The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. P215 of 2021
Claim No. CV2019-00005

Between

COLIN SIMMONS

Appellant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL:

N. BEREAUX J.A.
P. RAJKUMAR J.A.

Date of delivery: April 29, 2022

APPEARANCES:
Mr. F. Hove-Masaisai instructed by Ms. A. Pierre, Attorneys-at-Law for the Appellant
Ms. K. Prosper instructed by Ms. H. Muddeen, Attorneys-at-Law for the Respondent

REASONS

Delivered by Bereaux J.A.

(1) This is an appeal from the decision of Lambert-Peterson J, in which she struck out the appellant's constitutional motion as an abuse of process. On 13th April 2022 we dismissed this appeal and awarded the respondent costs in the sum of seven thousand dollars ($7000.00). These are our reasons.

Summary of Facts

(2) This appeal has its genesis in the arrest of Colin Simmons ("the appellant") on 17th July 2008 at the Crown Point International Airport in Tobago. He was charged with possession of a dangerous drug for the purpose of trafficking and attempting to export certain prohibited goods contrary to the **Dangerous Drugs Act Chap.11:25**. He was brought before the Scarborough Magistrates' Court where the appellant opted for a summary trial and pleaded not guilty to both charges. He subsequently retained Mr. Subhas Panday to represent him in the criminal proceedings. The matter was adjourned on several occasions between July 2008 and June 2010 for various reasons but principally because the prosecution was not ready to proceed.

(3) In June 2010, the appellant was informed by Mr. Panday's office that Mr. Panday had been appointed a government minister and that someone else at his firm would take over conduct of the case. On the morning of 24th June 2010 (which was latest adjourned date) Mr. Panday's office informed him that the attorney assigned to his case was unable to appear. The office advised him to either ask for an adjournment or obtain fresh representation.

(4) The appellant attempted to obtain the services of another attorney but was unsuccessful. When the matter was called before the magistrate on 24th June, the appellant indicated that he was unrepresented and the circumstances which led to that state of affairs. The magistrate insisted on proceeding. The prosecution opened its case with the appellant being unrepresented. The trial was then adjourned to the following day.

(5) On the morning of 25th June the appellant met with attorney at Law Mr. Chaitram Sinanan outside the Scarborough Court and Mr. Sinanan orally agreed to represent him. When the matter was called before the magistrate, Mr. Sinanan sought an adjournment to take proper instructions. The magistrate refused. She gave Mr. Sinanan leave to withdraw. She then directed that the trial continue and the appellant was required to cross-examine prosecution witnesses himself.

(6) At the close of the prosecution's case the magistrate ordered the appellant into the witness box without caution as to his rights to decline giving evidence. He was then subjected to cross-examination. At the end of the evidence the magistrate found him guilty on both charges and sentenced him to five (5) years in prison.

(7) Before he was taken to the Tobago Prison on 25th June, a police officer at the courthouse told him that he had a right to appeal which he could only access from prison. On Monday 28th June 2008 the appellant informed a prison officer at the Tobago Prison of his desire to appeal. The officer responded that the appellant was being transferred to Trinidad and he would be able to appeal from that prison.

(8) On 5th July 2010, the appellant was taken to the Port of Spain Prison. Almost

immediately upon his arrival, he requested that he be allowed to appeal. The prison officer documenting the new arrivals told him that he was *"too busy"* to consider his request at that time and advised the appellant to return to the office the following morning. On the morning of 6th July the appellant (at his request) was escorted to the officer so that he could get his appeal filed. He was told by the prison officer on duty that he could not appeal since he was an 'outsider'. The appellant is and has always been a citizen of Trinidad and Tobago but spoke with Barbadian accent, having grown up in Barbados. The appellant made several subsequent requests to appeal but no action was taken by the prison authorities.

(9) Sometime between the 8th and 9th July 2010, the appellant was transferred to the Carrera Convict Prison. On arrival he spoke to one Superintendent Morgan who advised him that the time for filing of his appeal had expired and that he would need legal assistance to obtain an extension of time. Between 28th July 2010 to November 2013 the appellant wrote numerous letters to the Legal Aid and Advisory Authority, the Ombudsman and the Attorney General in an effort to obtain legal representation to prosecute his appeal. He received no responses.

(10) On 31st October 2013, the appellant was released from prison and made enquiries of the Legal Aid and Advisory Authority as to why he was never accepted for representation. A few days later on 7th November 2013, the appellant was informed that attorneys Bindra Dolsingh and Chris Selochan had been appointed to represent the appellant for the purposes of the criminal appeal. On 11th May 2014, the appellant was granted an extension of time to file an appeal against conviction and sentence. The appeal came up for hearing on 22nd January 2016 whereupon the Court of Appeal allowed the appeal and quashed the appellant's conviction.

(11) The appellant then filed three constitutional motions between 2018 and 2019 in respect of his detention in the custody of the Prison Service. In the first motion, **CV 2018-00006**, the appellant sought declarations that:

a. The failure of the prison authorities to allow him to file his notice of appeal within the statutory time period breached his rights under sections 4 (a) and (b) of the Constitution;

b. The failure of the State to provide Legal Aid/ with an attorney at law to assist him in applying for an extension of time to file his notice of appeal breached his rights under section 4(a)(b) and (d) of the Constitution;

c. An order for monetary compensation as a result of the State's failure to deliver the notice of appeal; and

d. An order for monetary compensation for the distress and inconvenience that the appellant suffered during the period of unconstitutional detention and loss of earnings;

The second constitutional motion is the subject of this appeal. It was filed on 4th February, 2019 approximately one year after the first motion. By this second motion the appellant sought a declaration that he was denied his right to equality of treatment as guaranteed to him by section 4(d) of the Constitution of the Republic of Trinidad and Tobago ("the Constitution"), as a result of the neglect, failure or refusal of the prison authorities to give him remission of this sentence under rule 285 of the Prison Rules. He claims had he been given remission he should have been released from prison on 24th October 2013, but was instead released on the 31st October 2013. This relief had not been sought in the first motion.

The third action, **CV 2018-02503** was docketed to Rampersad J. The case details

are not contained in the Record of Appeal.

(12) All three claims were initially docketed to Gobin J who held CMCs regarding the conduct of these matters simultaneously. Gobin J was transferred to another jurisdiction and the three motions were re-docketed to separate judges. Neither the Attorney General nor the appellant applied to have them consolidated or heard together before a single judge. Directions were given with view to moving the instant claim to trial. The Attorney General complied with all of the directions until he made the July 2021 application to strike out. This was twenty-nine months after the filing of the claim by the appellant.

(13) On the 5th March 2021, Margaret Mohammed J in CV 2018-00006 made the following award in the appellant's favour:

(i) twenty thousand dollars ($20,000.00) as compensation for the breach of the appellant's constitutional rights;

(ii) nine hundred thousand dollars ($900,000.00) as compensation for the appellant's deprivation of liberty suffered during the unconstitutional detention including an uplift for aggravating factors. Interest on this sum at the rate of 2.5% per annum from the date of service of the claim to the date of judgement;

(iii) sixty thousand dollars ($60,000.00) as vindicatory damages;

(iv) a declaration that the failure of the Prison Service to allow the Claimant to file his notice of appeal within the statutory time limit breached the Claimant's right under sections 4(a) and 4(b) of the

Constitution.

The period of unconstitutional detention referred to was the period 25th June 2010 to 31st October 2013.

(14) On 2nd July 2021, the Attorney General applied to Lambert-Petersen J for the instant claim to be struck out as an abuse of process on the grounds that:

(a) the Claimant was awarded damages for distress and inconvenience for the requested period in the matter of CV 2018-00006 Colin Simmons v AG.

(b) the Claimant failed to raise these specific issues which were the live issues in the related matter of CV 2018-00006 Colin Simmons v AG.

(c) In the alternative that there be a stay of proceedings pending the determination of the substantive appeal.

Decision of the Judge

(15) Lambert-Petersen J agreed with the Attorney General and struck out the instant claim. The material portions of her reasoning are as follows:

> ***22. The rule in Henderson v. Henderson as originally articulated, and subsequently reformulated focuses on re-litigation of identical claims or issues. The instant case was filed one year after filing proceeding CV2018-00006. The facts of the instant case were obviously known to the Claimant at the time of filing the CV2018-00006 proceeding. At that time the Claimant could not be said to have been seeking to re-litigate or challenge an earlier decision of a competent court. Proceeding CV2018-00006 was not***

determined at the time that the instant case was filed.

24. It was always open to the Claimant to address the issue of inequality of treatment by the Defendant in proceeding CV2018-00006. Even when the three matters concerning the Claimant and the Defendant were unfortunately assigned to three different judges, there was nothing preventing the issue of equality of treatment being addressed with the other constitutional claims. The instant proceeding as separate and parallel litigation based on the same facts should not have been pursued.

28. I am satisfied that at this stage of the instant case, determination of whether the Claimant's detention between 24th October 2013 and 31st October 2013 is in breach of the Constitution amounts to re-litigation of that issue. I make a finding that to proceed with the instant matter will be an abuse of the process of the court.

32. The presentation of the Claimant's case in a piecemeal manner resulting in parallel cases is not in keeping with the overriding objective of saving expenses, ensuring that the claims are dealt with expeditiously and allotting to claims an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. In addition, the Claimant's conduct in wishing to proceed in this manner is an unjust harassment of the State.

(16) The appellant brought this procedural appeal against the ruling of Lambert-Petersen J. Mr. Masaisai argued as follows:

(i) that the breach of the appellant's right to equality of treatment in relation to his remission of sentence was not previously litigated and adjudicated upon by Margaret Mohammed J. Therefore, the appellant's claim did not fall within the question of re-litigation to constitute an abuse of the court's processes. He also pointed out that the judge failed to consider the procedural history of all three matters and the fact they were being managed simultaneously by Gobin J until they were separated and re-docketed in circumstances beyond the appellant's control, and without objection from the Attorney General.

(ii) While Margaret Mohammed J awarded compensation to the appellant, both the appellant and respondent have appealed the order; see **Civ. App. P075 of 2021 and P076 of 2021**. To date the State has not complied with any part of the order of Margaret Mohammed J.

(iii) That the striking out of the appellant's claim was a *"nuclear"* option which the Court ought not to have opted to adopt even when presented with an alternative by the respondent. He relied on Part 26(2)(1) of the Civil Proceedings Rules as amended (CPR). He added that the striking out of pleadings is an exercise of discretion by the Court which must be done in accordance with the overriding objective. The Court must therefore exercise its discretion in such a way to ensure a just outcome to the parties involved. It is a discretion that should be used sparingly as striking out is a *"draconian"* and *"nuclear"* option to be used as a last resort as per **Summers v Fairclough Homes [2012] 1 WLR 2004** and **Real Time Systems Ltd. v Renraw Investments Ltd. [2014] UKPC 6**. Once the pleadings are coherent, then same should not be struck out once any omissions can be remedied by way

of amendment or once there is another viable alternative.

(iv) The appellant amended the claim to remove all reliefs similar to those sought in his earlier claim of CV 2018-00006 and adding the relief sought pursuant to section 4(d) of the Constitution.

(v) The appellant's claim under section 4(d) did indeed have merit.

(vi) The respondent was aware that all of the appellant's claims were docketed before one judge prior to being transferred to separate judges. The respondent participated in case management conferences and complied with directions for twenty-nine months before raising abuse of process. The appellant would have incurred legal costs over the years in trying to move his matter towards a trial. The judge failed to take this into consideration. The respondent made no application to consolidate or strike out the appellant's claim after the transfer to the separate judges and instead complied with all directions in the claim herein up to the filing of affidavits in reply.

(17) Ms. Prosper for the Attorney General, in her submissions, generally supported the decision of Lambert-Petersen J.

(18) In my judgment Mr. Masaisai's submissions are misconceived. The judge's decision is unimpeachable.

(19) With specific reference to the claim of unequal treatment, I agree with Lambert-Peterson J that it was always open to the claimant to address that claim in CV2018-00006 which was decided by Margaret Mohammed J. The dictum of Wigram VC in **Henderson v Henderson [1843-60] All ER Rep 378**,

cited by the judge is worth repeating:

> ***"I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."***

(20) I do not agree with the submission that the subsequent moderation of **Henderson** rule resulted in a focus on re-litigation of identical claims or issues. As Lord Bingham explained in **Johnson v. Gore Wood [2001] 1 All ER 481**, the original **Henderson** doctrine was too dogmatic an approach. What was required was a broad merit based judgment which takes account of the public and private interests involved and all the facts of the case, focusing on the crucial question whether a party was misusing or abusing the process.

(21) The judge herself went on to consider Lord Bingham's dictum in **Johnson v.**

Gore Wood and to find that these proceedings are an abuse of process. She cannot be said to be misconstrued the law or to have misdirected herself on the law.

(22) Mr. Masaisai contended that the equality of treatment allegation is a separate point of law which was not considered by Mohammed J and not adjudicated upon. With regard to this submission I say this: It remains the rule in **Henderson** that all possible claims arising out of the same subject which is in contest should be raised in one litigation by parties exercising all reasonable diligence; but the approach of the Court to the issue of abuse of process must not be too dogmatic. A broad merit based judgment is to be exercised; regard being had to public and private interests and focusing on whether the party is abusing the process. Even applying this approach I am of the opinion that the appellant should have raised the equality of treatment question in the proceedings before Margaret Mohammed J.

(23) It arose out of the same subject - his unlawful detention during the period 25th June, 2010 to 31st October, 2013. Indeed I go so far as to say if the 3rd proceeding before Rampersad J is of such a nature that it ought to be have been raised before Mohammed J then that too is an abuse of process. Inherent in the placement of the three claims before the same judge (Gobin J) was a recognition that the claims should all have been embraced in one proceeding. When they were separated it was open to the appellant (not just the Attorney General) to apply for their consolidation or to be heard together but did not make the separate filings any less an abuse. It was still open to the Attorney General to make the same application to strike out at the joint hearing. Certainly this became even more of an imperative after the fulsome orders of Margaret Mohammed J.

(24) Miss Prosper for the Attorney General submitted that it was incorrect to say that the respondent was dilatory in its application or that the application to strike out was sprung upon the appellant. She stated that these proceedings were filed one year after CV2018-00006 by the same attorneys. After Margaret Mohammed J had delivered her judgment the Attorney General enquired whether the appellant was still pursuing this matter. It was when they indicated that they were still pursing the matter despite Margaret Mohamed J's judgment, that the application to strike out was filed. In my judgment, it was perfectly within the rights of the respondent to apply to strike out after the Margaret Mohammed J's decision was delivered in the appellant's favour.

(25) But even if the strike out application were late (which I do not find) that did not make the claim any less an abuse of process. At best, it was open to the court to punish the respondent by disentitling him to a percentage of his costs.

(26) Mr. Masaisai sought to rely on the Privy Council decision in **Real Time Systems Ltd. v. Renraw Investments Ltd. (supra)** which is a decision of the Privy Council on the provisions of Part 26.1 of the **Civil Proceedings Rules (1998) (as amended)**. In my judgment that decision has no application to the facts of this case. The same applies to the decision in **Summers v. Fairclough Homes (supra)**.

(27) Mr. Masaisai also submitted the appellant has amended his relief in these proceedings to delete all claims already sought in CV2018-00006 and adding only declaratory relief. He submitted as well that the claim was meritorious.

(28) The grant of constitutional relief under section 14(1) of the Constitution is

discretionary. The appellant has succeeded in his substantive claim for the deprivation of his liberty. I agree that the facts of this case are very troubling. The cavalier approaches of both the Magistrate and the prison authorities to the appellant's rights leaves a lot to be desired. However, the substance of the appellant's claim is the unlawful deprivation of his liberty for three years and four months. On that he has succeeded before the High Court. Margaret Mohammed J has granted quite substantial damages including vindicatory damages in respect of the acts and omissions of the State officials. He is not in these proceedings seeking any compensation for the alleged section 4(d) breach having amended his claim by deleting all such claims sought in CV2018-00006.

(29) The appellant claims in these proceedings that he was a model prisoner and had he been treated like other model prisoners he would been released on 24th October, 2013 (one week earlier) but his later detention to 31st October, 2013 is included in the quantum awarded by Margaret Mohammed J. As such the failure to release him on 24th October, 2013 (which in effect is the substance of his complaint in these proceedings) has been fully addressed. Does a declaration of unequal treatment go so much further to vindicating his rights? I think not. Margaret Mohammed J's judgment and order, if upheld on both liability and quantum, are a more than sufficient vindication of the appellant's rights. See **Daniel v. AG [2011] UKPC 31** per Lord Brown at paragraphs 6 to 10.

(30) Mr. Masaisai points to the fact that the claim has been amended to seek only declaratory relief. In my judgment, this does not help his case. The fact that the amendments were made to the pleadings (no doubt as an afterthought) in these proceedings to accommodate the seeking of a declaration only, simply demonstrates the negligence of the appellant in not

fully pursuing his claim in CV2018-00006. Even adopting the broad merit based judgment approach as per **Johnson v. Gore Wood**, and focusing on the question whether the appellant is abusing the court's process, I am compelled to conclude that he is.

(31) Finally, Mr. Masaisai submitted that the judge erred in finding that the greater prejudice lay with the respondent. He submitted that the respondent participated in case management conferences and complied with directions for twenty-nine months and before making the allegation that the claim was an abuse of process. The appellant incurred costs of the period of twenty-nine months including retaining two sets of attorneys. The judge failed to take this into account. As I have said at paragraph 25 above, at best, the Attorney General could have been punished in costs at the discretion of the judge.

(32) In the result, the appeal is dismissed.

Nolan Bereaux
Justice of Appeal

I have read the judgment of Bereaux J.A. I agree with it and have nothing to add.

Peter Rajkumar
Justice of Appeal