

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**Civil Appeal No. 113 of 2009**

BETWEEN

ANTONIO WEBSTER

APPELLANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENT

**Civil Appeal No. 120 of 2009**

BETWEEN

KELVIN PARMASSAR

APPELLANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENT

**PANEL: P. JAMADAR, J. A.**

**N. BEREAX, J. A.**

**G. SMITH, J. A.**

**APPEARANCES:**

Mr. A. Ramlogan for the Appellants.

Mr. C. Sieuchand for the Respondent.

**DATE OF DELIVERY: 1<sup>st</sup> day of February, 2010.**

I have read the judgment of P. Jamadar, J.A. and I agree that Webster's appeal be dismissed and that Parmassar's appeal be allowed with costs in both appeals to be assessed by this court.

N. Bereaux  
Justice of Appeal

I have also read the judgment of P. Jamadar, J.A. and I agree that Webster's appeal be dismissed and that Parmassar's appeal be allowed with costs in both appeals to be assessed by this court.

G. Smith  
Justice of Appeal

## **JUDGMENT**

Delivered by P. Jamadar, J. A.

### **INTRODUCTION**

1. These are two procedural appeals by Antonio Webster and Kelvin Parmassar from the judgments of Pemberton J. and Best J. respectively. Both appeals raise a specific common issue, which is: Whether a claimant in an action in tort, commenced by Claim Form under the Civil Proceedings Rules 1998 (CPR, 1998), can also seek declaratory relief for breaches of his constitutional rights where that relief is claimed solely for the purpose of the assessment of damages in the tortious claim.

2. In **Webster's case**, Pemberton J. ordered that paragraphs 2 and 4 of the Prayer in the Claim Form and in the Statement of Case be struck out as offending Part 8.1 (4) of the CPR, 1998. The relief sought in these paragraphs were declarations for the breach of constitutional rights arising out of the common facts giving rise to the alleged tort. The action was allowed to continue on the other relief claimed. In **Parmassar's case**, Best J. dismissed the entire action with no order as to costs. He gave no reasons for this decision.

3. Since both cases raised the stated common issue, they were both heard together. However, **Parmassar's case** raised an additional issue which is identified and dealt with later on in this judgment.

## **BACKGROUND**

### **Webster's Case**

4. The Appellant filed an action by way of Claim Form on the 2<sup>nd</sup> July, 2008 for damages for false imprisonment against the Respondent, claiming the following relief:

1. Damages including damages and/or aggravated damages for false imprisonment;
2. A declaration that the arrest and detention of the said Claimant was unconstitutional and illegal;
3. A declaration that the Claimant was deprived of his right to be informed promptly and with sufficient particulars of the reason for his arrest;
4. A declaration that the Claimant was deprived of the constitutional right to be informed of his right to communicate with, instruct and retain an Attorney at Law of his choice contrary to Section 5 of the Trinidad and Tobago Constitution.
5. Interest pursuant to Section 25 of the Supreme Court of Judicature Act Chap. 4:01;
6. Costs; and
7. Such further and/or other relief as this Honourable Court may seem just in the circumstances.

5. On the 4<sup>th</sup> December, 2008, at a Case Management Conference, Pemberton J. identified and ordered as a preliminary issue to be determined the general question: "Can Constitutional Relief be claimed on a Claim Form under the Civil Proceedings Rules?" The judge answered the question in the negative, made the order stated and gave written reasons for her decision on the 12<sup>th</sup> May, 2009.

### **Parmassar's Case**

6. The Appellant filed an action by way of Claim Form on the 25<sup>th</sup> September, 2008 for damages for false imprisonment against the Respondent, claiming the following relief:

1. Damages including damages and/or aggravated damages for false imprisonment;
2. A declaration that the arrest and detention of the said Claimant is unconstitutional and illegal;
3. A declaration that the refusal and/or omission of the police to inform the Claimant upon arrest and/or detention of his right to retain or instruct without delay a legal adviser of his choice and to hold communication with them, was unconstitutional;

4. A Declaration that the Claimant was deprived of the Constitutional right to be informed of his right to communicate with, instruct and retain an Attorney at Law of his choice contrary to section 5 of the Trinidad and Tobago Constitution.
5. Interest pursuant to Section 25 of the Supreme Court of Judicature Act Chapter 4:01;
6. Costs; and
7. Such further and/or other relief as this Honourable Court may seem just in the circumstances.

7. On the 1<sup>st</sup> May, 2009 the Respondent filed a notice of application seeking, inter alia, to strike out the Claimant's Claim Form and Statement of Case (pursuant to Part 26.2 (1) (a) and (b) of the Civil Proceedings Rules, 1998). On the 20<sup>th</sup> May, 2009 Best J. dismissed the entire action with no order to costs. No reasons were given for the decision.

## **ANALYSIS**

### **(i) Insufficiency of Particulars in the Statement of Case**

8. In **Parmassar's case**, the additional issue raised was whether the Appellant's claim should be struck out (pursuant to Part 26.2 (1)) on the basis that it did not disclose sufficient particulars, relative to the pleaded facts and claims, necessary for the Respondent to carry out an investigation of the allegations made and to permit an adequate response to them.

9. The Respondent contended that the Appellant's failure to particularize (i) the names and regimental numbers of the police officers and/or (ii) the registration number of the police vehicle allegedly involved in the events pleaded, permitted the court to strike out the action pursuant to Part 26.2 (1) of the CPR, 1998, on the basis that the Statement of Case failed to provide the necessary particulars required by Part 8.6 and 58.4, CPR, 1998.<sup>1</sup>

10. In my opinion, in the context of the entire Statement of Case, the contended lack of particulars does not justify striking out the Appellant's action.

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<sup>1</sup> In actions against the State there is a duty to provide 'reasonable information as to the circumstances in which it is alleged that the liability of the State has arisen', see Part 58.4 (1), CPR, 1998.

11. This is an action against the Attorney General (on behalf of the State). It is agreed that what must be established by the Claimant is that police officers, and not any particular police officers, committed the tort of false imprisonment. The failure to particularise the names and regimental numbers of the police officers or the registration number of the police vehicle is not necessarily fatal to the claim. The following statements of Davis J.A. in Civil Appeal No. 71 of 1987 **Patrice Kareem v The Attorney General of Trinidad and Tobago**, though made in the context of constitutional proceedings, are applicable in a case such as this:

In proceedings under the Constitution, which are civil in nature, I do not think that it is necessary to go so far as to name the particular police officer, particularly where there has been concealment of a particular officer's name or identity as the evidence in the case does suggest. Once the Court is satisfied, on a balance of probabilities, that a police officer was responsible, then, in my view, that is sufficient to establish that an arm of the State or some officer of a public authority was involved in the alleged deprivation of a constitutionally guaranteed right. It must be borne in mind that in constitutional suits the proper defendant is the Attorney General, and not the defending officer, the servant or agent of the state.

12. In this case no defence has as yet been filed. The only relevant question at this stage, therefore, is whether the Statement of Case discloses sufficient facts which if proven would establish the alleged tort. In my opinion it does. For example, paragraphs 4 and 5 of the Statement of Case state:<sup>2</sup>

4. When the Claimant saw this he shouted, "Stop, stop, officer allyuh reckless!" The police vehicle stopped and an officer, whom the Claimant later found out was attached to the Couva Police Station, came out the vehicle and said, "What you say, you feel you is ah police ohwa?". The said police officer then slammed the Claimant against the police vehicle, put his hands behind his back and placed handcuffs on him. The Claimant was not informed of the reason for the arrest.

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<sup>2</sup> See also paragraph 6 (dealing with what happened at the police station) and paragraphs 10 and 11 of the Statement of Case.

5. At this point three other police officers who were in the police vehicle came out, examined the scratch on the Claimant's vehicle and then went back into the police vehicle. The Claimant was then placed in the police vehicle.

13. These allegations, if accepted by a trial judge, could be sufficient to establish the tort of false imprisonment against the State. In my opinion, if Best J. dismissed the action in **Parmassar's case** on this basis, as he was urged to do by the State, he was wrong in so doing.

**(ii) Mixed Claims: Constitutional Relief Claimed in Civil Actions**

14. The issue that Pemberton J. posed in **Webster's Case** was: "Can constitutional relief be claimed on a Claim Form under the Civil Proceedings Rules 1998".<sup>3</sup> The judge in her reasons concluded<sup>4</sup> that it could not and as a consequence made the orders stated.<sup>5</sup> Thus, the judge's reasoning is necessarily questioned in this appeal even though the appeal is a challenge to her decision and orders.<sup>6</sup> In my opinion the judge was not correct in her reasoning and conclusion that constitutional relief cannot be claimed in a Claim Form, though, as it will be pointed out, she was right in her decision and the orders she made.

15. It is clear that Part 56, CPR, 1998 requires a claim for constitutional relief to be brought by Fixed Date Claim Form.<sup>7</sup> It is also clear that this procedure is consistent with section 14 of the Constitution.<sup>8</sup>

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<sup>3</sup> See page 27 of the Record of Appeal.

<sup>4</sup> At paragraph 9, page 3, of her Reasons.

<sup>5</sup> See page 115 of the Record of Appeal.

<sup>6</sup> See ground 4 of the Notice of Appeal (Page 122 Record of Appeal).

<sup>7</sup> See Part 56.1 (1), CPR, 1998, which states that this Part deals with applications – (b) by way of originating motion under s. 14 (1) of the Constitution, and Part 56.7 (1), CPR, 1998 which states that an application for an administrative order must be made by a fixed date claim identifying whether the application is - (b) under section 14 (1) of the Constitution.

<sup>8</sup> Section 14 (1) of the Constitution states that an action for any breach of the fundamental rights provisions "may" be brought "by way of originating motion".

16. However, this does not necessarily mean that a claim made by Claim Form which raises constitutional issues is an abuse of process or a nullity. This is because pursuant to Part 56.6 (1), CPR, 1998, where an action brought by Claim Form discloses facts which can support a claim for constitutional relief, the court may give such directions as are necessary for the action to proceed under Part 56. Thus, the fact that a matter giving rise to constitutional relief is commenced by Claim Form is not necessarily fatal to that action and does not necessarily render such a matter an abuse of process or a nullity.

17. Further, Parts 56.6 (2) and 56.6 (4), CPR, 1998 provide as follows:

(2) The court may at any stage direct that the claim is to proceed by way of an application for an administrative order.

(4) If the court makes a direction under paragraph (2) it must give such directions as are necessary to enable the claim to proceed under this Part.

18. What the CPR, 1998 contemplates is that where the ‘only or main relief’<sup>9</sup> disclosed in an action brought by Claim Form is for an administrative order (which includes constitutional relief), then such an action should be directed to proceed under Part 56.

19. It is also noteworthy that under Part 56.9, where a claim (by Fixed Date Claim Form) is brought for constitutional relief, a claim for other connected relief may be joined in that action.<sup>10</sup> In this scenario ( of mixed claims) a Court can give directions for both types of claims to be dealt with, including a direction that the matter be dealt with “as a claim”, that is, as if commenced by Claim Form.<sup>11</sup> In such cases the advice of the Privy Council in two recent decisions on this issue could be applied. In **The Attorney**

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<sup>9</sup> See, Part 56.6 (1).

<sup>10</sup> Part 56.9 (1) states: “The general rule is that, where permitted by the substantive law, the applicant may include a claim for any other relief or remedy that arises out of or is related or connected to the subject matter of an application for an administrative order”.

<sup>11</sup> See, Part 56.9 (2) (b) which states: “The court may, however, at any stage (in a matter commenced pursuant to Part 56, by Fixed Date Claim Form) – (b) direct the whole of the application be dealt with as a claim and give appropriate directions under Parts 26 and 27”.

**General of Trinidad and Tobago v Siewchand Ramanoop**,<sup>12</sup> where certain aspects of an earlier decision in **Jaroo v The Attorney General of Trinidad and Tobago** were clarified,<sup>13</sup> it was held that legitimate constitutional claims, though usually brought by Originating Summons (Fixed Date Claim Form) and proceeded with accordingly, could in appropriate circumstances be directed to proceed as if commenced by Writ (Claim Form). For example, where there are relevant facts in dispute.

20. In **Jaroo v Attorney General of Trinidad and Tobago** Lord Hope stated:

Their Lordships wish to emphasize that the originating motion procedure under section 14 (1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to facts. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law.<sup>14</sup>

21. Then, at paragraph 39 he also stated:

Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.

22. And, in **Siewchand Ramanoop** the Board (Lord Nicholls) explained and expanded on these statements of Lord Hope as follows:

What, then, of the case where on the information available to an applicant a constitutional motion is properly launched but it later becomes apparent (1) that there is a substantial dispute of fact or (2) that a claim for constitutional relief is no longer appropriate? As to the first of these two events, the emergence of a factual dispute does

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<sup>12</sup> Privy Council Appeal No. 13 of 2004.

<sup>13</sup> Privy Council Appeal No. 54 of 2000.

<sup>14</sup> See paragraph 36 **Jaroo's Case**.

not render the proceedings an abuse where the alleged facts, if proved, would call for constitutional relief. Where this is so, the appropriate course will normally be for the applicant to apply promptly for an order that the conditional proceedings continue as though begun by writ and for any appropriate ancillary directions for pleadings, discovery and the like. Where appropriate, directions should also be given for expedition and a timetable set for the further steps in the proceedings ...<sup>15</sup>

23. From all of the above it is clear that (both under the substantive law and the CPR, 1998) proceedings for constitutional relief originally instituted by Fixed Date Claim Form can be continued as if commenced by Claim Form and dealt with and determined as such.

24. In light of the above analysis, I am of the opinion that in general all claims for constitutional relief ought properly to be made by Fixed Date Claim Form. If exceptionally such relief arises in matters commenced by Claim Form, then the proceedings are not necessarily an abuse of process or a nullity and where appropriate can be dealt with under Part 56.6, CPR, 1998 as explained above. The converse of this position is addressed by Part 56.9, CPR, 1998. Both of these provisions are consistent with the general rule at Part 8.4, CPR, 1998, which provides that: “A claimant may make a claim which includes all, or any, claims which can be conveniently disposed of in the same proceedings”.

25. I say generally and exceptionally above, because the CPR, 1998 properly acknowledges the status to be given to claims for breaches of the Constitution as the supreme law and the procedure prescribed by it for such claims, by affording them the priority and expedition which the rules and procedures spelt out in Part 56 facilitate. This is also so because this approach is consistent with the general advice of the Privy Council in **Jaroo** as to appropriate procedure and substantive legitimacy with respect to claims for constitutional relief; and in particular that such claims are an abuse of process

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<sup>15</sup> See paragraph 30, **Ramanoop's Case**.

where there are available parallel and adequate common law remedies arising out of the material facts.<sup>16</sup>

26. In **Damian Belfonte v The Attorney General of Trinidad and Tobago**<sup>17</sup> Chief Justice Sharma, in giving an example of a special feature which could take a case out of the Jaroo substantive limitation, stated:

Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights.

27. Such a ‘mixed claim’ would typically be covered by and can be dealt with under Part 56.9, CPR, 1998. In such a case, where what is involved is the breach of the fundamental human rights provisions of the Constitution (and therefore of the supreme law of the Republic), it would appear to be inimical to the Constitution to consider such a claim an abuse of process because of the mode of commencement of the proceedings.

28. It would seem therefore, as a matter of both logic and common sense, that in cases initiated by Claim Form for damages or other relief, where the facts supporting that claim “are such that the only or main relief” that arises is constitutional, such actions ought correspondingly to be neither a nullity nor an abuse of process by reason only of their mode of commencement. In my opinion such actions are properly to be dealt with under Part 56.6, CPR, 1998 (whether or not the relief claimed is articulated as being for a breach of the constitution). In such a case, if there are other or subsidiary issues which may give rise to any other relief or remedy (other than constitutional relief) that arise out of or are related or connected to the subject matter of the claim, those aspects of the case

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<sup>16</sup> This substantive limitation is a general position and is subject to the proviso stated by the Privy Council in **Attorney General of Trinidad and Tobago v Ramanooop**, which is the existence of ‘some feature which ... indicates that the means of legal redress otherwise available would not be adequate’ (At para. 25 of the judgment). The example of such a feature given by the Privy Council was “an arbitrary use of state power”. In **Damian Belfonte v The Attorney General of Trinidad and Tobago** (Cv. A. No. 84 of 2004) Sharma C.J. suggested that another possible example could be multiple breaches of the constitution.

<sup>17</sup> Cv. A. No. 84 of 2004, at page 13, para. 19.

may also properly be considered and dealt with under Part 56.9, CPR, 1998 (which could include an order that the matter be dealt with as if an ordinary claim – that is, as if commenced by way of Claim Form).<sup>18</sup> The possibility therefore exists that such a matter could end up ‘continuing’ as by way of Claim Form, at least for some aspects of the claim.

29. In summary, what emerges from this analysis is that once the only or main relief disclosed by a claimant’s statement of facts is a legitimate constitutional claim, then whether the action is commenced by Fixed Date Claim Form or by Claim Form is not determinative of the action. Legitimate mixed (Constitutional) claims can arise out of both Fixed Date Claim Form and Claim Form proceedings.<sup>19</sup>

30. What may be seemingly unclear is how one should deal with a case under the CPR, 1998 that is predominantly a common law action with only subsidiary legitimate constitutional issues. That is, a case in which the constitutional issues are neither the only or main relief that can be claimed. In my opinion, it would appear that in such a case, because of the supremacy of the constitution and subject to the learning in **Jaroo**, **Ramanoop** and **Belfonte**, the proper approach would be to proceed under Part 56, CPR, 1998 and at the appropriate stage seek directions under Part 56.9, CPR, 1998. Such an approach is procedurally consistent with section 14 of the Constitution, the overarching policy of Part 56, CPR, 1998 and the opinions of the Privy Council on the proper procedures to be followed in seeking constitutional relief and the substantive limitations in relation to doing so.

31. It is important to remember that under the CPR, 1998 the mandate to comply with pre-action protocols and the opportunities afforded in the context of the powers and responsibilities of a court at a case management conference (both of which exist whether an action is commenced by Fixed Date Claim Form or by Claim Form), mean that both before an action is commenced and shortly after that has occurred, first the parties and

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<sup>18</sup> See Part 56.9 (2) (b), CPR, 1998.

<sup>19</sup>In the case of Claim Form proceedings the only constraint imposed by the CPR, 1998 is that the constitutional relief must be “the only or main relief” that arises out of the facts supporting the action.

then the court have the duty to consider (in light of all the information that must now be disclosed at these initial and early stages of litigation) whether or not there are legitimate actionable constitutional issues that can be pursued and/or whether these are the only or main relief that arise out of the facts supporting the claim(s). The consequence is that at either and/or both of these stages the parties and/or the court ought to be able to resolve the '**Jaroo/Ramanoop** dilemma', namely, whether substantively there are available parallel and adequate common law remedies arising out of the material facts giving rise to the constitutional claim(s); and having done so, to determine the appropriate procedure to follow to prosecute any actionable claims that may arise.

### **THE CASES BEFORE THE COURT**

32. In these two cases, where it is admitted by the Appellants that (i) "the central claim is a common law claim for tort",<sup>20</sup> (ii) the claim for any breach of constitutional rights "is not the substantive claim made by the Appellant",<sup>21</sup> and (iii) "the Appellant sought no damages for breaches of his constitutional rights but same is pleaded in his ground for aggravated and exemplary damages"<sup>22</sup> for the alleged tort, then in my opinion both cases fall squarely within the narrow confines of the substantive limitation in **Jaroo**.<sup>23</sup> The consequence is therefore that the relief sought for the alleged breaches of the constitution amount to an abuse of process.

33. In light of the Privy Council's decisions in **Jaroo, Naidike** and **Ramanoop**, and until such time as they are changed, I am unable to accept the suggestion of counsel for the Appellants, that in any civil proceedings where the facts disclose a breach of a constitutional right a declaration as to that must be made by the court and the court is also obliged to consider what is required to vindicate the breach of the fundamental right, including the consideration of an award of vindicatory damages.

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<sup>20</sup> Paragraph 8 of the Skeleton Submissions of the Appellant filed on the 18<sup>th</sup> June, 2009 in Webster's Case.

<sup>21</sup> Paragraph 7 of the Skeleton Submission of the Appellant filed on the 18<sup>th</sup> June, 2009 in Webster's Case.

<sup>22</sup> Paragraph 7 of the Skeleton Submission of the Appellant filed on the 18<sup>th</sup> June, 2009 in Webster's Case.

<sup>23</sup> See also the decision of the Privy Council in **Naidike v Attorney General**, Privy Council Appeal No. 10 of 2003, per Lord Brown at paragraph 56: "... where a parallel remedy exists at common law only exceptionally will it be proper and not an abuse of process to proceed by way of constitutional motion".

34. I am also unable to accept, for the same reason, that such a course is necessary where exemplary damages are sought in tort. In cases of tort it is quite clear that an award of exemplary damages can be made in instances of oppressive, arbitrary or unconstitutional acts by government servants.<sup>24</sup> In both of the cases before this court, the facts that support a finding of unconstitutional action by the police are raised in support of claims for aggravated and exemplary damages. There is nothing improper about this. However, such a course does not necessitate the making of the declarations sought to justify or quantify an award for aggravated or exemplary damages. Further, in neither of these cases is any claim made for vindictory damages for the breach of any constitutional rights. There is, therefore, an implicit admission in the way these two cases are framed that the damages sought in tort constitute an available parallel and adequate common law remedy arising out of the facts that may give rise to the stated constitutional relief claimed.

### **CONCLUSION**

35. In these two cases evidence as to whether or not breaches of the Claimants fundamental rights occurred can be received within the parameters of the tort of false imprisonment, for the purpose of determining whether and if so what aggravated and/or exemplary damages may be awarded. Given the state of the law, there is no basis for the making of any declarations with respect to any such constitutional breaches. Both of these matters were initiated and intended only as actions in tort.

36. In the circumstances, I am of the view that in **Webster's case** Pemberton J. was not correct in the answer she gave to the general question posed by her for determination. Nevertheless, I am of the opinion that she was right in striking out paragraphs 2 and 4 of the prayer in the Claim Form and in the Statement of Case namely, the claim for declaratory relief under the Constitution. In my opinion the judge should have also struck out paragraph 3 in both of the above. Therefore, I now also order that paragraph 3 in the Claim Form and the Statement of Case be struck out. Though I have found the judge's answer to the general question posed by her to be incorrect, I have also held that

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<sup>24</sup> See **Rookes v Barnard** [1946] A. C. 1129.

the judge was correct in the orders she made on the facts of this case. An appeal is against an order of the court. In the circumstances Webster's appeal is dismissed.

37. In **Parmassar's case** the judge gave no reasons, but struck out the entire action. The judge was wrong in doing so whether he acted on the basis of a lack of particularity in the Statement of Case or the adoption of an improper procedure. Indeed, and as done by Pemberton J. in **Webster's case**, the judge should have struck out the claims for declarations for breaches of constitutional rights and allowed the action to proceed on the other relief claimed. I am therefore of the opinion that paragraphs 2, 3, and 4 of the prayer in both the Claim Form and the Statement of Case ought to be struck out, and so order. This action is to proceed on the other claims made. In the circumstances Parmassar's appeal is allowed.

38. Both of these appeals are procedural, and the costs of both will now have to be assessed by this court.

P. Jamadar  
Justice of Appeal