THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2018-04199

Between

PATRICK CHARLES

First Claimant

WADE CHANKA

Second Claimant

IAN BARROW

Third Claimant

And

HER WORSHIP MAGISTRATE SHERENE MURRAY-BAILEY

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: June 26, 2019

Appearances:

Claimants: Mr. B. Winter instructed by Ms. T. Lowe

Defendants: Mr. D. Byam instructed by Ms. J. Mitchell

DECISION ON APPLICATION

1. On February 27, 2019 the first defendant filed a Notice of Application ("the original application") seeking the following relief;

    i. The Claim Form and Statement of Case filed on behalf of the claimants on November 9, 2018 be struck out pursuant to the inherent jurisdiction of the court and Rules 26.1(w), 26.2(1)(b) and 26.2(1)(c) of the CPR;

    ii. Alternatively, that this matter be stayed pending the determination of this application in accordance with the powers of the court under CPR Part 26.1(1)(f) and/or time be extended for the filing of a Defence pursuant to CPR Part 10.3(5); and

    iii. The costs of this application be paid by the claimants to the first defendant to be assessed in default of agreement.

2. The grounds of the original application were as follows;

    i. Pursuant to section 5(2) of the Magistrates Protection Act Chapter 6:03, no action shall be brought for anything done under the conviction or order or for anything done under any warrant issued by the Magistrate to procure the appearance of such party and followed by a conviction or order in the same matter, until after such conviction of order has been quashed by the High Court;

    ii. The order of the Honourable Mr. Justice Rahim dated May 25, 2018 on the first claimant's former application for leave to issue a Writ of Habeas Corpus Ad Subjiciendum did not quash the detention orders dated May 8, 2018 made by the first defendant;

    iii. In light of the legal provisions and the effect of the order of the Honourable Mr. Justice Rahim dated May 25, 2018, the Claim Form

and Statement of Case of the claimants do not disclose grounds for bringing or defending a claim against the first defendant and is an abuse of the process of the court.

3. On April 5, 2019 the defendants filed an Amended Notice of Application ("the amended application") which was virtually identical to the original application save and except, paragraph (i) of the grounds of the application was amended by deleting "5(2)" and substituting same with "6".

ISSUES

4. The issues for determination by this court are as follows;

   i. Whether the amended application is defective since it failed to properly set out the grounds of the application; and
   ii. Whether the Claim Form and Statement of Case of the claimants discloses no grounds for bringing or defending the claim against the defendants and is an abuse of the process of the court.

THE CLAIM

5. The court makes no findings of fact but has narrated the facts as set out by the claimants to provide important background information for the purpose of understanding the claim and the competing arguments.

6. The claimants, Patrick Charles ("Charles"), Wade Chanka ("Chanka") and Ian Barrow ("Barrow") were at all material times patients voluntarily admitted to the Caura Hospital, Caura Royal Road, El Dorado ("the hospital") afflicted with the disease, tuberculosis. On May 2, 2018 Dr.

Michelle Trotman, Medical Director of the Hospital ("the Hospital's Director") brought applications at the Tunapuna 3rd Magistrate's Court complaining that the claimants were tuberculosis patients at the hospital who on divers dates refused to remain thereat for the duration of their treatment contrary to Section 7(1) of the Tuberculosis Control Act Chapter 28:51 ("the Act").

7. On May 3, 2018 the first defendant pursuant to section 7(2) of the Act issued summonses for the claimants' appearance in court on May 8, 2018. On May 8, 2018 the claimants prepared themselves and awaited transportation by the authorities to be conveyed to the Tunapuna Magistrates' Court. However, the claimants were not conveyed to court. At around 4:10 p.m. on May 8, 2018 the claimants were arrested for not attending court and not taking their medicine. The claimants were transported to the Maximum Security Prison, Golden Grove, Arouca ("the prison").

8. At the prison, the claimants were received by the prison officers upon the authority of Orders of Detention dated May 8, 2018 and which were signed by the Justice of the Peace, St. George East Magisterial District, Tunapuna Magistrates' Court. Each Order of Detention recited that the hearing of the complaints was adjourned to June 5, 2018 at 9:00 a.m. and that the claimants were detained pursuant to section 7(9) of the Act pending the hearing of the matters.

9. On May 22, 2018 Charles' Attorney-at Law filed an application for the issue of a writ of *habeas corpus ad subjiciendum* to have the Commissioner of Police show cause why Charles should not be immediately released from custody. The application was grounded on the argument that section 7 of

the Act enjoined a Magistrate during the pendency of a hearing to make an order for detention at a hospital or such other safe and comfortable place and that a prison did not fall within that scope. The aforementioned application was heard by this court on May 25, 2018.

10. After hearing the oral testimony and legal arguments, this court found that the prison infirmary was not on the evidence before the court, a hospital described under the provision of section 2(1) of the Act in respect of persons who did not fall into the category of those prisoners set out at section 8 of the Act. Consequently, this court ordered that Charles be conveyed to the hospital, be admitted and detained there for treatment and remain there until discharged in the manner provided under the Act. There has been no appeal by the State of the aforementioned Order of this court. Charles was released from the prison on May 25, 2018 and conveyed to the hospital.

11. By Pre-Action Protocol letter dated May 28, 2018 Chanka and Barrow's Attorney-at-law wrote to the Commissioner of Prisons demanding their release to the hospital by May 29, 2018 or else further applications for writs of habeas corpus would be initiated. On May 29, 2018 further Orders of Detention were issued by the Justice of the Peace, St. George East Magisterial District, Tunapuna Magistrates' Court directing the release of Chanka and Barrow from the prison and authorizing their detention at the hospital until June 5, 2018.

12. On June 5, 2018 the complaints laid by the Hospital's Director against the claimants came up for hearing before the first defendant at the Tunapuna 3rd Magistrate's Court. Based on the Hospital's Director's statement relative to the medical condition of the claimants, the first defendant did

not make any further Orders of Detention however, the hearing of the complaints was adjourned to November 20, 2018.

13. The Hospital's Director discharged Charles, Chanka and Barrow from the hospital on June 6, 10 and 8, 2018 respectively.

14. The claimants claim they were unlawfully detained in prison custody by the first defendant and thereafter mechanically restrained at the hospital under police guard without being given the opportunity to be heard and upon complaints that were not criminal in nature and which carried no penal sanction. The claimants' further claim that their detention under the purported exercise of powers contained in section 7 of the Act was clearly outside the jurisdiction of the first defendant. Consequently, by Claim Form filed on November 9, 2018 the claimants claim the following relief;

    i. Damages for false imprisonment at the Maximum Security Prison, Golden Grove, Arouca for the following periods;
        a) In respect of Charles from May 8 to May 25, 2018;
        b) In respect of Chanka and Wade from May 8 to May 29, 2018

        By orders of detention issued by the first defendant, unlawfully and without jurisdiction at the Tunapuna 3rd Magistrate's Court.

    ii. Aggravated and/or exemplary damages;
    iii. Costs;
    iv. Interest; and
    v. Such further and/or other relief as the Court may deem just.

ISSUE 1 - *Whether the amended application is defective since it failed to properly set out the grounds of the application*

15. The claimants submitted that despite the altered statutory basis for the application, the grounds of the amended application remained the same as the original application. That is, the amended application continued to erroneously cite the terms of section 5(2) of the Magistrates Protection Act ("the MPA") and rely upon the abandoned argument that the detention orders of the Magistrate were not quashed by the High Court. As such, the claimants submitted that the amended application failed to comply with Rule 11.7 of the CPR which requires that an application must state why the applicant is seeking the order. That without the correct grounds of the application, the claimants were placed at a severe disadvantage in responding thereto.

16. Consequently, the claimants submitted that the amended application should be dismissed for failure to disclose the proper basis of the application. The defendants did not address this issue in their submissions.

17. ***Rule 11.7 of the CPR*** provides as follows;

"11.7 (1) An application must state—
(a) what order the applicant is seeking; and
(b) briefly, why the applicant is seeking the order
(2) The applicant must include with or attach to the application a draft of the order he is seeking.
(3) Either the applicant or his attorney-at-law must certify on the application that he believes any facts stated in the application are true."

18. Further, ***Rule 26.8 of the CPR*** provides as follows;

"26.8 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

19. The court finds that although the defendants failed to alter the grounds of the amended application, the claimants were not placed at a severe disadvantage as they were aware of the section of the MPA upon which the defendants were relying and were given the opportunity to address same via submissions. As such, the court finds that the amended application was not defective even though it failed to properly set out the grounds of the application and if it was, same could be easily remedied by order of the court in any event. In this case there is no need to order such an amendment in the court's view.

ISSUE 2 - *Whether the Claim Form and Statement of Case of the claimants discloses no grounds for bringing or defending the claim against the defendants and is an abuse of the process of the court*

Law

CPR

20. ***Rule 26.1(w) of the CPR*** provides as follows;

"26.1 (1) The court (including where appropriate the court of Appeal) may—

…

(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."

21. Further, ***Rules 26.2(1)(b) and 26.2(1)(c)*** of the CPR provide as follows;

"26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court—

…

(b) that the statement of case or the part to be struck out is an abuse of the process of the court;

(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim…"

Striking out

22. In ***Terrence Charles v Chief of the Defence Staff and the Attorney General***,[1] Justice Jones (now Justice of Appeal) stated as follows at paragraph 11;

"A decision made by the Court under Part 26.2 (1)(c), that the statement of case discloses no grounds for bringing the claim, amounts to a decision on the merits of the case. The burden of proof in this regard is on the applicant. At the end of the day the Defendants, as applicants, must satisfy me that no further investigation will assist me in my task of arriving at the correct outcome. That said the rule ought not to be used except in the most clear

[1] CV2014- 02620

of cases. Where an arguable case is presented or the case raises complex issues of fact or law its use is inappropriate."

23. Further, in ***Beverley Ann Metivier v The Attorney General of Trinidad and Tobago and others,***[2] Kokaram J at paragraph 4.7 and 4.8 stated as follows;

"4.7 Of course, the power to strike out is one to be used sparingly and is not to be used to dispense with a trial where there are live issues to be tried. A. Zuckerman observed: "The most straightforward case for striking out is a claim that on its face fails to establish a recognisable cause of action… (Eg. A claim for damages for breach of contract which does not allege a breach). A statement of case may be hopeless not only where it is lacking a necessary factual ingredient but also where it advances an unsustainable point of law" 4.8 Porter LJ in Partco Group Limited v Wagg [2002] EWCA Civ 594 surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bring a claim include: "(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides Harris v Bolt Burden [2000] CPLR 9; (b) Where the statement of case does not raise a valid claim or defence as matter of law""

Discussion and findings

24. Upon an analysis of the claimant's Claim Form and Statement of Case, the court finds that the claimants have made out an arguable case that the first defendant exceeded her jurisdiction by ordering their detention at the

[2] H.C.387/2007

prison infirmary and that it follows that by virtue of **section 5(1) of the MPA**, an action lies against the first defendant for false imprisonment.

25. ***Section 5(1) of the MPA*** provides as follows;

"Any person injured by any act done by a Magistrate in a matter not within his jurisdiction, or in excess of his jurisdiction, or by any act done in any such matter under any conviction or order made or warrant issued by him, may maintain an action against the Magistrate without alleging that the act complained of was done maliciously and without any reasonable and probable cause."

26. The court notes that by Act No. 4 of 2019 which was assented to on March 7, 2019 section 5(1) of the MPA was repealed and substituted with the following;

"A person may maintain an action against a Magistrate for any act done in a matter not within his jurisdiction or in excess of his jurisdiction, where it is alleged and proved that the act was done maliciously and without reasonable and probable cause."

27. This claim was however initiated prior to the amending of the MPA.

28. The claimants were never charged with a criminal offence. They were simply before the court because applications had been made by the Hospital's Director pursuant to Section 7(1) of the Tuberculosis Control Act.

29. ***Section 7 of the Tuberculosis Control Act*** provides as follows;

"7. (1) Any medical officer of health, hospital director or medical practitioner may make a complaint or lay an information in writing before a Magistrate that the person named therein—

(a) is suffering from infectious tuberculosis;

(b) is unwilling or unable to conduct himself in such a manner as not to expose members of his family or other persons to danger of infection; and

(c) refuses to be admitted to or to remain in a hospital or has left the hospital against the advice or without the knowledge of the hospital director.

(2) Upon receiving any such complaint or information, the Magistrate shall issue a summons directed to the person named therein requiring him to appear at a time and place specified in the summons.

(3) Where the person to whom the summons is directed does not appear at the time and place specified therein, or where the summons cannot be served, the Magistrate may issue a warrant directing that the person named in the summons be brought before him.

(4) Where the person named in the summons does not appear in person or by a representative, and the Magistrate is satisfied that the person so named is too ill to appear or to be brought before him, he may make an order requiring that person to be admitted to a hospital and that Magistrate or any other Magistrate may hold any further hearings in respect of the matter in the hospital.

…

(6) Where a Magistrate finds that any such person—

(a) is suffering from infectious tuberculosis;

(b) is unwilling or unable to conduct himself in such a manner as not to expose members of his family or other persons to danger of infection; and

(c) refuses to be admitted to or to remain in a hospital, or has left the hospital against the advice or without the knowledge of the hospital

director, ***the Magistrate shall order that such person be admitted to and detained in a hospital for treatment and remain therein until discharged as provided under this Act*** (emphasis mine).

…

(9) A person detained pending a hearing under this section, or pending his removal to a hospital, shall be detained in a hospital or such other safe and comfortable place as the Magistrate may direct. (emphasis mine)…"

30. As such, the court agrees with the submission of the claimant that the sentencing power of a Magistrate upon finding that a person is suffering from infectious tuberculosis, is unwilling to conduct himself in such a manner as not to expose members off the public to danger of infection and refuses to remain in a hospital or had left the hospital without the knowledge of the Hospital's Direction, is not exhaustive but limited to making an order that such person be detained in a hospital for treatment and remain therein until discharged. Section 2(1) of the Tuberculosis Control Act defines a hospital as a place used or designated under any law as a place for the treatment of tuberculosis and includes a part of a general or other hospital or other place that, with the approval of the Minister, is set aside for the care and treatment of patients.

31. The defendants submitted that even if the claimants rely on section 5 (1) of the MPA, the first defendant still attracts no civil liability as the said Act provides in section 5 (2) that the conviction or order must be quashed by the High Court for such an action as the one at bar to be brought. According to the defendants, the order this court made on May 25, 2018 in Charles' habeas corpus application did not have such an effect on Charles' Order of Detention dated May 8, 2018. The defendants further submitted that there was also no such order by the High Court in the case of both Chanka

and Barrow and therefore those Orders of Detention of May 8, 2018 were not quashed.

32. As mentioned above, on May 25, 2018 this court considered the lawfulness of the first defendant's order of detention to the prison infirmary in an application for habeas corpus. By order of even date, this court ruled that the prison infirmary was not on the evidence before it, a hospital as described under the provisions of section 2(1) of the Tuberculosis Control Act, in respect of persons who do not fall into the category of prisoners set out at section 8 of the said Act. It also ordered his removal to a hospital.

33. In the Court of Appeal case of ***Rion Woods v the Attorney General of Trinidad and Tobago***[3], (a case relied upon by the claimant) Bereaux J.A. had the following to say at paragraph 3;

"[3] The appeal must be allowed for the following reasons:

(i) The effect of the order of Tiwary-Reddy J was that the three month detention at the Dormitory was found to be unlawful. The failure of the Commissioner of Prisons (to whom the order was directed and who was a party to the habeas corpus proceedings) to appeal the order meant that the order, coming as it did from the High Court, which is a court of competent jurisdiction, is binding on the parties and on all courts of concurrent jurisdiction. Gobin J therefore was bound by the finding of unlawfulness of the detention, even though she too rightly concluded that the magistrate had no jurisdiction to order the brothers' detention.

[3] Civ. App. No. 6 of 2012

(ii) *(ii) The Commissioner of Prisons not having appealed the order of Tiwary-Reddy J in the habeas corpus application, any subsequent challenge to the illegality of the detention is a collateral attack on that decision and constitutes an abuse of process. But in any event the committal of the brothers to the Dormitory was plainly unlawful…"*

34. Further, at paragraph 14 His Lordship stated as follows;

"At the heart of the appeal is whether the magistrate had the power to order the brothers' detention pending the hearing of the variation of custody complaint or pending the hearing of the "beyond control" complaint. A court of competent jurisdiction has already found that she did not. I agree. Tiwary-Reddy J presiding on a habeas corpus application ordered the release of the brothers on 21st May 2008. The order of Tiwary-Reddy J of 21st May 2008 effectively quashed the warrant of commitment of 28th February 2008 and directed the brothers' release. Their release could only have been on a finding that their detention from 28th February was illegal. There was no appeal from that order."

35. As such, according to the aforementioned case law, the order of this court on May 25, 2018 in relation to Charles' habeas corpus application did have the effect of quashing Charles' Order of Detention dated May 8, 2018. However, in relation to Chanka and Barrow there was no High Court order quashing their Orders of Detention.

36. The defendants submitted that an order of detention is an instrument with a hybrid effect. That it serves to keep the subject of said order detained until such time, as in this case, the relevant personnel had deemed the person discharged or until such a complaint or information brought before

the relevant authority is heard. The defendants further submitted that a warrant, in effect, serves to have the subject of the same, arrested and detained until such time as they are discharged or brought before the relevant authority to answer a charge, information or complaint. That more specifically a warrant of detention is a court order authorizing someone's detention.

37. As such, the defendants submitted that that the word "warrant" as used in section 6 of the MPA can be interpreted to include an order of detention as issued by a Magistrate. That it would therefore follow that, the acts of the first defendant is covered by section 6 of the MPA. According to the defendants, the order of detention which the first defendant issued in the proceedings before her had the effect of a warrant from which no order or conviction was made. The word 'order' in both sections 5 and 6 of the MPA means a final order made after a substantive hearing of the charge or matter before the magistrate. Consequently, the defendants submitted that in the circumstances, the first defendant is immune from civil liability.

38. In so submitting, the defendants relied on the case of ***Myrtle Crevelle (Administratrix Ad Litem of the Estate of Clyde Crevelle (deceased) v the Attorney General of Trinidad and Tobago***[4]***,*** which dealt with an appellant commencing constitutional proceedings seeking declarations that the actions and conduct of a Magistrate in charging him for contempt of court was unconstitutional and that his arrest and imprisonment pursuant to the issued warrant were breaches of his right to the protection of the law, to liberty and security of the person and the right not to be deprived thereof except by due process of law. The trial judge found, inter alia, that the incarceration, even if it were in breach of the law, was the result of an error

[4] Civ. App. No. 45 of 2007

of law which was liable to correction on appeal. The appellant appealed and the Court of Appeal found that the trial judge was wrong in his finding because the appellant was never convicted of an offence and sentenced to a term of imprisonment from which lay a right of appeal. That the appellant's imprisonment was consequent upon his arrest by a warrant issued by the Magistrate. Further that there was no right of appeal from such imprisonment. At best, the appellant would have had a cause of action in tort. However, no such cause of action existed by virtue of the MPA. Justice of Appeal Bereaux giving the decision of the panel had the following to say;

"20. The appellant would thus ordinarily have been entitled to pursue his common law remedies in tort for the false imprisonment and malicious prosecution. However, the effect of the Magistrate's Protection Act, Chap 6:03 (the MPA) which governs the liability of magistrates in the exercise of their official function, is to prohibit the appellant from taking any action against the magistrate. The relevant provisions are section 3, 4, 5 & 6. They provide as follows:

(3) "Every action to be brought against any Magistrate for any act purporting to have been done by him in the execution of his office shall be brought in the High Court.

(4) The endorsement of the writ of summons in every such action shall allege either that the act was done maliciously and without reasonable and probable cause, or that it was done in a matter not within the jurisdiction of the Magistrate, otherwise the writ shall be set aside on summons; and if the plaintiff fails at the trial to prove the allegation, a verdict shall be given for the defendant.

(5) (1) Any person injured by any act done by a Magistrate in a matter not within his jurisdiction, or in excess of his jurisdiction, or by any act done in any such matter under any conviction or order made or warrant issued by

him, may maintain an action against the Magistrate without alleging that the act complained of was done maliciously and without any reasonable and probable cause.

(2) No such action shall be brought for anything done under the conviction or order, or for anything done under any warrant issued by the Magistrate to procure the appearance of such party and followed by a conviction or order in the same matter, until after the conviction or order has been quashed by the High Court.

(6) No action shall in any case be brought against any Magistrate for anything done under any warrant which has not been followed by a conviction or order, or if, being a warrant upon an information for an alleged indictable offence, a summons was issued previously thereto, and served upon such person personally, or by it being left for him with some person at his usual or last know place of abode, and he has not appeared in obedience thereto."

21. The Act, as its name suggests, is intended to protect magistrates and justices of the peace from actions brought against them in respect of actions done in the course of their duty. Its provisions are no doubt based on the Justices Protection Act 1848, in England said by Ormond J to have been "the culmination of a number of Acts designed to protect justices from civil litigation arising out of their functions as justices which, as Blackstone observed, was a serious detriment to recruitment", see R v Manchester City Magistrate's Court, ex parte Davies [1989] 1 QB 631, 648. As to the rationale for such protection, Lord Denning in Sirros v Moore [1976] QB 118, 136, observed that:

"Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: If I do this, shall I be liable in damages.

…

31. The magistrate having wrongly charged the appellant and having issued a warrant for his arrest as a result of the charge, would be liable for all the consequences which naturally flow from those acts. The fact that the appellant's detention was a consequence of the magistrate's act, would ordinarily have brought him under the first limb of section 5(1) of the Act as I have set it out in paragraph 23 above. However, the appellant was detained pursuant to the issue of a warrant of arrest by the magistrate, which brings this case within section 6 of the MPA. Because there was no conviction or order which resulted from the charge, the magistrate is protected from civil liability by section 6.

32. Under section 6, anything done under the authority if a warrant issued by a magistrate is not actionable against the magistrate if there were no resulting conviction or order. Section 6 contemplates, ordinarily, a situation in which a person appears in court on a warrant issued by a magistrate and the matter which is the subject of the warrant is resolved in his favour with the result that there is no "conviction or order" made against him. "Order" in both sections 5 and 6 thus refers to a final order made after a substantive hearing of the charge or matter before the magistrate.

33. In this case the appellant was detained by virtue of the warrant of the magistrate but there was no conviction or order because the charge was quashed before a hearing was conducted by the magistrate, the detention thus falls within section 6 as being something "done under any warrant which has not been followed by a conviction or order." While this does not fit classically within the contemplation of section 6, the wording of section 6 is broad enough to bring this case within its provisions. The fact is that there has been no "conviction or order" and the effect is to protect the magistrate from any private law action."

39. In the case of ***Indar Jagroo v Anisha Mason***[5] (a case relied upon by the claimant) Narine J.A. had the following to say at paragraph 10;

"Section 6 of the Act also provides a measure of protection to a Magistrate in certain limited circumstances, where the Magistrate acts under a warrant that has not been followed by a conviction or order, or when a person fails to appear in obedience to a summons…"

40. In ***Jagroo v Mason*** supra the appeal involved the determination of the following two issues;

"(i) Did the Magistrate have the jurisdiction to remand the respondent to the Women's Prison?
(ii)Does section 6 of the Act protect the Magistrate from liability for false imprisonment in this case?"[6]

41. At paragraph 20, His Lordship disaggregated the wording of the section as follows;

"Section 6(1) of the Act provides that no action shall lie against the Magistrate:

(i) for anything done under any warrant,

(ii) which has not been followed by a conviction or order, or

(iii) being a warrant upon an information for an alleged indicatable offence, a summons was issued previously thereto, and served upon such person personally ….and he has not appeared in obedience thereto."

[5] Civ. App. No. P182 of 2014
[6] See para 11

42. In respect to part (iii), His Lordship opined that it applied to a case where a summons had been served in indictable proceedings upon a person who did not appear and explained that in such a case, a Magistrate who then issues a warrant for such a person to appear in court is immune from suit.

43. The court agrees with the submission of the claimants that the aforementioned is inapposite to the facts of the instant matter. In this case, there was no indictable offence alleged against the claimants. In their pleadings, the claimants gave a reason for their non-attendance at court. Although the claimants were served with summonses to attend court, the first defendant was aware at all material times that they were at the hospital and it was Police Inspector Anson Ali[7] who made the application to the first defendant indicating that the claimants were too ill to appear under section 7 of the Tuberculosis Act. As such, the court agrees with the submission of the claimants that it does not accord with common sense and logic to suggest that they failed to appear in obedience to the summonses and as a result the first defendant issued a warrant for their apprehension and/or commitment. That there was absolutely no evidence of any warrant being issued for the claimants to appear in court.

44. The defendant appears to aver onto the Magistrate the powers contained at sections 46 and 48 of the Summary Court Act (SCA) Chap 4:20 which read as follows;

    a. Section **46** of the SCA;

        If, either before or on the hearing of any complaint, it appears to the Magistrate or Justice on the statement of the complainant or of the defendant or otherwise, that any person is likely to give

[7] See Affidavit of Police Inspector Anson Ali sworn to on May 25, 2018 in the application for the issue the writ of habeas corpus ad subjiciendum

material evidence for the complainant or for the defendant, the Magistrate or Justice may issue a summons for such person requiring him to attend, at a time and place to be mentioned therein, before the Court, to give evidence respecting the case, and to bring with him any specified documents or things and any other documents or things relating thereto which may be in his possession or power or under his control.

b. Section **48** SCA;

If the person to whom any such summons is directed does not attend before the Court at the time and place mentioned therein, and there does not appear to the Court on enquiry to be any reasonable excuse for such non-attendance, then, after proof upon oath to the satisfaction of the Court that the summons was duly served or that the person to whom the summons is directed willfully avoids service, the Court, on being satisfied that he is likely to give material evidence, may issue a warrant to apprehend such person, and to bring him, at a time and place to be mentioned in the warrant, before the Court in order to testify as mentioned above.

45. To do so would be improper as the Magistrate did not purport to act under those sections but in fact purported to act under section 7(4) of the Tuberculosis Act. The magistrate is a creature of statute and can only exercise the specific powers granted by the specific statutes. Clearly therefore the Magistrate had no power to issue a warrant under section 7(4) in the case where the person against whom the charge is laid is too ill to attend.

46. The court further agrees with the claimants' submission that even if the defendants attempted to fashion a submission based on parts (i) and (ii) of

Justice of Appeal Narine's dicta above to the effect that the detention of the claimants was something done under a warrant (of commitment) which was not followed by a conviction or order, the plain answer would be that there was no warrant in place pursuant to which the first defendant ordered their detention at prison. A close examination of the committal documents discloses that the pro forma Warrant of Commitment utilized the words "Warrant" and "Commitment" which were deleted and replaced with the words "Order" and "Detention" respectively. Further, at the bottom of the document, the word "Remanded" was struck through and replaced with "Detained". Consequently, the literal interpretation to be gleaned from such modifications is that the committal papers were not to be construed as "Warrants" per se.

47. As such, it was clear that the Orders of Detention simply authorized the keeper of the prison infirmary to admit and detain the claimants pending the hearing of the matter. Consequently, the court finds that the first defendant did not do anything pursuant to any warrant of commitment which is protected by section 6 of the MPA.

48. Lastly, the defendants submitted that although their Application is based on section 5(2) and 6 of the MPA, alternatively the first defendant is also safeguarded by section 9 of the MPA. ***Section 9 of the MPA*** provides as follows;

"No action shall be brought against any Magistrate for the manner in which he has exercised any discretionary power given to him by law."

49. According to the defendants, the Tuberculosis Control Act gives the Magistrate, who hears complaints under the Act two options on the non-

appearance of the persons who have been served with a summons pursuant to section 7(2), the Magistrate may either issue a warrant (section 7(3)) or make an order (section 7(4)) for that person named in the summons to be detained. As such, the defendants submitted that the first defendant was given a discretion under the Tuberculosis Control Act which she exercised fairly in the circumstances. That in light of that and the law as stated in section 9 of the MPA, no action can be brought against the first defendant.

50. As can be gleaned from paragraph 8 of the affidavit of Police Inspector, Anson Ali sworn to on May 25, 2018 in the application for the issue of the writ of habeas corpus ad subjiciendum, his application made to the first defendant set out that the claimants were too ill to appear and he was therefore applying pursuant to section 7(4) of the Tuberculosis Act specifically. It means that the application was made for the exercise of the specific power set out by section 7(4). In those circumstances the Magistrate did not have a discretion under the statute as to whether to issue a warrant.

51. Section 7(4) of the Tuberculosis Act provides that where the person named in the summons does not appear in person or by a representative, and the Magistrate is satisfied that the person so named is too ill to appear or to be brought before him, he may make an order requiring that person to be admitted to a hospital and that Magistrate or any other Magistrate may hold any further hearings in respect of the matter in the hospital. As such, once the first defendant was satisfied that the claimants were too ill to appear, she was restricted to making an order requiring them to be admitted to a hospital. She therefore did not have any discretionary power

under section 9 of the MPA as submitted by the defendants. Section 9 is therefore not applicable.

52. It is therefore clear to the court that Charles has made out an arguable claim against the first defendant and so the defendants have failed to demonstrate that the claim discloses no reasonable ground for bringing same and that it is an abuse of the process of the court.

53. In relation to Chanka and Barrow as the court noted above, they both did not bring High Court proceedings and so it follows that there was no order setting aside their order of detention. The first defendant is therefore protected from any action by either of them by virtue of the provisions of section 5(2) of the MPA. Their claims must therefore be struck out as disclosing no ground for bringing the claim.

54. In relation to Charles, the application to strike made by the first defendant will be dismissed and the time limited for the defendants to file and serve their defences is extended to the 12th July 2019.

55. The second and third claimants shall pay to the first defendant 45% of the prescribed costs of the claim and the costs of the application to be assessed by an Assistant Registrar in default of agreement.

56. The first defendant shall pay to the first claimant the costs of the application to be assessed by an Assistant Registrar in default of agreement.

Judge
Ricky Rahim