities in this jurisdiction are clear, voluminous and compelling. Repeatedly, failure to serve a notice of intent and/or to prove its service has proved fatal to claims brought against the Crown.
- [34] The 'substantial compliance' argument proffered by learned counsel Mr. Thomas is precisely the issue addressed in cases such as **Peter Clarke** where the gravamen of that matter informed that serving a defective notice or failing to serve a notice on any of the defendants is fatal to the claim against all the defendants. The cases stipulate that the court in these situations has no discretion and is bound to enter judgment for the defendants.

[35] In the **Michael Richards** case, the learned master ruled that that case was distinguishable from the decided cases having regard to the facts and conduct of the parties. Notwithstanding the defect in service, the parties were in continuous negotiations and the acknowledgment of service was filed almost 4 years after the filing of the claim. The learned master held that the conduct of the Attorney General was “tantamount to an inducement in the belief that the irregular service had been waived”.¹⁶ At paragraph 37 of the judgment, the learned master stated:

“Having reviewed the facts and the authorities, I am of the view that the justice of this case militates against the nuclear option of striking out. It would be unconscionable to strike out the statement of claim having regard to the combination of time which has elapsed since the filing, the conduct of the parties in an effort to settle the claim and the procedural irregularities by both parties....To strike out the claim having regard to the conduct of the parties would be draconian and unconscionable in the circumstances and in breach of the overriding objective to deal with matters justly.”

[36] There is nothing before this court to allow me to take the route of the learned master in **Michael Richards**. The conduct of the defendants in relation to the proceedings does not come into play. There is no other factor weighing on the court to permit a departure from the mound of authorities relied on by the defendants.

[37] It appears to be the deliberate intention of the legislature that non-compliance or substantial or partial compliance will result in the dismissal or termination of actions against the Crown and its officers.

Conclusion

[38] The claimant has failed to satisfy the mandatory condition precedent to the filing of the claim. Based on the unchallenged evidence on behalf of the Attorney General that he was not served, and the failure of the claimant to prove that he was, the claimant is in breach of section 3 and section 5(a) of the Act. Section 5 mandates that the claim be dismissed or otherwise terminated. The court has no discretion in this matter. This claim is obviously unsustainable and must be struck out as an abuse of the process of the court.

¹⁶ Supra at note 7, at paragraph 35 of the judgment

Order

[39] In light of the foregoing, it is hereby ordered as follows:

- (1) The claim is struck out.
- (2) No order as to costs.

Tamara Gill
Master (Ag.)

By the Court

Registrar