

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2023-00049

NICOLE DYER GRIFFITH

Claimant

AND

MC DONALD JACOB

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

BEFORE THE HONOURABLE MME JUSTICE KAREN REID

Appearances:

Mr. Martin George instructed by Ms. Keshavi Koorban for the Claimant

Mr. Rishi Dass SC instructed by Ms. Allanna Rivas for the first Defendant

Mr. Gilbert Peterson SC with Ms. Vanessa Gopaul instructed by Mr. Vincent Jardine for the second Defendant

DECISION ON THE SECOND DEFENDANT'S APPLICATION TO STRIKE OUT CLAIM

Procedural History

1. By Fixed Date Claim Form supported by the Affidavit of the Claimant on January 06, 2023, the Claimant brought proceedings against the Defendants for breach of her right to respect for her private and family life as guaranteed under Section 4(c) of the Constitution of the Republic of Trinidad and Tobago (“the Constitution”). This is said to arise out of the alleged tapping of the Claimant’s telephone on the direction of the first Defendant purportedly pursuant to the **Interception of Communications Act, Chap. 15:08** and the subsequent investigation of her finances by the Financial Intelligence Unit of Trinidad and Tobago (“FIUTT”) without any lawful justification.

2. On February 17, 2023 the second Defendant filed an application to strike out paragraphs 4 and 9 of the Claimant’s affidavit in support of her claim, including exhibit “N.G.D. 2”, and an order striking out the entirety of the Claimant’s claim. The second Defendant alternatively sought an extension of time to file its affidavits in response if the application to strike is unsuccessful. The grounds of the applications are that:
 - i.* The contents of the paragraphs and exhibit are hearsay, which is prohibited in affidavits to be used in final proceedings.
 - ii.* There is no admissible or any evidence supporting her claim and, as such, the claim ought to be struck out.

3. On February 22, 2023, the first Defendant filed an application for an extension of time to file his affidavits in reply to a date after the hearing and determination of the second Defendant’s application.

4. On April 3, 2023, the Claimant filed an Amended Fixed Date Claim Form to include the grounds upon which her claim was based. These grounds appear to be a reproduction of the matters set out in the Claimant's affidavit filed on January 6, 2023, which is the subject of the second Defendant's application to strike.
5. On April 4, 2023 the matter came up for first hearing. The filing of affidavits in response to the Claimant's claim was stayed for both Defendants pending the hearing and determination of the second Defendant's application and directions were given for the filing of written submissions by the parties in respect of the application.
6. The Claimant filed an affidavit on May 26, 2023 to disclose an order of the court made in **CV2022-04949 Gary Griffith and Nicole Dyer Griffith v The Director of the Financial Intelligence Unit of Trinidad and Tobago and the Attorney General of Trinidad and Tobago** granting an interim injunction restraining the first defendant therein from requesting financial information from several financial institutions or utilizing any information received pursuant to such a request until the determination of the proceedings therein. Those proceedings are judicial review proceedings challenging the decision of the Director of the FIUTT to request financial information from certain financial institutions regarding the claimants therein, one of whom is the Claimant in these present proceedings.
7. The parties filed their respective submissions in respect of the second Defendant's application and the matter was adjourned to today for decision.

LAW AND ANALYSIS

Issue 1: Whether paragraphs 4, 9 and exhibit “N.G.D.2” ought to be struck out.

8. The relevant framework governing the filing of constitutional proceedings under the Civil Proceedings Rules (“the CPR”) is set out in **CPR Part 56** and more particularly **Part 56.7** as follows:

“56.7 (1) An application for an administrative order must be made by a fixed date claim identifying whether the application is-

(a) for judicial review;

(b) under section 14(1) of the Constitution;

(c) for a declaration; or

(d) for some other administrative order (naming it).

(2) The claim form in an application under section 14(1) of the Constitution shall serve as the originating motion mentioned in that section and shall be headed "Originating Motion".

(3) The claimant must file with the claim form an affidavit.

(4) The affidavit must state-

(a) the name, address and description of the claimant and the defendant;

(b) the nature of the relief sought identifying-

(i) any interim relief sought; and

(ii) whether the claimant seeks damages, restitution or recovery of a sum due or alleged to be due, setting out the facts on which such claim is based and, where practicable, specifying the amount of any money claimed;

(c) in the case of a claim under s. 14(1) of the Constitution, the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;

(d) the grounds on which such relief is sought;

(e) the facts on which the claim is based;

(f) the claimant's address for service; and

(g) the names and addresses of all defendants to the claim.

(5) The general rule is that the affidavit must be made by the claimant or where the claimant is not an individual by an appropriate officer of the body making the claim.”

9. These provisions, as it relates to the affidavit to be filed in support of such claims, must be read together with the provisions of **Part 31** of the CPR, which governs affidavit evidence generally, and more particularly **Part 31.3** which provides as follows:

“31.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his own knowledge.

(2) However, an affidavit may contain statements of information and belief-

(a) where any of these Rules so allows; and

(b) where it is for use in any procedural or interlocutory application or in an application for summary judgment, provided that the source of such information and the ground of such belief is stated in the affidavit.

(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.”

10. An affidavit filed by a Claimant in support of a claim for relief under the Constitution in accordance with **CPR Part 56.7** is an affidavit filed for use in final proceedings and must generally only contain matters which the

Claimant is able to prove from his/her own knowledge. It must not, therefore, contain any hearsay unless the same is permissible under the rules of court¹ or the **Evidence Act, Chap. 7:02**. The reason for this is obvious. In these types of proceedings, the court is required to determine the issues on the affidavit evidence only² and cross-examination in these types of proceedings is rare³. The evidence filed, therefore, must be of a kind that can be relied upon for the truth of its contents. Furthermore, the court is entitled to deal with issues of admissibility of evidence at this stage of proceedings since the Claimant is under an obligation to ensure that her affidavit contains only admissible evidence compliant with the aforementioned rules of the CPR⁴.

11. The second Defendant argues that the offending paragraphs and the exhibit do not contain evidence that can be relied upon for the truth of its contents as the same consist of inadmissible hearsay. The paragraphs are reproduced below:

*“4. On 18th October 2022, the former Commissioner of Police Mr. Gary Griffith, held a Press Conference regarding certain alleged breaches of the **Interception of Communications Act Chapter 15:08**. In said press conference, Mr. Griffith, who is also my husband, indicated that he had clear proof that certain telephone*

¹ **CPR Part 30** governs the admissibility of hearsay evidence generally

² **HCA NO. 1066/99 In the matter of an Application by the Chairman, Alderman, Councillors and Electors of the Region of Tunapuna/Piarco** at page 33

³ **Pamela Hunt v Jennifer Daniel and Others CV 2014 -02496** at paragraphs 21-24 in which an examination of the relevant authorities determined that cross-examination ought only to be ordered in cases in which “*there are glaring omissions which amount to a failure to observe the duty of frank disclosure of a party*” or “*where you have a complete conflict over a question of fact, and it is accepted that the case would turn on whose version is to be accepted... (and) justice can only be done by allowing cross-examination.*”

⁴ **CV20190-03989 Law Association of Trinidad and Tobago -v- Dr. Keith Rowley and Ors (30 October 2019)** at paragraphs 12-16.

numbers were listed in a directive by Acting Commissioner of Police Mr. McDonald Jacob, the First Defendant, to be tapped and for the communications thereupon to be intercepted, ostensibly under the provisions of the Interception of Communications Act Chapter 15:08. Mr. Griffith further indicated that my telephone number as aforesaid, was one of the numbers which was tapped. A copy of the newspaper report from this Press Conference is hereto annexed and marked "N.G.D.2".

...

9. Furthermore, I believe that the Defendants have further continued in their flagrant breach of my Constitutional rights by violating my rights to respect for my private and family life, in that I verily believe that the Defendants have now sought to investigate my finances, with no justification being made for same. I have received a document from a litigant in a concurrent matter, which shows that the FIUTT has requested the production of financial information as it relates to myself as an individual, as well as my business, "NDG Communications and Consulting/O2N Oxygen with Nicole Foundation." The directive requested information as to my account details, balances, monthly deposits and withdrawals, and all wire transactions conducted."

12. "N.G.D.2" is a copy of what purports to be a newspaper article dated October 18, 2022 regarding the press conference held by Garry Griffith. In relation to the "document from a litigant in a concurrent matter" referred to in paragraph 9 of the affidavit, no document purporting to evidence this bare allegation is attached.

13. The second Defendant argues that the said paragraphs and newspaper article are inadmissible hearsay and ought to be struck out and cites the following authorities in support:

i. **Section 36(1)** of the **Evidence Act**:

“36(1) In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings is admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part or by virtue of any other statutory provision or by agreement of the parties, but not otherwise.”

ii. **Anand Rampersad v Willi’s Ice Cream Limited Civil Appeal No 20 of 2022** at page 3:

“It is fundamental common law rule of evidence that hearsay evidence is generally inadmissible. Subject to certain statutory exceptions, the rule against hearsay applies to documents as well as oral statements. Apart from express statutory provision it is not competent for a party to prove a fact by producing a document in which that fact is recorded without calling the maker of the document to say that what he wrote in the document represented a true statement of fact.”

iii. **Bankers Insurance Company of Trinidad and Tobago Limited v Petroleum Company of Trinidad and Tobago Limited, Procedural Appeal No. 180 of 2018** at paragraphs 2 and 3:

“2. Generally oral or written statements made by persons who are not parties and who are not called as witnesses are inadmissible to prove the truth of the facts or matters stated therein. By its hearsay notice Bankers Insurance seeks to adduce into evidence documents and out of court statements pursuant to sections 39 and 37 of the Evidence Act Chap 7-02. (The Act). The Act permits a party to adduce hearsay evidence where made admissible by the Act, any other statutory provision or by agreement between the parties but not otherwise: section 36(1). Both sections 37 and 39 of the Act provide for the admission of oral or written statements as evidence of any fact stated therein of which direct oral evidence would have been admissible. By Section 37(3) of the Act however second hand hearsay is not admissible.

3. ... The Act provides a complete code for the admission of hearsay evidence within its terms.”

iv. **Section 37(3)** of the **Evidence Act**:

“37(3) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it.....”.

14. There is no doubt that offending paragraphs are inadmissible hearsay. It is clear that by paragraph 4 of her affidavit and the exhibit “N.G.D.2”, the

Claimant is attempting to prove that her telephone was tapped on the direction of the first Defendant and upon that basis her rights under section 4 (c) of the Constitution were breached. However, a report in a newspaper purporting to contain words spoken by a person who is neither a party to proceedings nor a witness in the proceedings is wholly inadmissible to prove the truth of the words alleged to have been spoken. Further, paragraph 4 contains information the Claimant either saw in the newspaper report or was told to her and in either case is predicated upon an allegation that Gary Griffith is alleged to have made at a press conference that her telephone number was one of several numbers "*listed in a directive*" to be tapped. The Claimant is, therefore, relying on a report made by a third party of what another third party has allegedly seen in a document or was told by yet another third party to prove as a fact that her telephone was tapped. This is wholly inadmissible.

15. Paragraph 9 is also inadmissible hearsay. The allegations contained in the paragraph purportedly come from an undisclosed document given to the Claimant by an unidentified third party in other court proceedings and are stated in the paragraph for the purpose of establishing the truth of those allegations.

16. For her part, the Claimant argues that the press conference arose her suspicion and it is for the Defendants to prove whether her telephone was or was not tapped and if so, whether this tapping was justified and whether the Defendants unlawfully initiated an investigation into the Claimant's finances or not. The Claimant also argues she is entitled to bring her claim on the basis of these bare allegations since no response to her pre-action letter was forthcoming and the motion is not at the stage of evidential objections as evidence has not yet been closed. In my view,

however, these arguments display a fundamental misunderstanding of the nature of constitutional proceedings. These proceedings are not like ordinary claims in which pleadings are filed first setting out facts that are alleged and evidence is filed thereafter to prove those facts with orders being made during the course of the matter for disclosure *et cetera*. Constitutional proceedings are meant to be dealt with quickly and usually on the basis of cogent affidavit evidence filed in support of and in defence to the claim, which contain no major disputes of fact. In initiating such a claim, the Claimant must file with her claim the evidence she relies on to support it. It is absolutely not for the Claimant to suggest that she can simply file her constitutional claim on the basis of bare allegations of unverifiable hearsay and state that it is for the Defendant to supply the evidence necessary to prove or disprove her case.

17. The Claimant also prays in aid the general duty of candor by which public authorities are expected to abide in these types of proceedings in support of her contention that the burden should be on the Defendants to prove or disprove her case by supplying the evidence required to determine whether her telephone is being tapped and whether her finances are being investigated. However, in my view, this general duty of candour does not assist the Claimant and her resort to it is very much an attempt to put the cart before the horse. The Claimant cannot invoke the court's constitutional jurisdiction to say "*I heard the State might be doing something to breach my rights so let me file a claim and have them come to court to supply evidence proving that they are not*". In any event, in these types of proceedings the duty of candour goes both ways and the Claimant has made no effort to explain why her husband has not filed or could not file an affidavit in support of her claim annexing the "proof" to which the newspaper report purports to refer and on which the Claimant

wishes to rely; nor has she sought to explain why the document in relation to the alleged investigation into her financial affairs could not be disclosed or annexed to her affidavit.

18. In the circumstances, I find that paragraphs 4, 9 and exhibit “N.G.D.2” ought properly to be struck out.

Issue 2: Whether the entirety of the Claimant’s claim ought to be struck out.

19. **Part 26.1 (1) (k)** provides that the court may: “dismiss or give judgment on a claim after a decision on a preliminary issue”. The second Defendant argues that having struck out paragraphs 4, 9 and exhibit “N.G.D.2”, there is no factual basis or evidence upon which the Claimant can ground her claim and so the same ought properly to be dismissed. I agree.

20. Even if the said paragraphs and newspaper article had not been struck out, I would find there to be insufficient evidence upon which a finding could be made as to a breach of the Claimant’s constitutional rights. The contents of the paragraphs and the exhibit are unverifiable hearsay and cannot be relied upon for the truth of their contents. At best, all the information contained in the said paragraphs can prove is that the Claimant read or heard something. The information is incapable of proving the truth of the matters alleged therein. I would have struck out the claim in any event under **CPR Part 26.2 (1) (c)**⁵.

⁵ **Part 26.2 (1) (c) of the CPR** provides:

(1) *The court may strike out a statement of case or part of a statement of case if it appears to the court –*

(a) ...

(b) ...

(c) *That the statement of case of the part to be struck out discloses no grounds for bringing or defending a claim;”*

21. Additionally, the Claimant's attempt to amend her Fixed Date Claim Form to reproduce the allegations in her affidavit as grounds of her claim are incapable of supplanting the very clear requirements of **CPR Part 56.7** which prescribe that both the grounds of the claim and the evidence in support must be contained in the affidavit filed in support of the claim. This amendment, therefore, cannot be relied on to save the claim.

22. Finally, it also appears to me that the Claimant has already instituted proceedings regarding the alleged investigation by the FIUTT into her financial affairs. Her attempt to include any allegation or ground regarding that matter in these proceedings would be an abuse of process⁶ and I would strike out that part of her claim on that basis also under **CPR Part 26.2 (1) (b)**⁷.

DISPOSITION:

23. In light of the forgoing this Court orders as follows:

(1) Paragraphs 4, 9 and exhibit "N.G.D.2" of the affidavit of the Claimant filed on January 06, 2023 are struck out.

(2) The Claimant's claim is dismissed.

⁶ As per **Harrisssoon v Attorney General [1980] AC 265** at page 286, **Jaroo v Attorney General [2001] UPKC 5**, **Ramanoop v Attorney General [2005] UKPC 15** at para. 25.

⁷ **Part 26.2 (1) (b) of the CPR** provides:

(1) *The court may strike out a statement of case or part of a statement of case if it appears to the court –*

(a) ...

(b) *that the statement of case or the part to be struck out is an abuse of the process of the court;*

(3) The Court will hear the parties on the issue of costs.

Dated this 31 day of July, 2023

Karen Reid

Judge