

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2015/0308

BETWEEN:

**(1) ALLAN GASKIN
(2) EDISON FRANCIS**

Applicants

and

SPICE MAS CORPORATION

Respondent

Appearances:

Ms. Claudette Joseph and Mr. Ian Sandy for Applicants
Ms. Sheriba Lewis for Respondent

2015: August 4; 5.

DECISION

- [1] **AZIZ, J.:** This is a decision which I give orally and thank you for your patience and time; I have had a lot of material to review. This is an application filed on behalf of Allan Gaskin and Edison Francis for leave to judicially review a decision of the SMC (hereinafter referred to as the "SMC") to omit them from the final round of the National Calypso Competition 2015 to be held on the 9th August 2015.
- [2] There is also an application for an interim injunction, restraining the SMC from proceeding with the final rounds of the competition on the 9th of August 2015.
- [3] As indicated during submissions, the court has to look at the whole case to see whether there is a question to be tried and if there is then look at the balance of

convenience between the parties; bearing in mind there is a good reason why status quo ought not to be preserved. I am not looking therefore of percentages, meaning whether or not one party has fifty percent more or less of being successful. It is an overall view of the evidence presented and of course the submissions ably put forward by both Counsel appearing before me and I don't mean to leave out Mr. Sandy who has assisted Ms. Joseph.

- [4] I start by dealing with the injunction first, if I may. One has considered the authority of **American Cyanamid Co. Ltd and Ethicon Ltd.**¹, the judgment of Lord Diplock. As indicated earlier, the application is for an interim injunction to restrain the defendant, SMC from doing acts alleged to be in violation of the applicants' legal rights.
- [5] The object of such interlocutory injunction is to protect the applicant against injury by violation of their rights which they could not be adequately compensated in damages recoverable in the action if the uncertainty will result in their favour at trial.
- [6] This need for protection must be balanced against the need for the defendant, SMC, to be protected against injury resulting from not being able to proceed with the competition for which they could not be adequately compensated under the applicant's undertaking in damages, if the case were to be resolved in the defendant's favour. Where does the balance of convenience lie?
- [7] As indicated, I make a determination on the affidavits and exhibits filed in this matter; as it's an application for an interim remedy the evidence is incomplete. The evidence has not been tested by cross-examination but the court has a discretion as to whether to injunct or not. What I must be satisfied of is not that there is a strong case or a probability; the court must be satisfied that the claim is

¹ [1975] UK House of Lords, 1

not frivolous or vexatious. Is there a serious question to be tried? I do not intend and will not try to resolve conflicts on the evidence at this stage.

[8] The applicants say that they have been aggrieved by the result in the semi-final round and I have been referred to the GCC, the Grenada Carnival Commission Rules 2.6 and the use of five judges. Paragraph 11 of the joint affidavit of the applicants deals with the issue of five judges as opposed to seven. The applicants say there is no basis to use seven judges and there has never been any consultation about seven judges. The applicants say they are not aware of any deviation in relation to the rules. The dispute arises out of the seven judges and the score sheets. Reference was made to the exhibits and the score sheets example "EF1", and it is submitted, that it is not clear which artist or which song was being judged at the material time. Reference has also been made to the manner in which the competition has been judged. In fact Allan Gaskin was a judge of the competition for a number of years.

[9] I also have to consider whether there was any material irregularity as Ms. Joseph contends. The applicants contend that they have been deprived of being in the final and will lose accolades and potential earnings if they win. Ms. Joseph contends that the rule of law must be obeyed and it is completely right that no mass, no artist, neither any organization is above the rule of law. But I am not dealing at this stage with the merits of the case. The court must deal with the evidence and come to a just decision which in the end will be determined by where the balance of convenience lies and whether the status quo ought to be preserved.

[10] Ms. Joseph ably submitted that the balance of convenience lies with the applicants and noted that the applicants came to court as a last resort. Ms. Lewis strongly submitted that there was no serious issue to be tried. Ms. Lewis submitted that the applicant's submission in relation to irreparable damage is based on presumption(s). She submitted that the injunction was strongly opposed and

referred the court to the **American Cyanamid** case as did Counsel, Ms. Joseph. The following paragraphs were referred to and if I can just refer to the case, the paragraph that was referred to by Ms. Lewis was this one:

“If the defendant is enjoined temporarily from doing something he has not done before the only effect of the interlocutory injunction in the event of succeeding a trial, is to postpone the day at which he is able to embark upon a course of action, which he has not previously found it necessary to undertake, whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding the trial.”

But of importance are the following words:

“Where other factors appeared to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.”

And that comes two lines above the paragraph that I have just read. Is there a serious question to be tried? Complaints have been made that rules were not followed. The SMC is a statutory body subject to be judicially reviewed. It is submitted that the Grenada Carnival Commission Rules were used. There was no evidence of adopting the rules but for ensuring under Act number 10 of 2011. Section 4(2) (a) deals with organizing, promoting, conducting and controlling the operation and management of Carnival that is exhibit “SMC8”; and (b) carry on any form of activity and business related to Carnival, so that’s what incorporated in Act number 10 of 2011.

- [11] Rule 2.6 of the Grenada Carnival Commission deals with five judges for semi-finals, but there is nothing that says that the SMC cannot increase that number up

to seven. I am not of the view that upon reading the affidavits of the applicants and also the affidavit of Ms. Andrews who I have found able to depose the information in her affidavit as a director on the SMC Board that the procedure was significantly flawed to the point where they were prejudiced by wrong judging.

[12] The issue of a booklet, which is referred to in paragraph 7 of the joint affidavit of the applicants, containing blank score sheets and paragraph 1 of Ms. Andrew's affidavit are similar in terms of the blank score sheets being handed out. There is an issue with when the relevant details are to be filled in such as the name, the subrogate and the tent. Paragraph 7(2) of the joint affidavit and paragraph 5(c) (3) are essentially the same, both are about when the name of the song is entered for example Allan Gaskin, Pan Fight and on sheet number 7 the name that appears is that of Edison Francis. It seems to me that the first songs were properly scored. Furthermore, it seems to the court that as soon as the respective songs are completed, the sheets are collected and kept together. By that I mean they are kept together whether in a booklet or collected and stapled together.

[13] In addition, the manner in which the competition was run meant that the artist was required to sing songs back to back, which leads the court to the conclusion that the judges knew who was on stage, and that an error was made as far as judge 7 was concerned. This error, in relation to having seven judges or an error in the score sheet is not, in my view, leading the court to find that there is a serious question to be tried. Damages will not be an adequate remedy; it is submitted, to either the applicants or the defendant. I therefore turn my mind to the basic principles set out in the case **The National Commercial Bank of Jamaica and Olint Corporation**² which was an appeal from the Court of Appeal in Jamaica:

“The basic principle is that the court should take which ever course seems likely to cause the least irremediable prejudice to one party or the other.”

² Privy Council Appeal No. 61 of 2008

In that particular case of **Olint Corp. Ltd.** there was reference to the case of **R v The Secretary of State for Transport ex p Factortame Ltd. No. 2**³. And in referring to the case of **Olint Corporation** the court has taken into account, among other matters, the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is the likelihood of such prejudice actually occurring. The extent to which it may be compensated by an award of damages or enforcement of the cross undertaking; the likelihood of either party being able to satisfy such an award. And the likelihood that the injunction would turn out to have been wrongly granted or withheld; that is to say the court's opinion of the relative strength of the parties cases.

[14] As per Lord Diplock in the **American Cyanamid** case it would be unwise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies. Parties seem to agree that if this injunction is granted the effect may be that of a mandatory injunction. It does not seem probable that a 2015 Carnival Calypso Competition will be had after the Carnival is over. So therefore, the court in refusing the application for an interim injunction, has considered a practical consequence of any injunction.

[15] I have referred myself to paragraph [16] of the joint affidavit of the applicants in which they depose that they would have lost prestige and winnings and potential earnings but the SMC would also lose the same revenues, lose credibility, the potential risk of a law suit, the country/island would suffer from the loss of revenue not only from the SMC level but down to the small man selling his bottled drinks and sweets for the competition.

³ [1991] 1 App. Case 603 at page 602 – 683

Judicial Review

- [16] I turn now to judicial review; this I can deal with more quickly than the injunction. The court, based on the submissions, has found that the SMC is a body which is reviewable under the judicial review provisions. Ms. Lewis concedes that the SMC is a public body; Act No. 10 of 2011. Ms. Lewis argues that there is nothing breached by the defendant company. She says that the court cannot and has no jurisdiction to deal with the error of a judge, and that's a judge of the calypso competition. That is so. Ms. Lewis argues that there is no decision made that is *ultra vires* therefore no decision to judicially review.
- [17] The rules, she said, has not been adopted by the SMC Act and neither by the SMC Board. Ms. Lewis argues that the Grenada Carnival Commission Rules are not the SMC Rules. Ms. Joseph argues that the defendant cannot say that there are no rules as deposed in the joint affidavit of the applicants; and the rules are published on the SpiceMas website: www.spicemasgrenada.com/press and set out in paragraph 4 of their joint affidavit.
- [18] It is also clear from that joint affidavit that the applicants in their affidavit have considered the procedure for judging on the night. Reference is made to paragraph 5(c) (1-5) of the Andrew's affidavit, which is the affidavit filed on behalf of the defendant SMC, bearing in mind that the rules are not the rules of SMC but the GCC. It is a technicality but it is right that the rules have not been published by the SMC but the GCC. The court accepts that those rules were the rules used and implemented to a certain extent by the SMC. Those rules provided the procedure to be applied and this is where the court had some difficulty.
- [19] The joint affidavit set out that with respect to paragraph 8(c) (1-5) and the court is of the opinion that that ought to have been 5(c) (1-5) because the affidavit of Isha Andrews only goes up to paragraph 7. And I quote if I may from the joint affidavit

if I can, right here, its paragraph 6 of the joint affidavit of Mr. Gaskin and Mr. Francis and it reads as this:

“With respect to paragraph 8(c) (1-5) we are not questioning the procedure set out therein; but it does not appear that in the case of the judge using score sheet number 7 that this procedure was followed. As far as we are concerned the failure of the said judge to use the procedure outlined has resulted in prejudice to us in that our name and or song performed appear to have been mixed up by the said judge with result that we do not know whether we were in fact judged while we were performing on stage.”

So, I stress from the joint affidavit of the applicants that they are not questioning the procedure set out in paragraph 5(c) (1-4) but they have referred to it as 8(c) (1-4). And for completeness and for the record 5(c) says this:

“The process followed by the defendant company on the material day was as follows:

1. The judges were handed blank score sheets upon their arrival at the venue, they were required to arrive an hour before the competition commenced; each judge receiving the said bundle was instructed to fill out the name, subrogate and respective tents corresponding with the respective artist. There were two score sheets allotted for each artist as each artist was allotted to perform two songs.
2. The only parts of the score sheet that were allowed to remain blank were the name of the song and the marks awarded. These two columns remained unfilled as the judges are not aware, prior to the commencement of the competition, what the artist chosen song will be for certainty as the artists often change their songs on the night of the show.

3. Once the master of ceremonies announces the song being performed, the name of the song is entered on one of the score sheets and the relevant song is marked and placed in an envelope.
4. As soon as the individual song is marked by all seven judges on the material day, the score sheets are collected for that performance, stapled together and the marks are tabulated and entered into the excel database. Finally;
5. Upon the artist returning to perform their second song, the said process listed above is conducted until completion of the competition. So from the affidavit of the applicants, they are not questioning that procedure; but it does not appear that in the case of judge number 7 that this procedure was followed.”

[20] The applicants also deposed in their affidavits their legitimate expectation that the SMC would run the competition fairly and in accordance with the rules. This does not fit comfortably with now saying in their new joint affidavit that they do not question the procedure for judging as set out in paragraph 6 of their own joint affidavit.

[21] I have also turned my mind turn to “AG3” and “EF3” whereby both applicants requested a compromise that they both be included in the finals. This again does not fit comfortably with a decision or act being *ultra vires*.

[22] The judicial review being sought must be against a decision or act of the SMC which is *ultra vires*. The applicants questioned the failure of the said judge number 7 to use the procedure outline which resulted in ‘they say prejudice’. Ms. Joseph referred the court to paragraphs [22] and [23] of the judgment from acting Justice Ramdhani and that is the case I believe of **Alan Chastenay**; a case arising out of St Lucia, just so that we are clear I will add the name of the case in, but it was the case of **Lewis and Chastenay**. Thank you Ms. Joseph.

- [23] In that particular case, it was said out that public bodies ought to perform public function there is no dispute there. They must act judicially even though that is no longer a strict requirement; but again there is no dispute.
- [24] There is no litmus test for reviewing matters, what Justice Ramdhani intimated is that the emphasis is really one on function and not on the decision maker's office or status. This means that not all decisions of a public body would be amenable to judicial review, but only such decisions which infringed or affected some public law right of the applicant. So, has the functions of the SMC infringed or affected any public law rights of the applicants before the court. The court finds that this is not so.
- [25] The court is and ought not to be used as a means of seeking an advantage for any individual especially and in particular when there are national events being held and more so when the activities of all individuals contribute towards those events. This is an event which has been ongoing for years upon years. Parties should consider their actions in bringing proceedings against others when it is clear from their own evidence, based on affidavits, that they do not challenge the procedure; they cannot have their cake and eat it too. In the circumstances application for leave to seek judicial review against the SMC is refused as is the application for the interim injunction.
- [26] I thank all Counsel for their helpful submissions. The court extends all apologies for the delay, due to technical reasons, in providing the written version of the oral ruling which was indicated to the parties the day after submissions were heard.

Shiraz Aziz
High Court Judge