

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
Port of Spain**

Claim No. CV2016-01524

BETWEEN

FARAI HOVE MASAISAI

Claimant

AND

RICARDO WELCH

Defendant

Before the Honourable Mme. Justice Jacqueline Wilson

Date of Delivery: October 17, 2018

APPEARANCES:

Mr. Colvin E. Blaize for the Claimant
The Defendant appearing in person

JUDGMENT

1. This is the Claimant's application brought pursuant to Part 26.2 of the Civil Proceedings Rules (the CPR) to strike out the Defendant's counterclaim filed on 17 June 2017. The Claimant seeks orders that:
 - a. The counterclaim be struck out in its entirety or in part pursuant to Part 26.2 (1)(b) of the CPR as an abuse of process;

- b. The counterclaim be struck out pursuant to Part 26.2 (1)(c) of the CPR as disclosing no grounds for bringing or defending a claim;
 - c. The counterclaim be struck out pursuant to Part 26.2 (1)(d) of the CPR for failure comply with Part 8.
2. The counterclaim was filed by the Defendant in defamation proceedings brought by the Claimant in which the Claimant seeks the following relief:
- i. Damages, including aggravated and exemplary damages, for libel published on the Defendant's Facebook page, where a picture of the Claimant was posted and captioned "**ATTORNEY FIRED FOR PROFESSIONAL MISCONDUCT**" with a preceding narrative post relating to the Claimant, on the 1st May, 2016.
 - ii. Damages for republication of the article dated the 1st day of May 2016.
 - iii. Damages, including aggravated and exemplary damages, for libel published on the Defendant's Facebook page, where a picture of the Claimant was posted and captioned "**ATTORNEY FIRED FOR DISHONESTY**" with a preceding narrative post relating to the Claimant, posted on the 4th May 2016.
 - iv. Damages for harassment.
 - v. Aggravated and exemplary damages.
 - vi. An injunction restraining the Defendant, whether by himself, his servants or agents or otherwise, from further publishing on social

media platforms or causing to be published on any social media platform the words (dishonest, being disrespectful, over bills, lack of standard skills, sloppy work, egregious errors, brings the legal profession into disrepute and ridicule, extortionist, does not act in good faith, engaging in questionable and unethical practices, guilty of misconduct and negligence, guilty of misappropriating monies of his client, have not acted in client's interest and was fired as a result of the above) hereinafter referred to as "the said words" or any words similarly defamatory to the Claimant and any picture of the Claimant.

- vii. An injunction compelling the Defendant to remove all pictures of the Claimant "the said words" or any words similarly defamatory of the Claimant from all social media platforms and in particular Facebook.
- viii. An injunction compelling the Defendant to remove all recordings of the Claimant that have been recorded without the Claimant's knowledge and published without the Claimant's consent.
- ix. An injunction compelling the Defendant to immediately cease and desist from publishing "the said words" or any words similarly defamatory of the Claimant and/or any picture of the Claimant.
- x. An injunction preventing the Defendant from harassing, molesting and/or provoking the Claimant in any way.

- xi. An apology to the Claimant posted in the same manner as the defamatory statements and a personal apology by letter in terms and form to be agreed.
 - xii. Costs.
3. An injunction, previously granted, has since been discharged by the Court of Appeal.
 4. In his defence, the Defendant pleads justification and fair comment and counterclaims against the Claimant as follows:

“The Defendant counterclaims against the Claimant on the following grounds:

1. The Defendant repeats paragraphs 2 to 28 above.
2. By reason of the facts and/or claims hereinabove pleaded, the defendant pleads special damages against the Claimant in the following:-

NO	DESCRIPTION OF LOSSES	AMOUNT IN LOSS
1.	Loss of monies and/or unlawful deduction by Claimant from TTD\$30,000.00 cheque received on the Defendant’s behalf	\$10,687.00
2.	Loss of out of pocket monies for alleged disbursement to file witness statement and documents	\$15,000.00
3.	Loss of out of pocket monies for alleged disbursement of file trial bundle	\$10,000.00

4.	Loss of Costs received by Claimant on behalf of the Defendant on or about October, 2014	\$12,000.00
TOTAL		\$47,687.00

AND THE DEFENDANT CLAIMS AGAINST THE CLAIMANT

- a) Damages for Breach of Contract and/or Professional Negligence and/or professional misconduct;
 - b) Damages for detinue and/or conversion;
 - c) Special damages in the total sum of TTD\$47,687.00
 - d) Aggravated and exemplary damages;
 - e) Interest;
 - f) Costs;
 - g) Such further and/or other relief as the Court deems fit in the circumstances.”
5. The Claimant alleges that the counterclaim is fundamentally flawed in that:
- i. It seeks damages for breach of contract but fails to disclose or make reference to a contract, either by document or course of dealings, and fails to show a breach of an implied or express term of the said contract and further fails to establish the cause of the said breach;

- ii. It seeks damages for conversion and detinue but fails to show that the documents in question were owned by the Defendant; how and when the Claimant came into possession of the documents; or the loss and damage suffered as a result of the Claimant's detention of the documents;
 - iii. It fails to provide any proper explanation in support of the claim for special damages;
 - iv. It seeks aggravated and exemplary damages but fails to plead any facts or particulars to show why such an award should be made.
6. The Claimant submits further that the counterclaim is an abuse of the process of the court as the alleged breach of contract relates to the Defendant's retainer of the Claimant for litigation purposes and that allegations of professional negligence or professional misconduct are not justiciable by the Courts pursuant to section 22(2) of the Legal Profession Act, Chapter 90:03 but fall within the jurisdiction of the Disciplinary Committee established pursuant to section 36.
7. The Claimant relies on the decision of Mme. Justice Judith Jones, as she then was, in **CV 2011-02646 Mohanlal Ramcharan v Carlyle Ambrose Serrano**, where the learned Judge held that:

"... The Disciplinary Committee is a tribunal established by section 36 of the Legal Profession Act Chap 90:03 ("the Act") for the purpose of determining allegations concerning (a) any professional misconduct or (b) any criminal offence as may be for the purposes of section 37 of the Act prescribed by the Council of the Law

Association with the approval of the Chief Justice. Insofar as the Disciplinary Committee has the powers of the High Court it is only with respect to the power to summon witnesses, call for the production of books and documents and examine witnesses and parties on concerned on oath.

... Before the Disciplinary Committee the Claimant seeks a determination of professional misconduct. This Court does not have the power to determine professional misconduct.

....

... in my opinion the statement of case discloses no cause of action since professional misconduct is not a cause of action and by section 22 of the Act an attorney is immune from suit in negligence with respect to litigation.”

8. The Defendant asserts that section 22 of the Legal Profession Act does not confer a blanket immunity on the Claimant against claims for breach of contract or professional misconduct/ negligence and that the protections provided by section 22 are engaged only where the act or omission that is the subject of complaint *“is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a part of the preliminary decision affecting the way the cause is to be conducted at the hearing”*: **Rees v Sinclair [1974] 1 NZLR 180; Saif Ali v Sydney Mitchell [1978] 3 All ER 1033; Arthur Hall v Simons 2000 3 All ER 673.**
9. The Defendant contends that the Claimant’s alleged breach of contract and professional negligence do not relate to his advocacy in court or work directly related to the advocacy. Therefore the Claimant is not protected by the immunity provisions of section 22.

10. The question that arises is whether the counterclaim should be struck out on the grounds advanced by the Claimant.

DECISION

11. A review of the counterclaim readily establishes that the facts in support of the counterclaim have not been pleaded with any degree of particularity by the Defendant. The Defendant's wholesale reliance on the entirety of the matters pleaded in his defence without, providing the relevant context to support the relief sought in the counterclaim, is a clear breach of the requirements of Parts 8.5 and 8.6 of the CPR.
12. The principles to be applied in relation to the summary disposal of cases are well established. The objective is to resolve issues at an early stage and to save time and costs, which are important features of active case management. In deciding whether to exercise powers of summary disposal, the court must consider whether the overriding objective of dealing with cases justly is better served by the summary disposal of a particular issue or by letting all matters go to trial so that they can be fully investigated and an informed decision made: *Three Rivers District Council v Bank of England* [2001] 2 All ER 513.
13. Although the above principles were adumbrated in relation to the summary dismissal of cases, the discretion to strike out is subject to similar considerations and, where the allegation involves the failure to disclose grounds for bringing or defending a claim, is exercisable where the claim is bound to fail on its merits or as a matter of law. An important consideration is that the court, when faced with an application to strike out, must consider whether the justice of the case

militates against this nuclear option and requires a more proportionate response: *Real Time Systems Limited v Renraw Investments Ltd.* [2014] UKPC 6.

14. The authorities postulate that in many cases there will be alternatives which enable the court to deal with a case justly without taking the draconian step of striking it out having regard to the armoury of powers that are available under the CPR, including the power to order a party to supply further details or to file an amended statement of claim within a specified time subject to conditions specifying consequences of non-compliance (which might include striking out): *Asiansky Television Plc. v Bayer* [2001] EWCA Civ. 1792; *Real Time Systems Limited v Renraw Investments Ltd.* (*supra*).
15. Appropriate cases for striking out on the ground of failure to disclose grounds for bringing or defending a claim include cases where the statements of case raise an unwinnable case, where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides or where a claim or defence is not valid as a matter of law: *Brian Ali v The Attorney General of Trinidad and Tobago* CV2014-02843.
16. The principles applicable to striking out on the ground of abuse of process were also articulated in *Danny Balkissoon v Roopnarine Persaud & Another* CV2006-00639 where the learned Judge stated that:

“While the categories of abuse of the process of the court are many and depend on the particular circumstances of any case, it is established that they include: (i) litigating

issues which have been investigated and decided in a prior case; (ii) inordinate and inexcusable delay, and (iii) oppressive litigation conducted with no real intention to bring it to a conclusion....

Before considering these cases a few general comments on the court's power to strike out proceedings as an abuse of the process of the court may be pertinent.

First, it is clear that the onus of proof is on the party who is alleging the abuse. Second, under the CPR even the power to strike out proceedings as an abuse of the process of the court ought to be considered in light of the overriding objective and the function of the court to deal with cases justly. Thus, even where there may be an abuse of process that does not mean that the only correct response is to strike out a claim or statement of case (or part thereof). Third, the jurisdiction and power of the court to strike out proceedings as an abuse of the process of the court is discretionary; and given the status of the constitutional right of access to the courts it would appear that striking out a claim should be the last option."

17. In *Johnson v Gore Wood and Co* [2002] 2 AC 1, 31 the court cautioned that *"it would be wrong to adopt too dogmatic an approach to what...should be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case."*

18. With the above principles in mind and upon an overall consideration of the matters raised in the counterclaim, I am of the view that the justice of the case weighs against striking out the counterclaim.
19. The Defendant is therefore granted leave to file and serve an amended counterclaim within 14 days of the order of the court, failing which the counterclaim stands dismissed. The Claimant is granted leave to make such consequential amendments to his defence to the counterclaim as may be required no later than 28 days after service of the amended counterclaim.
20. When the counterclaim and defence to counterclaim are duly amended, a determination may properly be made on whether the immunity provisions of section 22 of the Legal Profession Act apply. This matter is reserved for determination at the trial of these proceedings.
21. The costs of this application are reserved.

Jacqueline Wilson
Judge