

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. 2013-01906**

**Between**

**NIXON CALLENDER**

**JILLIAN BEDEAU-CALLENDER**

**Claimants**

**AND**

**THE PUBLIC SERVICE ASSOCIATION OF TRINIDAD AND TOBAGO**

**AND**

**WATSON DUKE**

**Defendants**

**Before the Honourable Mr. Justice Frank Seepersad**

Appearances:

1. Mr. Joel Roper for the Claimants
2. Mr. Michael Quamina for the Defendants.

Date of Judgment: 25<sup>th</sup> July, 2013

## Decision

1. The issue for determination before the Court is whether or not the ex parte injunctive orders that were made on the 3<sup>rd</sup> May, 2013 should be discharged.
2. In this action the Claimants filed a Notice of Application seeking injunctive relief supported by a joint affidavit on the 3<sup>rd</sup> May, 2013. The Court considered the application and granted injunctive orders and issued further directions. The Court's orders were as follows:

*"1. An injunction is granted:*

- (a) Restraining the Defendants and/or the General Council of the First Defendant whether in its normal capacity or constituted as a tribunal from proceeding with and/or hearing and/or determining any allegations of misconduct and/or indiscipline against the Claimants stemming from the letters of suspension sent to the Claimants by the Second Defendant on the 11<sup>th</sup> April, 2013 as well as the decision of the First Defendant's General Council on the 18<sup>th</sup> April, 2013 to further suspend the Claimants and any other disciplinary matter which appertains thereto;*
- (b) Restraining the Defendants from preventing the Claimants from attending and/or participating in meetings of the Executive Committee and the General Council and Conference of Delegates of the First Defendant;*
- (c) Restraining the Defendants from appointing any person and or persons in the position of the Claimants' positions in the First Defendant until the legal disputes between the Defendants and the Claimants are resolved;*
- (d) Restraining the Defendants from withholding the salaries, allowances and emoluments to which the Claimants are entitled;*

*2. The Claimants are to file and serve their Claim Form and Statement of Claim on or before the 6<sup>th</sup> May, 2013.*

*3. The injunctive orders made at (1) above are to continue until the return date of hearing of the Notice of Application on the 7<sup>th</sup> May, 2013 at 9:30 a.m. in courtroom POS04 at the Hall of Justice, Knox Street, Port of Spain.*

4. *The Notice of Application and Affidavit in support are to be served with this order upon the Defendants.*
  5. *That the costs of these proceedings herein are reserved.”*
3. On the return date of hearing, counsel for the Defendants indicated in open court that his clients were advised to pay to the Claimants their full salary and entitlements. Counsel further indicated that he did not intend to file any affidavit in opposition to the application and having regard to the matters contained in the application and the affidavit in support thereof, the ex parte injunctions granted ought to be discharged. The Court then issued directions with respect to the filing of submissions on this issue.
  4. The summary of the relevant facts according to the Claimants in this matter is as follows:
    - i. On the 11<sup>th</sup> April, 2013, the Claimants received letters of suspension from the Second Defendant, who is the incumbent President of the First Defendant, pursuant to Section 38(b) of the First Defendant’s Constitution. The decision to suspend purportedly arose out of an article published in the Trinidad Express Newspaper on the 11<sup>th</sup> April, 2013, which stated ‘*inter alia*’ that the Claimants made a report to the Fraud Squad about financial improprieties and potential fraudulent criminal activity within the First Defendant. The letter alleged that the Claimants had breached a Special Resolution of the First Defendant which prohibits ‘*inter alia*’ the disclosure of unauthorized information arising from any meeting of the Executive Committee, General Council or Conference of the First Defendant. The Express newspaper article was annexed as exhibit 4 to the Claimants affidavit.
    - ii. The same letter of suspension, informed the Claimants of a hearing before the General Council of the First Defendant that was carded for the 18<sup>th</sup> April, 2013, and called upon them to attend the said meeting, in order to respond to the allegations. The letter also required the Defendant to respond in writing to the allegations on or before 12:00 noon on the 15<sup>th</sup> April, 2013.
    - iii. By letter dated 15<sup>th</sup> April, 2013, the Claimants through their Attorney at Law sought an extension of the deadline imposed on them to respond to the allegations contained

in the letters of suspension. In the said letter of the 15<sup>th</sup> April, 2013, the Attorney for the Claimants raised several concerns about the chairmanship of the meeting carded for the 18<sup>th</sup> April, 2013. The Attorney requested that the Second Defendant, Mr. Watson Duke and the 2<sup>nd</sup> Vice President of the First Defendant, Mr. Christopher Joefield, recuse themselves from chairing the meeting in order to preserve the fairness of the proceedings, given the allegations leveled against them. The Defendants did not respond to this letter.

- iv. The Claimants attended the meeting of the General Council on the 18<sup>th</sup> April, 2013 along with their Attorney. The said meeting was chaired by the Second Defendant, Mr. Watson Duke and the 2<sup>nd</sup> Vice President of the First Defendant, Mr. Christopher Joefield who sat alongside him at the head table. The Attorney for the Claimants reminded both individuals of the content of the letter which was sent on the 15<sup>th</sup> April, 2013 and made representations to the General Council as to his reasons for suggesting that they refrain from chairing the said meeting. At paragraphs 29 to 32 of the Claimants' affidavit they recounted the events that occurred at the meeting.
  - v. By way of a letter from the Defendants dated 18<sup>th</sup> April, 2013, the Claimants were informed of a further and additional suspension for failing to respond in writing to the allegations contained in the letter dated 11<sup>th</sup> April, 2013, by the deadline stipulated in the said letter, which was 15<sup>th</sup> April, 2013 at 12:00 noon and by letter dated 23<sup>rd</sup> April, 2013 the Claimants were placed on partial pay.
5. The decision to suspend the Claimants by letter dated 11<sup>th</sup> April, 2013 was purportedly authorized by Article 38(b) of the First Defendant's Constitution which provides:

*“The President shall have power to suspend until the next following meeting of the General Council any officer of the Association for failure to carry out his/his instructions or the instructions of the General Council. Where the officer is full time, suspension shall be with full pay until the first meeting of the General Council following the suspension. If the matter is unresolved the General Council shall*

*determine whether or not the Officer shall be on full pay or partial pay, pending the resolution of the matter.”*

## **The Law**

6. The decision of the House of Lords in **American Cyanamid Co v Ethicon Ltd [1975] A.C. 396** laid down the tests to be applied by courts when ruling on interim applications on notice for prohibitory injunctions. According to the American Cyanamid case, when an application is made for an interlocutory injunction, in the exercise of the Court’s discretion an initial question falls for consideration, that is:

*“Is there a serious issue to be tried?”*

*If the answer to that question is, “yes”, then two further related questions arise, they are:*

*Would damages be an adequate remedy for a party injured by the court’s grant of, or its failure to grant, an injunction?*

*If not, where does the balance of convenience lie?”*

7. Whether there is a serious issue to be tried essentially means that the action must not be frivolous or vexatious, and must have some prospect of succeeding. The Court when considering whether there is a serious issue to be tried, ought to consider what was said in **American Cyanamid v Ethicon (1975) AC 396**, which states at 107:

*“it is no part of the Court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult question of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial”*

8. The Court must also take into account the purpose of the injunction sought, which according to Lord Diplock in the American Cyanamid case is:

*“To protect the Claimant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial, but the Claimant’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant’s undertaking in damages if the uncertainty were resolved in the defendant’s favour at trial.”*

#### **Adequacy of Damages and Balance of convenience**

9. Lord Diplock, when considering the adequacy of damages in American Cyanamid at p 408 said:

*“...the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages ... would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiffs claim appeared to be at that stage.*

*If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis*

*that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction."*

10. A recent exposition of the relevant principles to be applied in granting interim injunctive relief is to be found in the judgment of Lord Hoffman in **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd [2009] 1 WLR 1405** (at paragraphs 16-18):

*"The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.*

*In practice, however, it is often hard to tell whether either damages or the cross undertaking will be an adequate remedy and the court has to engage in trying to predict whether the granting or*

*withholding an injunction is more or less likely to cause irreparable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:*

*“It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.”*

*Among the matters which the court may take into account are 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 will 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.”*

11. De la Bastide CJ in **Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 362** stated that focusing exclusively on whether damages were adequate and quantifiable is a far too narrow approach to be taken when considering if an interim injunction should be granted. His Lordship pointed out that:

*“It is a truism that facts are infinitely variable, and it is dangerous to prescribe or apply a single formula for determining whether an interlocutory injunction should be granted in all cases, unless it is expressed in very broad terms.”*



12. In doubting whether the rule should be so narrowly stated His Lordship stated that the court must go further and ask itself the question “*Where does the greater risk of injustice lie, in granting the injunction or in refusing it?*”

13. In treating with the question “*where does the greater risk of injustice lie, in granting the injunction or in refusing it?*” His Lordship stated:

*“If the question is, ‘Wherein lies the greater risk of injustice in granting or in refusing the injunction?’, then it becomes apparent that it is not possible to treat...the strength of the plaintiff’s case as irrelevant...*

*some assessment of the merits more than merely that there was a serious issue to be tried, was required and the plaintiff must show a likelihood of success at the trial...He explained that the greater risk of injustice which was likely to be created by the grant of such an injunction meant that such an injunction would not be granted unless the court felt ‘a high degree of assurance’ that the plaintiff would be able to establish his right at a trial. He concluded therefore that essentially the same test should be applied in the case of both mandatory and prohibitory interlocutory injunctions, that is which carried the higher risk of injustice: granting or refusing it? If the matter is approached in this way, it is pellucidly clear that it is necessary to make some assessment of the appellant’s chances of succeeding at the trial.”*

14. The Defendants have listed several factors which they contend should lead the Court to hold that the injunctive orders ought to be discharged. The first such factor is Delay.

#### Delay

15. The Defendants submitted that the Claimants subjected themselves to the disciplinary procedure when they elected to attend the meeting on the 18<sup>th</sup> April, 2013. They further contended that the application for relief was filed on the 3<sup>rd</sup> May, 2013 and that no proper

reason was advanced for the delay and that the combination of their submission to the disciplinary procedure coupled with their delay is sufficient to cause the Court to discharge the injunction.

16. At paragraphs 29 to 33 of the Claimants' affidavit the Claimants recounted their version of the events that occurred at the meeting on the 18<sup>th</sup> April. They contended that their hearing was not listed on the agenda and no hearing was carded but that their attorney was permitted to make representations. According to the Claimants' version of events, procedural concerns were discussed which included, *'inter alia'*, objections to the persons who ought to sit at and chair the meeting and the manner in which the meeting ought to be conducted.
17. There is no other version of the events before the Court and the Court is of the view that having considered the matters stated at paragraphs 29 to 33 of the Claimants' affidavit it cannot be said that the Claimants submitted to the process.
18. The Claimants at paragraph 33 went on to state that by letter dated 18<sup>th</sup> April, 2013 further disciplinary action was instituted against them for their failure to furnish Watson Duke with an explanation as to why they did not comply with Article 38 (b) and they further outlined that by letter dated 23<sup>rd</sup> April, 2013 they were informed that they were to receive partial pay. In relation to the first claimant the reduced sum was \$7,949 and with respect to the second claimant the reduced sum was \$1,035.
19. At paragraph 34 of the Claimants' affidavit they outlined the quantum of their salary and allowance entitlements. These sums were \$23,137 and \$16,162 respectively. Having considered the significant reduction in the sums that the second defendant intended to pay to the Claimants and having considered the claimants position that the letters dated 23<sup>rd</sup> April, 2013 were only received by them on the 26<sup>th</sup> April, 2013 as reflected on the hand written endorsements to **exhibit 'K'** attached to their affidavit, the Court is of the view that the delay in filing the application is not by itself sufficient to warrant a discharge of the injunctive orders that were granted.

20. The Defendants also submitted that the Court ought not to intervene at this stage to determine whether there is merit in the allegations as that is within the purview of the General Council. The Claimants filed a Claim Form and Statement of Case on the 6<sup>th</sup> May 2013, the relief sought in the Claim Form is as follows:

- “1. A Declaration that the decision of the Defendants through its General Council and conveyed to the Claimants by letters dated April 11, 2013 and April 18, 2013, to prefer charges and/or to take or institute disciplinary action against the Claimants for breach of Resolution of the Special General Council dated 27<sup>th</sup> April, 2011 of the Defendants arising out of the instances of Misconduct detailed in the said charges is invalid, illegal, null and void;*
- 2. A Declaration that the Special Meeting of the General Council held on Thursday, 18<sup>th</sup> April, 2013 at the Association’s head office on 89 Abercromby Street, Port of Spain is illegal, invalid, null and void;*
- 3. A Declaration that on a true interpretation of the Resolution of the Special General Council dated 27<sup>th</sup> April, 2011 that the Claimants were not in breach of the Resolution of the Special General Council dated 27<sup>th</sup> April, 2011 and therefore, should not have been suspended by Presidential suspension pursuant to Article 38B of the Constitution of the Defendant;*
- 4. A Declaration that the Claimants were at all material times, and still is the General Secretary and Treasurer of the Defendants and will hold office, pursuant to the Constitution and/or rules of the Defendants until the day of the next Biennial Elections, resignation, suspension, or dismissal from membership of the Association;*
- 5. A Mandatory Injunction directing that the Defendants change back the locks of the Claimants offices and/or give them access to their offices and to put back into the said offices the cabinets and files that were removed from the offices of the Claimants;*
- 6. Damages;*
- 7. Interests;*
- 8. Costs;*

9. *Such further and/or other relief as the Court deems fit and just in the circumstances.*”

21. The Claimants have submitted that the letters of suspension issued on the 11<sup>th</sup> April, 2013 were bereft of the necessary and requisite details so as to clearly inform them as to the nature of the instruction issued by the President and/or the General Council that they failed to carry out.
22. Further they contend that the Express Newspaper Article cannot be viewed as being in contravention of the Resolution of the General Council given on the 27<sup>th</sup> April, 2011.
23. These concerns were raised in paragraph 23 of the affidavit. The wording of Article 38 (b) under which the Defendants accept that they acted when the letters of suspension were issued is clear and unambiguous. The President is vested with the power to suspend where there is a failure to carry out his/her instruction or the instruction of the General Council.
24. It is therefore imperative that the ‘failure’ that is alleged to have occurred as well as the instruction issued to the Claimants must be clearly identified and determined so as to enable the President to exercise his power under Article 38 (b). The letter of the 11<sup>th</sup> April, 2013 referred to and outlined the Resolution of the Special General Council given on the 27<sup>th</sup> April, 2011, and went on to state that “*evidence of your failure was published in Thursday 11, 2013 Trinidad Express Newspaper Article, page 17*”.
25. The issue of the applicability of Article 38 (b) which is the Constitutional provision that the Defendants are relying on as well as the issue as to whether or not the information contained in the newspaper article and the acts of the Claimants amounted to and/or are in contravention of any of the aspects of the resolution made on the 27<sup>th</sup> April, 2013, are issues which are important and relevant and therefore the Court is of the view that there are serious issues to be tried.
26. There is no evidence before the Court at this stage which suggests that the Claimants engaged in protests and a factual issue to be determined is whether or not the Express article contained unauthorized information on any meeting of the Executive and/or the

Central Council and/or the Conference of the Association in accordance with the Resolution of the 27th April, 2011.

27. Having reviewed the Express's Article and the letter dated 11<sup>th</sup> April, 2013 as well as Article 38 (b) of the Defendants Constitution as well as the matters contained in the Claimants' affidavit, the Court is of the view and feels a great degree of assurance that the Claimants would be able to establish their rights at trial.
28. The Court is cognizant of the effect of Article 29 (a) of the Constitution which vests in the General council the authority to interpret the rules of the association but the Court is of the view that the Claimants' letter of the 15<sup>th</sup> April, 2013 appears to have raised valid concerns with respect to the Claimants inability to respond to the allegations levied against them in the time period that was allotted to them and the call to have the time extended for proper response to be formulated does not appear to have been unreasonable.
29. When the Claimants attended the meeting on the 18<sup>th</sup> April, 2013 as was stated earlier other procedural concerns were also raised. The Court will not usurp the Association's right to determine whether a particular rule has been infringed, however, where the Court is asked to intervene in proceedings that may have been improperly instituted and where there are allegations that the rules of Natural Justice may have been infringed the Court will and should act if it is of the view that no reasonable tribunal acting *bona fide* would or could uphold the complaint that the tribunal seeks to determine. The Court is of the view that at this stage there is persuasive evidence to suggest, if proved at a trial, that the issues being considered by the Defendants may have been prejudiced and that the prescribed procedure which ultimately must be conducted in accordance with the rules and principles of Natural Justice was not duly followed.
30. The Court also noted that the Claimants are duly elected members of the Executive of the PSA and they are accountable to the membership. The reality is that the current Executive has been unable to work together and this has resulted in the institution of numerous matters before the Court.

31. It is evident that power, personality and politics seem to prevail in the PSA. The Court has taken judicial notice of the fact that a new Executive is due to be elected close to the end of the year and is of the view that in the absence of compelling reasons to justify the suspension of any member, the Executive as elected should remain intact until the elections.
32. Members who have power, under the PSA's constitution should not wield same arbitrarily so as to oust duly elected members in an attempt to gain any perceived strategic advantage in the upcoming elections. In the circumstances and having noted with concern the allegations of financial impropriety raised by the Claimants, the Court is of the view that there is a greater risk of injustice in discharging the injunctive orders than in continuing them.
33. The Defendants have also raised the issue of non-disclosure. The Defendants contend that the Claimants failed to disclose the fact that the 2<sup>nd</sup> Defendant is no longer presiding over the disciplinary process. The letter dated 23<sup>rd</sup> April, 2013 was attached to and formed part of the Claimants case in support of the application for injunctive relief.
34. The Court therefore does not agree with the Defendants that there has been material non-disclosure. Although the 2<sup>nd</sup> Defendant is no longer carded to chair the tribunal, he sat and participated in the meeting held on the 18<sup>th</sup> April, 2013 and in accordance with the letter dated April 23, 2013 it is at the meeting of the 18<sup>th</sup> April, 2013 that the decision was taken that the issue of the Claimants suspension under Article 38 (b) remained unresolved and the decision was taken in relation to the Claimants being given partial pay.
35. The Claimants' call for an extension of time to prepare and furnish the 1<sup>st</sup> Defendant with a proper response to the allegations contained in the letter of the 11<sup>th</sup> April, 2013 was not addressed. The letter written on behalf of the Claimants on the 15<sup>th</sup> April, 2013, called for Mr. Duke to step down as well as for an opportunity to be heard on the allegations, to put forward a defence and to do so in conditions that were conducive to fairness and equity.
36. There was also a call for Mr. Joefield to recuse himself and for time to respond in writing to the allegations to be extended. It therefore cannot be said that the said letter only called for the removal of Duke as the chairman of the proceedings.

37. For all the reasons that have been hereinbefore outlined the Court hereby finds that the Defendants' application and submissions that the injunctive orders ought to be discharged is devoid of merit.

38. The Court finds that there are serious issues to be tried and feels a great degree of assurance that the Claimants would be able to establish their rights at trial. Further the Court is of the view that greater injustice would be occasioned if the injunctive orders are discharged as opposed to, if they are continued.

39. Accordingly, the injunctive orders made on the 3<sup>rd</sup> May, 2013 are to continue until the hearing and the determination of the trial or until further order.

40. The Court also orders that the cost of this application shall be the Claimants costs in the cause and the quantum of same is to be assessed in default of agreement.

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**FRANK SEEPERSAD**

**JUDGE**