

SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV 2009/0102

BETWEEN

CLAUDE ANTHONY SHOULETTE

Claimant

and

THE ATTORNEY GENERAL

Defendant

Appearances:

Mr. Horace Fraser for the Claimant and with him Ms. Isabella Shillingford.
Mrs. Brenda Portland-Reynolds and Ms. Jan Drysdale for the Defendant

.....
2010: January 14th, February 16th,
March 22nd
.....

RULING

[1] **WILKINSON J.:** The Claimant filed a claim form and statement of claim on 30th January 2009. By his statement of claim he claims the following relief:

- (a) Special damages of \$1,034,469.80.
- (b) General Damages for the loss of business prospects.
- (c) Costs.
- (d) Interest.
- (e) Further or other relief.

In his statement of claim the Claimant pleads:

"3. Gildas Willie obtained judgment in default against the Claimant on the 22nd June 2001 in the sum of \$45,000.00 in a civil suit number SLUHCV2001/0360.

4. The Sheriff of the High Court on the 15th February, 2006 purporting to act pursuant to the power vested in his office by virtue of the Code of Civil Procedure Chapter 243 of the Laws of Saint Lucia sold the Claimant's immovable properties, more particularly described as Block 1239B Parcels 48, 54 and 174 at a Judicial Sale.

5. The Sheriff in purporting to sell the Claimant's immovable properties breached the statutory duty imposed upon his office by Article 417 of the Code of Civil Procedure when he invoked the process of the said judicial sale despite the fact that at the time Gildas Willie was deceased and prior to the 25th July 2005 no order was obtained from the Court to substitute a representative for the late Gildas Willie.

6. The Sheriff committed further breach of the statutory regime when he failed to comply with the mandatory requirements of Article 511(1) and (2) of the Code of Civil Procedure as regards advertisements in the Official Gazette and Article 549 of the Code of Civil Procedure where he failed to insert a returnable date to the Writ of Seizure and Sale he issued on the 25th July 2005.

7. The Claimant contends that the judicial sale conducted by the Sheriff on the 15th February, 2005 was void ab initio because of the aforesaid statutory breaches committed by the Sheriff.

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[2] An affidavit of service was made by Beverly Mapson and filed February 6th 2009. Therein she states that she served the Defendant by leaving the claim form [which is endorsed with the statement of claim] with Andrea Joseph on the 30th January 2009 at 1.10p.m.

[3] The Defendant filed a Defence on 2nd March 2009. The Defendant states amongst other matters that upon obtaining judgment in default, Gildas Willie was entitled to take possession of any properties owned by the Claimant in execution of the default judgment and contended that pursuant to Chapter 242 of the Civil Code a judgment debtor renders liable the sale of all of his immovable properties to satisfy payment of the judgment debt. The Defendant further pleads that Claimant failed to comply with Article 2124 of the Civil Code, and given that the breach complained of occurred on the 15th February 2006, the matter is prescribed and extinguished pursuant to Article 2129 of the Civil Code.

[4] A Reply to Defence was filed on 24th March 2009. Therein the Claimant pleaded:
"2. In relation to paragraphs 3 and 4 of the Defence the Claimant contends that Section 6(iv) of the Constitution Order of Saint Lucia does not authorize the taking of possession of his property where natural justice was not observed and where there were statutory breaches committed by the Sheriff which rendered the taking of his property unlawful.

3. In relation to the matters raised in paragraphs 5 and 6 of the Defence the Claimant contends that Articles 2124 and Article 2129 envisages acts lawfully done in the course of duty albeit erroneously or negligently. The said Articles do not cover acts executed by the Sheriff outside the scope of his duties in accordance with the Code of Civil Procedure and

the Constitution Order of Saint Lucia which rendered the sale of the Claimant's properties nugatory and an unlawful act not protected by the immunities granted to public officers by the said Articles 2124 and 2129 of the Civil Code.

- [5] At 27th April 2009 the matter came on before the Master for case management and a case management order was made. Therein trial was fixed for February 16th 2010. Apparently unbeknown amongst colleagues within the Defendant's Chambers, whilst one colleague was before the Master taking the case management order, the other colleague was on the said day filing an application to strike out the statement of case of the Claimant. When the matter came up for trial on February 16th 2010, the matter of the application to strike out the Claimant's statement of case was raised. I decided to rule on the application before proceeding any further.
- [6] The application was supported by the affidavit of the Honorable Attorney General and Minister for Justice of Saint Lucia. The grounds set out in the Defendant's application were:
- (a) The Notice served on the 19th December 2008 is in violation of Article 28 of the Code of Civil Procedure, Chapter 243 of the Revised Laws of Saint Lucia 1957 and is fatal to the proceedings having failed to indicate the mandatory statutory requirement of stating the residence of the Claimant.
 - (b) Section 4 of the Crown Proceedings (Act) dictates that the Crown is responsible for the delicts and quasi-delicts committed by its servants and or agents. Consequently, the Article 28 Notice with respect to the alleged tortuous act committed by the Sheriff in the exercise of his functions must be properly executed and must be in compliance with the said Article irrespective of proceedings being instituted against the Attorney General pursuant to section 13(2) of the Crown Proceedings Act, Cap 2.05 of the Revised Laws of Saint Lucia.
 - (c) The Claim Form and Statement of Claim is prescribed under Article 2124 of the Civil Code, Chapter 242 of the Revised Laws of Saint Lucia.
- [7] CPR 2000 Part 26.3 provides guidance as to how the Court ought to proceed on an application to strike out a statement of case.
- “ 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 a claim;
 - (c) the statement of case or 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.”

Under the former civil rules, an applicant was required to state under which of similar provisions he was bringing his application to strike out a claim. I have observed that here, like several other applications filed, and some of which have come up before me, that the applications never state pursuant to which of the rules the application is being made. I am therefore left with the task of deciphering under which rule the application is being made.

- [8] The Rules requires the Court to resolve the issues raised in the application by strict reference to the statement of case of the Claimant.

- [9] I take the first and second grounds raised by the Defendant together. Article 28 of the Code of Civil Procedure provides:

“ 28. No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any judgment be rendered against him unless notice of such suit has been given him at least one month before the issuing of the writ of summons.

Such notice must be in writing, it must specify the grounds of the action, must be served on him personally or at his domicile and must state the name and residence of the Claimant.”

- [10] This Article has been in recent years, the subject of several decisions of the Court and yet there appears to be still much room for argument. Article 28 as I understand it, is a pre-action protocol required before the filing of a suit against a public officer and others described in the article.

- [11] To start, I revert to a basic rule of interpretation. Halsbury’s Laws of England 4th edition Reissue Vol. 44 (1) paragraph 1391 states:

“**1391. Plain meaning rule.** It is a rule of the common law, which may be called the plain meaning rule, that where, in relation to the facts of the instant case, the enactment under inquiry is grammatically capable of one meaning only and, on an informed interpretation of that enactment, the interpretive criteria raise no real doubt as to whether that meaning is the one intended by the legislator, then the legal meaning of the enactment is taken to correspond to that grammatical meaning; but that in any other case the basic rule of statutory interpretation is to be applied.”

- [12] The part of the Article under consideration is the second provision. The provision repeatedly uses the word **must** which is a verb, before four defined actions which a litigant is called upon take in order to comply with the Article. Three of the actions relate to preparation and content of the Notice

and the fourth relates to service of the Notice. Given the plain meaning of the word “must” which is to compel and mandate the manner in which the activities are to be carried out by a litigant, I have no discretion to apply a purposive interpretation to the provision as urged by the Defendant.

- [13] In **Life Rafts and Inflatables Centre (St. Lucia) Ltd. V. The Honorable Attorney General et al.** SLUHCV 2005/0593 the matter of a defective notice was an issue before the court. The defendants brought an application to strike out the Claimant's statement of case on the basis that the Notice of Proceedings filed and served by the Claimant was in violation of Article 28 of the Code of Civil Procedure. Mason J said:

“[12] It is argued by Counsel for the Defendants that the Claimant filed and served a document headed “Notice of Proceedings” against the First and Second named Defendants without specifying or disclosing the grounds of the action against them and this requirement being mandatory caused the notice to be defective.

[13] Added to this, the pleadings of the Claimant failed to address the question of effective service, if any, of any proper Notice.

[14] Counsel also referred to a letter of 17th June, 2005 sent by the Claimant to the second named Defendant which sets out fully and extensively the Claimant's claim and which the Claimant would wish to be accepted as a Notice.

[15] Counsel argues that if this letter is to be deemed Notice of Proceedings, then there is no proof of service on the Second named Defendant as required by Article 28 Civil Code of Procedure, the letter having been accepted by a member of staff of the Second Defendant as indicated in the Affidavit of Service. That letter would be also defective as a Notice there being no evidence of personal service.

[27] Taking into account the requirements of Article 28 Civil Code of Procedure, I must accept Counsel for the Defendants' submission that the Notice is defective, because while it is in writing and has been given to the First and Second Defendant at least one month before the issue of the claim form, there is no evidence of either personal service on the Defendant or at their residence.

[28] Personal service means exactly what it says. The document must be given directly to the individual and not left with some other person. It can however be left at the Defendant's residence.

[29] The Article also requires that the Notice of Proceeding must state the residence of the Claimant. Again there is no evidence of this.

[30] I am therefore left with the conclusion that the Notice of Proceedings does not comply with the requirements of Article 28 Civil Code Procedure (Code of Civil Procedure) and being noncompliant is defective and cannot stand.

[31] I am persuaded by Counsel for the Defendants to quote the words of Edwards J in the case of *Peter Clarke v. The Attorney General et al* SLUHCV 1999/047: "it is evident therefore that the consequence of giving a defective notice or no Notice is fatal to (the) action against all the Defendants".

[14] I find that in light of the plain and mandatory language of the second provision of Article 28, and the authorities cited, the notice is defective, and this is fatal to the Claimant's suit.

[15] The third ground of the application, the matter of prescription under the Civil Code also continues to be a battleground. The decisions of the Court have held that unlike the Limitation Acts of the United Kingdom, if prescription is found then all other remedies are also extinguished. I believe that it is partly the reason that the battle ensues.

[16] In regard to the third ground, I am guided by the extensive analysis done in past cases on the issue of prescription, and the co-related issue arising in cases of similar circumstances, that is whether there was bad faith pleaded which could extend the prescription period.

[17] In **Norman Walcott v. Moses Serieux** Civil Appeal No.2 of 1975 the Court considered both the Limitation Act at the United Kingdom and prescription at St. Lucia. Peterkin JA said:

"In Article 2129 quoted above, both the right and the remedy are extinguished and therefore there is no question of a party being called upon to choose whether he would plead the defence of limitation. As long as the evidence in a case discloses that the period of limitation has expired, the judge has no discretion in the matter."

[18] In **Michele Stephenson & Anr. v. Lambert James-Soomer** SLUHCV2003/0138 Edwards J. reviewed the English and the Foreign Rule of Limitation positions and concluded:

"[66] It is obvious that Article 2129 of The Civil Code exemplifies that "foreign rule of limitation" which extinguishes both the right and the remedy."

[19] I quote extensively from the consolidated cases of **Michael Christopher v. PC John Flavien and Anr.** SLUHCV 2004/0502, and **Tamara Barrow v. PC John Flavien and Anr.** SLUHCV 2006/0182 as it covers both the important issues of prescription, and a failure to plead bad faith thus leading to certain defeat for a Claimant in certain circumstances. Edwards J. said:-

"[8] Though the Defendants have not pleaded any special defence resulting from prescription, Learned Counsel Mr. Lay has argued confidently in his closing submissions,

that Ms. Barrow's claim is prescribed. Mr. Lay has argued further that (t)his claim cannot be maintained at all against the Defendants, in the absence of a specific pleading alleging, that PC Flavien was at the material time acting in bad faith.

[20] Section 4 (1), (3), (4) of The Crown Proceedings Act states:

"4(1) Subject to the provision of this Act, the Crown shall be subject to all those liabilities in delict or quasi-delict to which, if it were a private person of full age and capacity, it would be subject –

(a) in respect of delicts or quasi-delicts committed by its servants or agents;

However, proceedings shall not lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provision of this Act have given rise to a cause of action in delict or quasi-delict against that servant or agent of his or her estate.

(3) Where any functions are conferred or imposed upon an officer of the Crown as such by any enactment having the force of law in Saint Lucia and that officer commits a delict or quasi delict while performing or purporting to perform those functions, the liabilities of the Crown in respect of such delict or quasi-delict shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown

(4) **Any enactment which negatives or limits the amount of the liability of any Government department or officer of the Crown in respect of any delict or quasi-delict committed by that department or officer shall, in the case of proceedings against the Crown under this section in respect of a delict or quasi-delict committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings against the Crown had been proceedings against that department or officer.**(My emphasis).

[21] Article 2066 of the Civil Code presumes that the acts of PC Flavien at the material time were done in good faith. It states that **"Good faith is always presumed. He who alleges bad faith must prove it". (My emphasis)**

[22] Article 2124 states that: "Actions against public officers in respect of acts done by them in good faith and in respect of their public duties are prescribed by six months." Article 2075 states that : The Crown may avail itself of prescription.

[23] Article 2047 defines what prescription is. It states: "Prescription is a means of ... being discharged from an obligation by lapse of time, and subject to conditions established by law... Extinctive or negative prescription is a bar to, and in some cases precludes any action for the fulfillment of an obligation or the acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law.

[24] Article 2122.2 states that actions "for damages resulting from delicts or quasi-delicts, whenever other provisions do not apply," are prescribed by three years.

[25] Article 2093 states that: "Prescription runs against all persons, unless they are included in some exception established by the Code, or unless it is absolutely impossible for them in law or in fact to act by themselves or to be represented by others.

[26] Article 2129 states: "In all the cases mentioned in articles 2111, 2121, 2122, and 2123, 2124, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired except in the case of promissory notes and bills of exchange, where prescription is precluded by a writing signed by the person liable upon them.

[27] Article 2052 stipulates that "The Court cannot of its own motion supply the defence resulting from prescription, except in cases where a claim is extinguished by law as provided in Article 2129.

[37] It is not in dispute that PC Flavien at the material time was a servant or agent of the Crown in active duty, obviously performing his statutory functions and public duty under the Police Ordinance No. 30 of 1965 as amended, at the time of the alleged delict.

[38] The pleadings of Ms. Barrow do not allege that PC Flavien at the time he was acting in bad faith, or that he acted maliciously or without reasonable or probable cause, or without lawful justification....

[39] Under the Civil Code, in the case of a delict, an allegation of bad faith in a statement of case against a public officer performing his public duties, serves to take the prescription period beyond the six months stipulated in the Article 2124 for bringing the claim, and effectively extend the prescription period to 3 years as stipulated by Article 2122.2. That is my interpretation of Articles 2124 and 2122.2.

[40] Article 2066 makes it clear in my view, that a Claimant or Defendant whose case depends on a finding by the Court of bad faith concerning the conduct of the other party, must ALLEGE bad faith and PROVE bad faith. Consequently, you cannot prove what you have not alleged. This mandatory requirement that allegations of bad faith, like dishonesty and fraud, should be pleaded, was considered in Three Rivers District Council v. Bank of England (No.3) [2000] 3 All E.R. 1. by Lord Hope of Craighead. He said at paragraph 51: "On the other hand it is clear as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegation. This is especially so where allegations being made is of bad faith or dishonesty. The point is well established in the case of fraud." Lord Hope continued at paragraph 55: "We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty, [and bad faith]. If there is not specific allegation of dishonesty it is not open to the Court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Miller L.J said in *Armitage v. Nurse* [1997] 2 AER p.715 "It is not necessary to use the word "fraud" or "dishonesty" [or bad faith if I might add for the purposes of Ms. Barrow's

claim] if the facts which make the conduct fraudulent [or which amount to bad faith] are pleaded, but this will not do if language used is equivocal (See Belmont Finance Corporation Ltd. v. Williams Furniture Limited [1979] 1 AER p118 at 311). In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, the allegation of fraud, dishonesty, or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself must be struck out." Though Lord Hope's statements were made in relation to the tort of misfeasance in public office, in my view they are eminently applicable to Ms. Barrow's claim.

[41] In the absence of a plea of bad faith in Ms. Barrow's statement of case there is no question of fact to be determined by evidence at the trial, as to whether PC Flavien was acting in bad faith or good faith in my view. It seems to me from Article 2066, that the presumption of good faith can only be rebutted by pleading and then proving bad faith. There is therefore no triable issue of bad faith arising from the pleadings in Ms. Barrow's case.

[50] I am therefore firmly of the view, that Article 2052 buttresses the reasoning of Peterkin J.A. in Walcott v. Serieux supra where he stated that: "As long as the evidence in a case disclosed that the period of limitation has expired, the judge had no discretion in the matter."

[51] I must therefore uphold the submissions of Counsel Mr. Lay which in my view reflect the proper appreciation of the law on prescription. Ms. Barrow's cause of action has been prescribed by virtue of Articles 2124, since the claim was filed more than 6 months after her cause of action accrued.

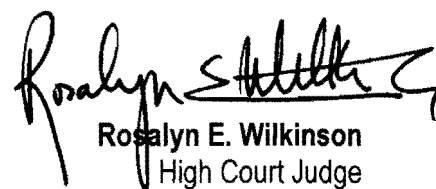
[52] Since she has not alleged that PC Flavien was acting in bad faith at the material time, or that PC Flavien was acting outside of the scope of his employment, her cause of action has not enjoyed the 3 year prescription period under Article 2122.2. She cannot therefore sustain her claim against the Defendants, or against PC Flavien in his personal capacity."

[20] It is clear that from the authorities cited in relation to Article 28 that a defective notice is fatal to a claimant's suit. I therefore find that the defective notice was fatal to the Claimant's claim.

[21] Secondly, I see this case as being analogous to the case of **Tamara Barrow** supra. The Sheriff would have been carrying out activities prescribed by law to lead to a judicial sale. The Claimant's own reply at paragraph 3 therein admits that Article 2129 could also cover acts done in the course of duty erroneously or negligently. On a close review of the pleadings, to which I must have regard only, on this application to strike out the statement of case, there are no direct pleadings of bad faith or pleadings from which it can be inferred that there was bad faith.

The Claimant's claim is struck out.

Costs to be agreed between the Parties failing which upon application costs will be fixed by the Court.


Rosalyn E. Wilkinson
High Court Judge