

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

SLUHCV2017/0276

BETWEEN:

**DANIEL FORDE
IAN FORDE**

Claimants

and

THE ATTORNEY GENERAL

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Horae Fraser for the Claimants

Mr. Seryozha Cenac for the Defendant

Present:

Claimants

2018: February 27;
March 27.

JUDGMENT

- [1] **CENAC-PHULGENCE J:** The claimants filed a fixed date claim form on 27th April 2017 for constitutional relief seeking a declaration that their right to a fair hearing guaranteed by section 8(8) of the **Constitution of Saint Lucia**¹ (“the Constitution”) had been infringed.

¹ Cap. 1.01 of the Revised Laws of Saint Lucia 2008.

- [2] The very short facts are that on 15th February 2012, the claimants filed a claim seeking constitutional relief as a result of the seizure and detention of their monies. The claim first came up for hearing on 24th May 2012 and the trial was scheduled for 1st October 2013. The matter was heard on 1st October 2013 and the learned judge who was at the time on an acting assignment reserved judgment. According to the claimants, in January 2014, the judge attempted to deliver the judgment but indicated in open court that there was a need to tidy the judgment before delivery. At the date of filing of the instant claim, the judgment had still not been delivered, some 3 years and 6 months later. The claimants therefore contended that the delay in delivering the judgment was unreasonable and the total period of five years awaiting a final determination in the matter was an infringement of the claimants' right to a fair hearing.
- [3] The claimants through their counsel wrote to the Registrar of the High Court on 10th June 2014 and on 15th December 2016 inquiring and seeking her assistance in getting the judgment delivered. The response from the Registrar indicated that the matter had been brought to the attention of the learned judge and efforts would be made to enquire into the status of the judgment and to report as soon as possible. Nothing further was received from the Registrar.
- [4] In its defence, the Attorney General contended that the delay in the delivery of the judgment was not gross or unreasonable and was therefore not sufficient to invoke the Court's constitutional jurisdiction. They alleged that the delay had to be assessed in the context of the available resources and that the failure of a judge to deliver a judgment fell outside the remit of State control, and as such, state liability ought not to be founded upon an omission, particularly since the State cannot exercise the coercive powers of the State to obtain the judgment. The judgment in the matter was finally delivered on 3rd July 2017, three years and nine months after the trial and was not in the claimants' favour. There was nothing on the face of the judgment addressing the delay in its delivery or providing any reasons for the delay.

- [5] Whilst it is the case that the State cannot coerce the judiciary in relation to the delivery of the judgment, it is the case in accordance with the principles espoused in **Maharaj v the Attorney General**² that the State would be the proper party in this matter and could be held liable for the actions of the judiciary.
- [6] Since the delivery of the judgment in July 2017, the claimants have filed an appeal to the Court of Appeal.
- [7] At the case management hearing on 6th December 2017, the Court after some discussion with the parties concluded that the constitutional right of the claimants to a fair hearing within a reasonable time had been infringed by the delay in the delivery of the judgment of three years nine months. The parties were then to discuss what relief apart from the declaration should flow from this finding, if any. The parties presented brief oral submissions as relates to the relief on 27th February 2018.
- [8] The conclusion that the delay constituted an infringement is fortified by the following cases:
- (a) **Citco Banking Corporation v Pusser's Limited**³ in which Lord Hoffman at paragraph 21 said:
- “Benjamin J heard evidence and argument over five days towards the end of June 1998 and reserved his judgment, saying that he would give it before the end of July. In fact he gave it on 7 April 2003, nearly five years later. The judgment as delivered offers the parties no explanation for the delay and their lordships understand that the judge is no longer serving in the British Virgin Islands. But their lordships feel bound to observe that such delays are completely unacceptable. **Besides being a violation of the constitutional right of the parties to a determination of their dispute within a reasonable time**, they are likely to be detrimental to the interests of the British Virgin Islands as a financial centre which can offer investors efficient and impartial justice.” (my emphasis)

² [1977] 1 All ER 411.

³ (2007) 69 WIP 308.

(b) **Yoland Reid v Jerome Reid**⁴ in which the CCJ speaking to the length of time taken to deliver the judgment said at paragraph 22:

“...The effectiveness of a judiciary is seriously compromised if it fails to monitor itself in respect of time taken to deliver judgments and to arrest promptly any tendency to lapse in this aspect of its performance. ... We trust that effective remedial action, if not already taken, will now be taken **to ensure that judgments are delivered within a reasonable time as required by the Constitution of Barbados [See Barbados Constitution section 18(8)]. What is a reasonable time? In our view, as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most.**”⁵

[9] In an article titled **“Justice Delayed is Justice Denied: Jamaica’s Duty to Deliver Timely Reserved Judgments and Written Reasons for Judgment** “by Sha-Shana Crichton of Howard University⁶ the writer said this:

“Jamaica has a constitutional obligation to issue reasoned judgments within a reasonable time. The duty to deliver timely reasoned judgments is implied under the Constitution of Jamaica’s guaranteed right to a fair hearing. Section 16(1) of the Constitution mandates that a person charged with a crime be “afforded a fair hearing within a reasonable time by an independent and impartial court established by law.” Section 16(2) further provides for the right to a fair hearing when determining “a person’s civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests ...” **The guaranteed right to a fair hearing applies from the time of the initial proceeding until the final judgment on appeal. This means that each stage of the process, including the delivery of reserved judgments and written reasons for judgment, must be completed within a reasonable time.**”⁷ (my emphasis)

⁴ CCJ Appeal No. CV 9 of 2007.

⁵ Section 18(8) of the Barbados Constitution is in similar terms to section 8(8) of the Saint Lucia Constitution.

⁶https://www.researchgate.net/profile/Shashana-Crichton/publication/317570838_Justice_Delayed_is_Justice_Denied_Jamaica%27s_Duty_to_Deliver_Timely_Reserved_Judgments_and_Written_Reasons_for_Judgment/links/594987604585158b8fd5b71d/Justice-Delayed-is-Justice-Denied-Jamaicas-Duty-to-Deliver-Timely-Reserved-Judgments-and-Written-Reasons-for-Judgment.pdf accessed 23rd March 2018.

⁷ see *Bond v. Dunster Props. Ltd.* [2011] EWCA (Civ) 455 [3] (“a ‘hearing’ includes the delivery of judgment”).

Relief

- [10] Counsel for the claimants, Mr. Horace Fraser ("Mr. Fraser") argued that the claimants were entitled to vindictory damages as a result of the breach, as it is the very institution which has breached the claimants' rights. He also argued that the claimants should be awarded damages for distress and inconvenience because of the length of time it took to deliver the judgment. Mr. Fraser as well as counsel for the defendant, Mr. Seryozha Cenac ("Mr. Cenac") agreed that there was no case found which specifically dealt with this matter. Mr. Fraser submitted that an award of \$35,000.00 as vindictory damages was appropriate. He relied on the cases of **Felix Augustus Durity v The Attorney General of Trinidad and Tobago**,⁸ **Alphie Subiah v the Attorney General of Trinidad and Tobago**,⁹ and **Jennifer Gairy (as administratrix of the estate of Eric Matthew Gairy, deceased) v The Attorney General of Grenada**.¹⁰ I must confess that the circumstances in these cases bear no resemblance to the instant case and so I found it rather difficult to use them as the basis for any determination which I will make. In all of these cases, the wrongs were committed by the executive and so it is easy to see why the State would be liable in damages.
- [11] I note that the claimants have not assisted me by pleading what distress and inconvenience they suffered. As far as I see it, the only distress and inconvenience is that the claimants have not for almost four years had the benefit of knowing whether their monies would be returned to them or not. The claimants now have an appeal pending before the Court of Appeal which addresses among other things the judge's decision not to return the monies to the claimants.
- [12] Mr. Cenac submitted that in the circumstances of this case, the grant of a declaration was sufficient to vindicate the claimants' rights. He argued that a compensatory or vindictory award would be inappropriate in a case such as this where the delay in the delivery of the judgment was not as a result of the State's

⁸ HCA No. 569 of 1997.

⁹ PC Appeal No. 39 of 2007.

¹⁰ PC Appeal No. 29 of 2000.

failure, but lay solely at the feet of the judicial officer. He relied on the case of **Joseph Kemmy v Ireland and The Attorney General**,¹¹ which examined in some detail the position of the judiciary vis-à-vis the State and the question of the State's liability in damages for the wrongs of the judiciary.

[13] **Joseph Kemmy** states clearly that the judiciary is independent in the exercise of judicial functions and is subject only to the Constitution and the law. In that case, the plaintiff's claim was for damages against the State for infringement by the State, through its judicial organ, of the plaintiff's constitutional right to a fair criminal trial. The case concluded that the position of the judiciary, as the judicial organ of the State was different from the other organs, that is, the executive and the legislature. It was also the Court's position that the State could not be vicariously liable for the wrongs of judges in exercising their judicial function and that judges have immunity from suit in respect of failures in the discharge of their functions. Despite **Joseph Kemmy** which is of persuasive authority, the case of **Maharaj** is clear that it is the State who has to be sued and who bears responsibility in relation to actions of the judiciary.

[14] Lord Scott in **Merson v Cartwright** speaking of damages as a relief in public law matters said:

"If the case is one for an award of damages by way of constitutional redress... the nature of the damages awarded may be compensatory but should always be vindictory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount... The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression... In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary."¹²

¹¹ [2009] 4 IR 74.

¹² [2005] UKPC 38, at [18].

- [15] The Privy Council in the subsequent case of **Attorney General of Trinidad and Tobago v Ramanoop**, considered the question of damages in public law and in an oft-cited passage, the Judicial Committee advised:¹³

“When exercising the constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. **An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.** All these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions ‘punitive damages’ or ‘exemplary damages’ are better avoided as descriptions of this type of additional award.”

- [16] An analysis of the cases above makes it clear that it is not all public law cases where it has been found that there was infringement of a constitutional right which will justify the award of vindicatory damages. One of the reasons for an award of vindicatory damages is to deter future breaches. However, it must always be remembered that a judge is accountable to the Chief Justice as Head of the Judiciary and the Chief Justice possesses the ability to address delays in

¹³ [2006] 1 AC 328, at [18]-[19].

judgment delivery by taking certain measures, disciplinary action included, if necessary.

[17] I have considered all the circumstances of this case and I conclude that in this case the grant of a declaration in addition to a nominal award of damages is sufficient to recognize the claimants' rights for the reasons set out below.

[18] I took the following into consideration:

- (a) The claimants never sought to engage the Chief Justice as head of the judiciary to secure delivery of the judgment after not having had any response from the Registrar after December 2017. That course of action would perhaps have averted the need to file a claim.
- (b) The State was also a party in this matter and was itself subjected to the delay in the delivery of the judgment.
- (c) There was nothing that the State could have done to compel delivery of the judgment on its own because of the principle of judicial independence and the doctrine of separation of powers.
- (d) The fiscal burden that an award of substantial damages would place on the tax payer when it has not been shown that the State did not provide the necessary facilities, or resources and this impacted on the judicial officer's ability to deliver his/her decision and this could not have been the intention.
- (e) The claimants have appealed against the judgment and have asked the Court of Appeal among other grounds of appeal to consider the effect of the delay on the quality of the judgment. That to my mind provides an opportunity to obtain vindication of the claimants' rights.
- (f) There is no public outrage which has been identified in this case.
- (g) The importance of the timely delivery of judgments especially in constitutional cases, which will prompt at least an award of nominal damages.

Conclusion

[19] The Order is that:

- (a) A declaration that the delay in the delivery of the judgment of three years and nine months infringed the claimants' rights to a fair trial within a reasonable time as guaranteed by section 8(8) of the **Constitution of Saint Lucia** is granted.
- (b) Nominal damages of \$5,000.00 are awarded to the claimants.
- (c) There shall be no order as to costs.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar