THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Claim No. CV 2012-03205
C.A. No. P 142 of 2014

BETWEEN

1. **DR. WAYNE KUBLALSINGH**
2. **RIAZ NIGEL KARIM**
3. **ELIZABETH RAMBHAROSE**
4. **RAMKARAN BHAGWANSINGH**
5. **MALCOM MOHAN**
6. **AMEENA MOHAMMED**

ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE HIGHWAY REROUTE MOVEMENT

7. **RUTH CHAITOO**
8. **ELAUTIE CHAITOO**
9. **KUMAR SAMLAL**
10. **LEELAWATIE BOODHAI**
11. **KHEMRAJ BOODHAI**

Claimants/Appellants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant/Respondent

****

Panel:

R. Narine J.A.

G. Smith J.A.

P. Moosai J.A.

Appearances: Mr. F. Hosein SC, Mr. R.L. Maharaj SC, Mr. R. Dass instructed by Mr. A. Maraj for the Appellant.

Mr. R. Martineau SC, Mrs. D. Peake SC, Mr. K. Ramkissoon, Mr. G. Ramdeen, Mr. S. Roberts instructed by Ms. Alexander and Ms. Ramroop for the Respondent

DATE DELIVERED:

I have read the judgment of Narine J.A. and agree with it.

P. Moosai
Justice of Appeal.

JUDGMENT

Delivered by R. Narine J.A.

1. This is an appeal from an order of the High court made on 7th May 2014, refusing the appellants' application made on 18th September, 2013 for a conservatory order staying the continuation of works on the Debe to Mon Desir segment of the Solomon Hochoy Highway extension project pending the hearing and determination of the appellants' application for constitutional relief.
2. The action was commenced more than one year before by a Fixed Date Claim Form (F.D.C.F.) filed on 3rd August 2012 seeking declarations that the decision to commence or continue the Debe to Mon Desir segment of the highway breached the claimant's rights guaranteed under section 4 of the Constitution to, inter alia life, liberty, the security of the person, enjoyment of property, protection of the law and respect for private and family life.

3. The claimants allege that they are adversely affected by the decision to build the Debe to Mon Desir segment of the highway. Some of them have been served with acquisition notices. Some have homes on the perimeter of the highway. The first claimant however, does not live on or about the highway. He is an environmental activist, and the chief spokesperson for those opposed to the highway.

4. At the time of the hearing of this appeal, there was pending before the High Court an application by the appellants to join five additional claimants who had received acquisition notices and to convert the proceedings into a representative action on behalf of some 300 persons. As it turned out, three of the acquisition notices against the original claimants have been withdrawn, due to an adjustment of the path of the highway. The effect of this was that the only original claimant whose property rights would be affected by the highway, was the second claimant who is in fact the licencee of the legal owner.

5. The judge noted in, his written judgment (para. 100) that the parties agreed that he should "theoretically consider" the constitutional position of persons who owned property in the path of the highway, and that "it was conceded" that he should treat the F.D.C.F. as having already been amended for the purposes of deciding the application. However, in his speaking note before us, Mr. Martineau agrees that his position before the trial judge was that he would not object if the judge considered the application "as though someone who owns property on the path of the Highway was affected". However, Mr. Martineau submitted that this court should not determine this appeal on the basis that the application for joinder and amendment had been granted, since to do so would be to usurp the function of the trial judge who had not yet determined the application.

6. The facts of this case are voluminous. They are set out in great deal in the judge's written decision. We see no need to rehearse them here. This matter involves the extension of the Solomon Hochoy Highway from Golconda to Point Fortin. For the purposes of construction the project was divided into

different segments. The appellants in this case oppose the construction of the Debe to Mon Desir segment along the proposed route. Their claim is based on statements allegedly made by high ranking government officials, including Ministers of Government and the Prime Minister. The appellants contend that their statements gave rise to certain legitimate expectations, inter alia, that the government would review its decision to continue the highway along the proposed route, and that it would abide by the findings of a committee (the Armstrong Committee) set up to review the proposed route of the highway.

7. There is no need to go further into the facts of this case for the purposes of this appeal. Mr. Martineau has helpfully agreed in his submissions that this court should proceed on the basis that the appellants have raised a serious issue to be tried. Mr. Martineau was careful to point out that he was not conceding that the appellants' have in fact made out a case based on legitimate expectations. In fact, he intends to argue against that position, when the substantive issue arises for consideration by the trial judge.

8. In refusing the application for the conservatory order, the trial judge followed the Privy Council decision in **Belize Alliance of Conservation Non-Governmental Organizations v. The Department of the Environment and anor.** [2003] UKPC 63, (the **Bacongo** case) in which the Board applied the principles laid down by the House of Lords in **American Cyanamid Co. v. Ethicon** [1975] AC 396, for the grant of interlocutory injunctions. Applying those principles, the judge found that the appellants had raised a serious issue to be tried, but the balance of justice favoured the respondent. The judge further found that the appellants had been guilty of unreasonable delay in applying for an interim conservatory order which he described as "an exceptional discretionary constitutional remedy".

9. In considering the balance of justice the judge took into account the scale of the financial loss to the state, the tremendous burden to the taxpayers, the burden of "offensive traffic" faced by thousands of motorists, the rights of third party sub-contractors, and the absence of an undertaking in damages.

10. The appellants have submitted that the judge was wrong to apply the **American Cyanamid** principles to this case. They distinguish the **Bacongo** case on the basis that the Board was dealing with the grant of an injunction in the context of a judicial review application. The instant application involves a constitutional motion and the conservatory order was to preserve the status quo in order to ensure that the rights protected by the Constitution are not destroyed before the substantive matter is heard. The appellants further submitted that the application is grounded in section 14(2) of the Constitution which gives the High Court an original jurisdiction to make such orders as it sees fit for the purpose of protecting and securing the constitutional rights of the appellants. As such, the court is not fettered by the usual principles that apply under the general law for the grant of interlocutory injunctions. In addition, since the appellants are not invoking the equitable jurisdiction of the court, such matters as delay in making the application, do not arise.

11. In support of this proposition, the appellants relied heavily on the decision of this court in **Attorney General v. Sumair Bansraj** [1985] 38 WIR 286. In **Bansra**j this court recognised that it was prevented by section 22(2) of the **State Liability and Proceedings Act** Chap. 8:02, from granting an interlocutory injunction against the State, a Minister, or officers of the State. However, the court considered that if the State could not be prevented from destroying or disposing of the respondent's property until the determination of the constitutional proceedings, the object of the constitution would be defeated in the event that the respondent succeeded in asserting his right to the enjoyment of his property. In those circumstances, the court fashioned a remedy, which it called a "conservatory order" for the purpose of preserving the property and maintaining the status quo pending the determination of the motion. Kelsick CJ (at 291 H) expressly recognised that although the order was not called an injunction, it might be argued that the effect was the same.

12. The terms of the conservatory order were formulated by Brathwaite JA. The order directed both parties to undertake that no action of any kind would be taken to enforce their respective rights until the determination of the originating

motion (at 302 F). Brathwaite JA further directed that in the exercise of its discretion under s. 14(2) of the Constitution the High Court would be required to deal expeditiously with the application inter partes, and to set down the substantive motion for hearing within a week of the grant of the conservatory order, and that the motion should be heard forthwith (at 302 H).

13. It is now well established that the principles for the grant of interlocutory injunctions that were devised by Lord Diplock in the **American Cyanamid** case, apply in public law matters: **R. v. Secretary of State for Transport Ex parte Factortame Ltd.** [1990] 1 AC 603, **Chief Fire Officer and Public Service Commission v. Elizabeth Felix-Philip & ors.** (unrep.) Civ. App. No. S. 49 of 2013, and the **Bacongo** case (supra).

14. As recognised by both Braithwaite JA and Persaud JA in **Bansraj** (supra.) at 299G and 305G), constitutional motions fall within the realm of public law. However, the appellants distinguish the authorities cited in paragraph 13 above on the basis that they were based on applications for judicial review, and submit that constitutional motions are sui generis and the court's power under section 14(2) of the Constitution ought not to be fettered by the general common law principles for the grant of interlocutory injunctions, and principles pertaining to the equitable jurisdiction of the court. In fact, Mr. Maharaj has submitted that once an application for a conservatory order to preserve property is not found to be frivolous, the applicant is entitled to a conservatory order to preserve his property rights pending the determination of the motion.

15. We do not agree with this submission. By its very nature the grant of a conservatory order involves the exercise of a judicial discretion. As noted by Kelsick CJ, the effect of a conservatory order is arguably the same as that of an injunction. The exercise of the court's discretion in matters of this kind cannot be arbitrary or capricious. While it is desirable that the court's discretion under section 14(2) of the Constitution to fashion a remedy in particular circumstances, ought not to be fettered, there is no basis for the proposition that the intention of the framers of the Constitution was to exclude the principles of law applicable to particular remedies. For example, if the

court decides that the appropriate remedy is an award of compensatory, vindicatory or exemplary damages, the court must act in accordance with established legal principles pertaining to such damages in making an award. In the same way, if the court exercises its discretion to grant a conservatory order, which has the effect of an interlocutory injunction, the exercise of the discretion must be in accordance with established legal principles for the exercise of such discretion. Accordingly, we hold that the trial judge was correct in applying the **American Cyanamid** principles in deciding whether to grant the conservatory order.

16. In applying these principles, the trial judge found that the appellants have raised a serious issue to be tried. For the purposes of this appeal, Mr. Martineau has not challenged this finding.

17. The appellants submit that any attempt to proceed with the highway will cause permanent and irreparable damage to their constitutional rights. In their view, damages will not be an adequate remedy for the loss of a home, and interference with family and private life. Of course, damages may adequately compensate a litigant for loss of property rights. In this case, there has been no challenge to the acquisition notices. The inadequacy of damages may be related to interferences with family and private life, which does not appear to be one of the stronger aspects of the appellants' case.

18. The trial judge went on to consider the balance of justice at paragraphs 165, 167 and 168 which we set out in full:

> *"165. I have already held that the claimants have raised a serious issue to be tried at the substantive hearing. The question to determine is how should the discretion to grant relief at this stage be exercised. Lord Walker said that "the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimize the risk of an unjust result)" (at para 39). In analysing the balance of the risk of injustice he took into account the absence of an undertaking in damages, the rights of third parties, and the fact*

that the impugned dam site was already a busy construction site. He refused the injunction. I recognize that there are differences in the fact situation between ***Belize Alliance*** *and this case, but I cannot ignore the statements of principle enunciated there.*

167. Mr Hosein forcefully submitted that if an undertaking in damages is required then poor people would be deprived of their constitutional rights. With respect, I do not agree. An interim conservatory order is an exceptional discretionary constitutional remedy, unlike a declaration. There is no fetter on the right to seek declarations. Poor people who expeditiously seek this exceptional interim relief will not be adversely effected by this consideration. There is, in any event, no rule of law that says that a rich man or a poor man is entitled to any remedy of his choice, under any circumstances. The scale of the loss to the State and third parties is an exceptional feature of this case. It is not likely to often arise. In considering the balance of justice, the granting of an order to stop the highway to secure a right of review must be balanced against the tremendous cost that the taxpayer has already borne and the stupendous cost that he or she will bear as a result of its grant. To this must be added the continued burden of oppressive traffic faced by thousands of motorists. I must bear in mind as well that the review sought to be protected by this order is not guaranteed to result in any substantial design alteration, and, at least on the basis of Dr Armstrong's report, is unlikely to lead to a reroute of the highway. In the absence of any allegations of an unlawful acquisition process, or the illegal exercise of executive powers save in relation to the frustration of a right to a review, the orders sought will cause more trauma to taxpayers and third parties if it is granted, than to the claimants if it is not granted. It

would be a disproportionate loss. Many of these considerations would have had less force if the claimants had expeditiously sought their interim orders.

168. Taking into account the unreasonable delay in pursuing the interim conservatory order, the fact that no undertaking in damages was offered, that third party commercial rights and the rights to adequate transport of those living in the four towns, will be adversely affected I decline the oral and the written applications for the interim conservatory orders."

19. In our view, a careful reading of these paragraphs of the judgment reveals that the trial judge took into account the matters that were relevant to the exercise of his discretion. We are unable to say in this case that the trial judge was plainly wrong in exercising his discretion to refuse the application for the conservatory order.
20. As noted in paragraph 168 of the judgment, the trial judge found that there was unreasonable delay in making the application for the conservatory order, and took the delay into account in refusing the application.
21. The appellants contend that the judge was wrong in finding that there was unreasonable delay in making the application. They submit that in considering the issue of delay time should run from 30th August, 2013 when the Prime Minister announced that the Debe to Mon Desir segment of the highway would be built, to 18th September 2013 when the application was filed. Accordingly, there was no unreasonable delay. In addition, the appellants submit that no actual construction had as yet been commenced on the Debe to Mon Desir segment, hence there was no unreasonable delay in bringing the application.
22. For the respondent, Mr. Martineau pointed out that the constitutional motion had been filed since 3rd August, 2012 seeking inter alia, a conservatory order in respect of works on the Debe to Mon Desir segment, and yet no application was pursued until 18th September 2013, despite clear evidence to the effect

that the appellants knew that the State intended to proceed with construction of the segment in dispute. Mr. Martineau further submitted that the State had in fact commenced works in April 2012, June 2012 and November 2012 which were closely connected with construction of the disputed segment, and it was not necessary that construction of the disputed segment itself should actually commence before the appellants bring their application. In addition, Mr. Martineau drew reference to two earlier occasions on which the trial judge raised the issue of applying for a conservatory order with the appellants' attorneys – as early as 6th December, 2012 and 27th March, 2013. On the earlier occasion, the judge asked Mr. Martineau whether he was giving an undertaking not to proceed with the disputed segment. Mr. Martineau indicated that he could not. In spite of the clear indication that the State intended to continue with the highway, the appellants did not bring their application for the conservatory order until more than nine months later.

23. Having regard to the evidence, the trial judge cannot be faulted for finding that there was unreasonable delay in bringing the application. Of course, by its very nature, an application for a conservatory order is discretionary relief, and the court is entitled to take unreasonable delay into account in exercising its discretion. In our view, the trial judge was correct in factoring the issue of delay into his decision, although it was not strictly necessary for his decision to refuse the application based on the **American Cyanamid** principles.

24. The respondent filed a cross appeal against the decision of the trial judge in which they have asked this court to set aside what appear to be final findings of fact and/or mixed fact and law and /or law made by the trial judge on the interlocutory application.

25. Some of the apparent final findings that causes this court some concern are to be found in the transcript of the oral judgment of the trial judge delivered on 7th May 2014. In his oral judgment the judge indicated that he had written a 74 page judgment comprising 172 paragraphs. However, he distributed at the time of delivery of his decision on 7th May, 2014 what he describes as "as executive summary" of his decision. His reasons for doing so were the public

interest in the case, and his concern that he would not be misquoted in the press. He further indicated that the judgment is an "advance copy" and it may contain typographical or grammatical errors or flaws in expression that he may wish to revise. However, the reasons for his conclusion as stated therein would not be altered.

26. Some of the statements contained in the transcript of the oral judgment that cause some disquiet are:

> ***"Looking at it panoramically, I have come to the conclusion that these representations were sufficient to create an expectation that was legitimate, and what the expectation was, was an expectation of a review and in relation to the Armstrong report of a consideration."***
>
> . . . . . .
>
> ***However, I do find that there was a representation that the report would have been considered.***
>
> ***In my judgment I said that I regard a promise emanating from a Government Minister and especially from the Prime Minister that there would have been a review, to have been said with sincerity.*** *I was also heartened by the remarks by Lord Justice Laws in Nadarajah where he emphasized how important it was for a public authority to deal with the public in a straightforward manner.*
>
> ***In my opinion the representations that were made to the Claimants were insincere because a review that was promised to them was never provided.***
>
> *Moreover, I have dealt as well with the NIDCO preliminary report which I regard as superficial.*

I also did not accept that if it were to amount to a review as Mr. Martineau suggested and with respect, I disagree with him, that if it were to amount to a review that there would be no right of participation, of representation, of consultation with the person who is directly affected.

*I think I described Minister Warner's meeting in April or May when at the end of the meeting the NIDCO report at the very end, not having been delivered previously, I described it as though it was dropped on the table as if it were an ace of spades****. I did not find that behavior to be sincere or forthcoming.***

In my opinion, the effect of these promises, I should say that I relied heavily on Paponette, is that it amounted to a breach of the Claimants' constitutional rights.

Now in those circumstances, I should not say it amounted, my finding is that in relation to allegations of breach of constitutional rights the Claimants have made out a serious case. *I cannot actually say with any assurance that at trial that this would hold, but the parties would obviously have a right to appear at the trial, but at this preliminary stage the question that arises is, "Is a serious case made out?"*

I accept that section 4(a) rights have been infringed.

I do not accept that section 4(c) rights of right of private and family life to have been infringed.

This brings me to the second question which was, having found the Claimants' constitutional rights have been infringed by the frustration of the legitimate expectation, what is the appropriate remedy*?*

. . . . . .

It is a long history of these broken promises and these unfulfilled assurances that caused the Claimants to approach this court.

. . . . . .

But all of these assurances and all of these promises that were made in 2012 were not kept and this is why the fixed date claim was filed …"

27. In his written judgment, the trial judge appears to make final findings as follows:

"124. …… ***In this case I think that the interference with property owners on the periphery of the highway is substantial. I do not doubt that there is a serious question to be tried, but the exact nature or extent of their rights can only be fully defined at the substantive hearing.***

135. ***The second meeting with Minister Warner on 8 June 2012 was self-described by Dr Kublalsingh as a review process, and meant to discuss the NIDCO report****. . . . . .*

*. . . . .****If the meeting was called to "discuss the technical issues" then it would be disingenuous to have withheld the NIDCO preliminary report until the last moment and then to have laid it on the table as an ace of spades. Such actions suggest pre-judgment and a lack of sincerity in a process meant to be a meaningful discussion of technical issues.***

136. . . . . .The representation was that the JCC committee report would be considered by NIDCO. ***Consideration involves something meaningful, something that is not artificial. While I am not satisfied***

on the evidence that the Prime Minister agreed to be bound by the findings, I do not understand why there is no proper evidence to show exactly how it was considered, and if any of its recommendations necessitated a change of tack in the methodology of the project. *To say that it was considered but rejected (as the defendant's witnesses in sum testified) does not assist the court in determining the genuineness of the consideration process. This is no mere semantical exercise.* ***If a promise is made to consider something then the court expects that the promise is serious. The work of the Armstrong Committee cost the government $672,000. Is it that the joint press statement was just a ploy to cause Dr Kublalsingh to end his hunger strike, and that the Government privately intended to reserve the right to ignore its findings? That may well be so, but in relation to the promised consideration there was no statement in the joint press release that qualified its plain meaning.*** *The representation was that the report would be considered, and I must accept that promise at face value. As I have found, the evidence is weak in relation to the Prime Minister's alleged representation to abide by the findings. However, this has nothing to do with the genuineness of the promised consideration.*

137. ***It seems to me that what runs through the evidence is the absence of a clearly formulated policy statement in response to the HRM activities.*** *If it was the chosen executive policy to build the highway, the Government Ministers, and the Prime Minister especially, should have acted decisively and plainly told the HRM that the decision was not reviewable and that the Government policy would not be changed. Instead, in response to the HRM accusations in the political arena, there were a series of minor capitulations. These achieved temporary respites from the pressure generated by the HRM, and, I think, put the Government in a good public light as being caring and considerate. These capitulations*

however have public law consequences. Mr Martineau, ever resourceful and methodical, took me through each and every representation. He said that each of them was not clear, unambiguous, or devoid of relevant qualification. ***While I agree that to some extent he is right – in relation to work stoppages and an agreement to be bound by the Armstrong report – they appear sufficiently clear, unambiguous and unqualified in one important unifying respect: they all promised a review or a reconsideration.*** *The fact that different persons offered reviews at different times, he said, meant that a later promise would have revoked an earlier one. I respectfully do not agree.* ***A court must take a panoramic view of all the evidence and it must sum up the total of all its parts. When a person no less than the Prime Minister promises a review she must be expected to understand what that term means and to have said it with sincerity. Instead of dealing with the HRM in a straightforward and consistent manner*** *(to use the words of Laws LJ in Nadarajah) and telling the HRM that she refused to negotiate,* ***she took a series of steps that are now made out to be half-promises – or no promises at all – to appease, or defuse, or otherwise deal with the activities of the HRM."***

28. We have noted that on occasion, having expressed what appear to be final findings, the trial judge went on to comment that there was a serious issue to be tried. However, ex facie the statements quoted above from the oral and written judgment of the trial judge appear to be findings of fact, mixed fact and law, and findings of law. It is well settled that at the interlocutory stage it is not permissible for the trial judge to make or appear to arrive at final findings. He is required to make a preliminary or provisional assessment of the evidence and the relevant law and to determine whether there are serious issues to be tried. Not having embarked on a full hearing of the substantive issues in the case involving possible

cross-examination, a close analysis of the evidence and the full assistance of counsel on both sides with respect to the evidence and the relevant law, it is quite wrong for a trial judge to make final findings at the interlocutory stage. Accordingly, in so far as the matters set out in paragraphs 26 and 27 reflect final findings of fact, mixed fact and law, these findings are set aside. In doing so, we express the hope that the trial judge will revisit these findings with an open mind at the hearing of the substantive issues.

29. There is one final issue which was raised in the cross-appeal on which we have been asked to express a view. Mr. Martineau submits, as an additional ground for refusing discretionary relief to the appellants, that the trial judge should have taken into account the unlawful conduct of the appellants in wilfully obstructing the contractor from carrying out the works.

30. Mr. Hosein has submitted that the appellants were entitled to engage in protest to protect their constitutional rights, and that there has been no finding that any of the appellants have broken the law.

31. There was evidence before the judge of unlawful acts committed by members of the Highway Reroute Movement. These included damage to equipment, threats to employees of the contractor, blocking of access to work sites, and physically preventing the tractors from operating. The first appellant was arrested on more than one occasion for obstructing the works.

32. In his oral judgment the trial judge expressed the view that this unlawful conduct was a matter to be dealt with in the criminal court. He did not take the unlawful conduct of the appellants into account as an additional ground for refusing discretionary relief. In his view the conduct of the appellants did not offend any principle of equity.

33. In support of his submissions Mr. Martineau referred us to a number of authorities. In **R v. Chief Constable of Devon and Cornwall** [1982] 1 QB 458, Lord Denning MR expressed the view that there is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully prevented by another from doing it.

34. In **Caird and Ors** [1970] 54 Cr. App. R 499 the appellants appealed their convictions for inter alia, riot, unlawful assembly and malicious damage. In delivering judgment the Court of Criminal Appeal noted at pages 504-505:

> *"The moment when persons in a crowd, however peaceful their original intention, commence to act for some shared common purpose supporting each other and in such a way that reasonable citizens fear a breach of the peace, the assembly becomes unlawful."*

And at pages 510-511:

> *"In conclusion this court feels it necessary to advert to the clear line that exists between the freedom of citizens to assemble peaceably in a permissible place to express their views in a lawful manner, a right which the courts always safeguard and the unlawful act of doing something which threatens a breach of the peace. As has already been stated, a common purpose of thus disrupting by tumult the peaceful pursuits of other citizens whether at work or in proper enjoyment of their leisure is unlawful in this country, even if unaccompanied by acts of frightening violence."*

35. There was evidence before the judge that the Highway Reroute Movement under the leadership of the first appellant has engaged in unlawful acts with a view to obstructing the operation of the tractors and preventing the construction workers from carrying out their lawful duties. Some of these unlawful acts are set out in paragraph 23 of the affidavit of Marcelo Luiz Labate, an engineer employed by the contractor, filed on 7th October 2013. The alleged unlawful acts include verbal abuse and attacks on the workers, blocking of an access road by unlawfully placing an excavator in the path of the road, and physical obstruction of the tractors. While we expressly make no finding of criminal culpability on the part of the appellants, we are of the view that the judge was entitled to take into account the conduct of the appellants in deciding whether to grant discretionary relief.

36. The courts must always be vigilant in its protection of the rule of law and must be uncompromising in its insistence that the rule of law must be observed. While the courts will always protect the citizen's right to engage in lawful protest in defence of his constitutional or private rights, where the protest crosses the line into unlawful activity, the court must be careful not to condone such conduct. This is particularly important in the prevailing social climate in which there has been a noticeable erosion of respect for and observance of the rule of law. In this case, what troubles the court even more, is the fact that the unlawful acts outlined in the Labate affidavit took place after the constitutional motion had been filed, and the matter was placed before the court.

37. The grant of a conservatory order is in the nature of an interlocutory injunction to preserve the status quo. Without doubt it is a discretionary remedy. In considering whether to grant or refuse such a remedy the conduct of the parties is a legitimate and relevant consideration, which the trial judge ought to have taken into account in exercising his discretion. However, his refusal to take this matter into consideration as an additional ground for refusing discretionary relief, does not in any way alter our view that the trial judge was correct in refusing the conservatory order.

Disposition:

38. It follows that the appeal is dismissed and the cross-appeal is allowed. We will hear the parties on costs.

Dated the 8th day of August, 2014.

R. Narine,
Justice of Appeal.