REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2019-04044**

BETWEEN

DAVID JUNIOR FERNANDO SANCHEZ

Claimant

AND

THE ATTORNEY GENERAL

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 20 November, 2019
Appearances:
Mr. Matthew G.W. Gayle instructed by Mr. Jason Jones, Attorneys at Law for the Claimant.
Ms. Trisha Ramlogan instructed by Ms. Janine Joseph, Attorneys at Law for the Defendant.

REASONS

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1. In this judgment I address the matter of compliance with pre-action protocols. I wish to make it clear that even in matters of administrative law, litigants that fail to observe the basic requirements of pre-action conduct set out in our pre-action protocols do so at their peril. The three pillars that underpin pre-action conduct of the early exchange of information, the commencement of settlement discussions and discussions on the efficient management of the impending litigation should be engaged before commencing litigation. To do otherwise can often make the case management of litigation by the Court cumbersome, costly and inefficient.

2. Before the Court is the Defendant's application[1] to strike out the Claimant's claim seeking

[1] Defendant's Notice of Application filed 15th November, 2019

constitutional redress under section 14(1) of the Constitution of the Republic of Trinidad and Tobago Chap 1:01[2]. The basis of the Claimant's claim is that in contravention of his rights and freedoms enshrined in section 4(a), 4(b) and 5(2) of the Constitution, while he was imprisoned in the Cumoto Police Station on 18th July 2019 he was denied access to his attorney at law, he was denied a telephone call to his attorney at law and family members and he was detained without charge and station bail between Thursday 18th July 2019 and Friday 19th July 2019.

3. The main ground of the Defendant's application to strike out is that the conduct which the Claimant complains of is susceptible to adequate redress by an application to the Court under its ordinary non-constitutional jurisdiction. The Defendant contends that the Claimant's decision to forego the parallel remedy available to him under the common law of tort constitutes an abuse of process. It relied on the well-known authorities of **Harrikissoon v The Attorney General of Trinidad and Tobago** [1979] 31 WIR, **Thakur Persad Jaroo v The Attorney General** [2002] UKPC 5, **Antonio Webster v The Attorney General of Trinidad and Tobago** [2011] UKPC 22 and **The Attorney General of Trinidad and Tobago of Trinidad and Tobago v Siewchand Ramanoop** [2005] 2 WLR 1324.

4. Lord Diplock in **Harikissoon v The Attorney General of Trinidad and Tobago** at page 349 stated that:

> "The right to apply to the High Court under section 6 of the Constitution for redress when any human right is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being

[2] Claimant's Fixed Date Claim filed 8th October, 2019.

made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

5. Subsequently in **Thakur Jaroo v The Attorney General of Trinidad and Tobago** at paragraph 14 of its decision the Privy Council noted:

> "[14] The Court of Appeal also rejected the appellant's argument under s 4(a). But Hosein JA, in a judgment with which de la Bastide CJ and Ibrahim JA agreed, raised the question for the first time whether the constitutional route which the appellant had chosen for his application was appropriate. The question which he posed was whether proceedings under the Constitution ought really to be invoked in matters where there is an obvious available recourse under the common law. He referred to Lord Diplock's observation in Harrikissoon v A-G (1979) 31 WIR 348 at 349 that the mere allegation of constitutional breach was insufficient to entitle the applicant to invoke the jurisdiction of the court under what is now s 14(1) of the Constitution if it was apparent that the allegation was frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy. He said that in his opinion the appellant's motion was inescapably doomed to failure on the merits. But he also said that it connoted a resort to proceedings under the Constitution which lacked bona fides and was so clearly inappropriate as to constitute an abuse of process."

6. Further at Paragraph 39 of the **Jaroo** decision the Court 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…."

7. In **Ramanoop** it was noted that in instances where a parallel remedy exists only in exceptional circumstances, one could still seek constitutional relief. Lord Nicholls had this to say:

> "25 In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.
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> 26 That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206."[3]

8. Importantly in **Ramanoop**, the Law Lords pointed out that the Court can, after appreciating the nature of the Defendant's case which may raise a dispute of fact, convert the proceedings to a private action rather than dismiss the case outright as an abuse.[4]

9. The Claimant, in relying on **Thornhill v The Attorney General of Trinidad and Tobago** [1981] AC 61 contends that its claim pertains to fundamental constitutional matters with significant public law implications for which there is no parallel or adequate remedy available to it under the Court's non-constitutional jurisdictions. The Claimant further pointed out that in this case,

[3] T**he Attorney General v Ramanoop** [2006] 1 AC 328, pages 337-338
[4] T**he Attorney General v Ramanoop** [2006] 1 AC 328 pages 338 paragraph 30

the Defendant has not filed an affidavit in response to indicate whether there is a dispute of fact in the claim.

10. At the hearing on 20th November 2019, when probed on the pre-action activity the Claimant admitted that it did not issue a pre-action letter. The Claimant therefore failed to outright comply with the pre-action protocols for administrative orders set out in Appendix D of the Practice Directions:

11. The Court asked the parties the address it on the issue whether the Claimant's claim should be struck out for his failure to comply with the pre-action protocols. In the circumstances of this case, the Court was of the view that the claim should be struck out for failure to comply with the pre-action protocols for the following reasons.

Non-Compliance With Pre-Action Protocols- A Festering Wound?

12. There has been before the Court too many instances of claims being filed without compliance by the parties of proper pre-action activity as set out in the pre-action protocols. This translates into the convening of first hearings or CMCs where parties are now being introduced to the main issues for determination. While this may well be through a lack of preparation for a first CMC, not engaging in proper pre-action activity simply exacerbates the problem.

13. A Court can, given the appropriate circumstances, utilise it powers to strike out under Part 26 of the Civil Proceeding Rules 1998 for a party's failure to comply with the pre-action protocols. The objectives of the pre-action protocols are three fold: 1) To encourage parties to exchange information on the prospective claim 2) The identification and narrowing of issues for determination in litigation and discussions towards an amicable resolution of the dispute 3) To support the efficient management of proceedings. See Paragraph 1.4 of the Practice Directions.

14. Pre-action protocols were viewed as an important feature of the reforms of our civil rules.

Lord Woolf commented[5]:

"1. These (pre-action protocols) are intended to build on and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute. The purposes of such protocols are:

a) To focus the attention of litigants on the desirability of resolving disputes without litigation;

b) To enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or

c) To make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and

d) If a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.

6. Pre-action protocols will be an important part of the new system. They are not intended to provide a comprehensive code for all pre-litigation behaviour, but will deal with specific problems in specific areas. They will set out codes of sensible practice which parties are expected to follow when they are faced with the prospect of litigation in an area to which a protocol applies. Protocols will make it easier for parties to obtain the information they need, by the use of standard forms and questionnaires wherever possible. This will be assisted by wider powers for the courts to order pre-action disclosure. (See chapter 12 of this report). Protocols will also be an important means of promoting economy in the use of expert evidence, in particular by encouraging the parties to use a single expert wherever possible. Unless this happens before the commencement of proceedings, it will frequently be too late because the parties will already have established an entrenched relationship with their own expert. In addition, protocols will encourage the use of any appropriate alternative mechanisms for the resolution of disputes. If litigation proves necessary, observance of protocols should put the parties in a good position to meet the

[5] Access to Justice (Final Report) By The Right Honourable the Lord Woolf, Master of Rolls, July 1996, paragraphs 1 and 6.

timetable imposed by the court. This will be particularly important on the fast track, with its tight standard timetable."

15. Dick Greenslade observed the need to ensure that the steps taken by attorneys prior to the issue of proceedings "accord with rather than contradict the system of case management."[6] More importantly, in his preface to the CPR, Sharma CJ noted:

> "The CPR are founded on a system of caseflow management with active judicial case management: [Parts 25 and 26]. This new procedural code is buttressed by a plethora of rules which create several in-built mechanisms to foster settlement at the earliest and every stage of the proceedings: [Part 25.1*(c)*, *(d)*, *(e)*]. Pre-action protocols have been introduced by means of a Practice Direction and are an important feature of this reformed process. They lay the foundation for compromise by establishing a format for pre-action negotiations. As Lord Woolf stated in his Final Report, "Access to Justice" (1996) that the main purpose of pre-action protocols is to ensure that prospective litigants focus their attention on the desirability of resolving disputes without litigation but if pre-action settlement is not achievable, then to lay the foundation for expeditious conduct of proceedings. This highlights the imperative that under the CPR litigation must be the last resort."

16. The Court will expect all parties to have complied in substance with the terms of the protocols:

> "2.1 The court may treat the standards set out in protocols as the normal reasonable approach to pre-action conduct. The court will expect all parties to have complied in

[6] See Judicial Sector Reform Project Review of Civil Procedure, Dick Greenslade, Chapter 6, Pre-Action Protocols:

> "Much work will be done by attorneys prior to the issue of proceedings and there is a need to take whatever steps are possible to ensure that such steps accord with rather than contradict the system of case management that is proposed.
>
> ……
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> The aim would be:
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> - To ensure early and sufficient notification of potential claims.
> - To encourage joint instruction of experts
> - To encourage defendants to make clear admissions of liability where appropriate, or
> - If liability disputed to give reasons for the dispute
> - To progress with disclosure of basic documents.

substance with the terms of an approved protocol. If proceedings are issued the court may take into account the failure of any party to comply with a pre-action protocol when deciding whether or not to make an order under Part 26 (Powers of the Court) or Part 66 (Costs—General).

2.3 The court will expect all parties to have complied as far as reasonably possible with the terms of an approved protocol. If proceedings are issued and parties have not complied with this practice direction or specific protocol, it will be for the court to decide whether sanctions should be applied. The court is not likely to be concerned with minor infringements of the practice direction or protocol. The court is likely to look at the effect of non-compliance on the other party when deciding to impose sanctions.

17. The sanctions for non-compliance include the following:

- The Court may take into account the failure of any party to comply with a pre-action protocol when deciding whether or not to make an order under Part 26 (Powers of the Court which includes striking out a claim) or Part 66 (Costs-General).
- The Court may make an order that the party at fault pay the costs of the proceedings or part of those costs, of the other party or parties.
- The Court may order that the party at fault pay those costs on an indemnity basis. (See Practice Direction 2.4)

18. The Court will however "exercise its powers under paragraph 2.4 with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with." (See Practice Direction 2.5).

19. Pursuant to Practice Direction 3.1 a Claimant may be found to have failed to comply with a protocol in failing to provide sufficient information or to follow the procedure required by the protocol to be followed.

20. In Administrative Law matters the Claimant should send a letter to the Defendant before making a claim which identifies the issues in dispute and establishes whether litigation can be avoided. The letter should state the Claimant's interest in the decision being challenged

and how he/she is affected by it. It should contain the date and details of the decision being challenged and a clear summary of the facts on which the claim is based. They should also specify the relief claimed. A copy of the letter should be sent to the Solicitor General. The Defendant should respond within 30 days to the letters and failure to do so will be taken into account by the Court in exercising its discretion pursuant to Part 26 or Part 66 of the CPR.

21. In this case, had a pre-action protocol letter been issued by the Claimant, the Defendant would have been expected to answer it. In that case at least two things would have arisen 1) the question of a preliminary point would have been identified and 2) a substantive answer to the question of whether the allegations of the failure to advise the Claimant of his right to an attorney at law and the refusal of the officers to let him see his attorney at law were substantiated as a matter of fact. It would have been clearly established before the proceedings commenced whether either a preliminary issue needed to be addressed or that there being a dispute of fact, what procedural vehicle is appropriate for those matters to be resolved.

22. In the circumstances such as in this case, where their pre-action exchange of correspondence does not take place pursuant to the pre-action protocols, litigants really are "shooting in the wind" when proceedings are commenced. The Defendant has now filed a procedural application to strike out which raises an issue which could so easily have been the type of activity engaged in before the proceedings were commenced: That is sharing information on the dispute of fact and the Claimant's conscious decision as to whether public law proceedings are appropriate and if so, whether by Fixed Date Claim for Claim Form. Instead, for the first time, the Defendant is being given notice of the claim after it is filed when there are no exceptional reasons to do so such as urgency. The Defendant for the first time will answer it by filing evidence or raising a preliminary point. The parties may or may not engage in settlement discussions. The upshot of it all is to make the first hearing of the claim counterproductive as it now engages the type of activity contemplated under the pre-action protocols.

23. As stated above, if proceedings are issued without complying with the pre-action protocol, the Court may consider the failure to comply with the protocol in making an order under Part

66 of the CPR. However, even if the Court exercises its power under the Part 66 CPR to penalise a party in costs for failure to comply with the pre-action protocol rather than striking out a claim, in a case such as this which does not "cry out" for any substantial compensation, the costs that may be awarded against the Claimant, even if he wins, might render the judgment nugatory.

24. I take into account that the Court is not to be troubled with minor infringements of the Practice Directions but is likely to look at the effect of non-compliance on the other party when deciding if to impose sanctions. I also take the point of minor infractions to mean that if a party had decided to comply with the protocols, minor deficiencies in the process would be overlooked depending on the circumstances but it is not to be used as an excuse to not comply at all with the pre-action protocols.

25. The effect of non-compliance is that the Defendant faced without notice of the pending proceedings is now compelled to file its application to strike out a claim that could have been dealt with in a letter in response outlining the grounds upon which the claim or proposed claim has no merit in previous correspondences.

Conclusion

26. In these circumstances, as a matter of saving costs and to give effect to the overriding objective and the pre-action protocols, the claim is struck out but without prejudice to the Claimant re-filing his claim after compliance with the pre-action protocols. The claim is not to be construed as res judicata in the event it is re-filed. The parties are to engage in meaningful pre-action activity before the claim is re-filed.

27. On the question of costs, having regard to the reasons upon which the claim is struck out, the costs which the Defendant has contended that they are entitled to, which are the costs for preparing the application to strike out, should not be recovered. The only issue is whether the costs of attending these proceedings or a part thereof ought to be payable by the Claimant to the Defendant.

28. In my view, having regard to the practice direction which sets out the sanction for failing to comply with the pre-action protocols which is either an order under Part 26 or Part 66 CPR,

the Claimant having already incurred costs to bring the proceedings and now having to follow the pre-action protocols, in the interest of justice in this case, each party shall bear its own costs. Accordingly, there shall be no order as to costs.

Vasheist Kokaram
Judge