

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

SAINT LUCIA

Claim Number SLUHCV2022/0128

BETWEEN:

JAMES ST. PRIX

Claimant

-and-

[1] THE ATTORNEY GENERAL OF SAINT LUCIA

[2] NANCY FRANCIS

Defendants

Appearances:

Maureen John – Xavier for the Claimant;

Rochelle John – Charles and Kozel Creese for the First Defendant; and

Alberton Richelieu for the Second Defendant.

2022: June 13;
July 05 – Decision

DECISION

First Defendant's application to strike out filed on May 12, 2022

[1] **PARIAGSINGH, M:** - Before the Court is the First Defendant's application to strike out this claim.¹ The sole ground of the application is that the Claimant failed to comply with Article 28 of the Civil Code.² Article 28 imposes an obligation on an intended Claimant to serve notice on a public officer of the intended claim for damages at least one month before the claim is commenced.

¹ Filed on May 12, 2022.

² Article 28 states: No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him or her in the exercise of his or her functions, nor can any judgment be rendered against him or her, **unless notice of such suit has been given him or her at least one month before the issuing of the writ of summons.**

Such notice must be in writing, it must specify the grounds of the action, must be served upon him or her personally, or at his or her domicile, and must state the name and residence of the plaintiff.

- [2] In support of the application is the affidavit of Mr. Seryozha Cenac, Senior Crown Counsel. In his evidence Mr. Cenac contends that the Claimant's action is in damages and the officer alleged to have committed the act of delict was identified in the statement of claim as No. 152 Sgt. Ferdinand. The Applicant contends that Sgt. Ferdinand who was acting in the discharge of a public officer was not served with any notice of intended action pursuant to Article 28. As such, the Applicant contends that the claim is fatally flawed.
- [3] In a supplemental affidavit³ Mr. Cenac deposed that since the filing of this earlier affidavit he had seen a notice of intended action served within the requisite time stipulated in Article 28. The Applicant nevertheless contends that the notice of intended claim is defective as the public officer, Sgt Ferdinand was not served with the notice personally.
- [4] In response to the application the Claimant has filed an affidavit in which he referred to the notice of intended action being served and accepted by the Attorney General's office. The Claimant also raises the issue that the tenor of the application is really a challenge to the Court's jurisdiction which ought to have been made in accordance with the procedure in Part 9 Rule 9.7 of the Civil Proceedings Rules 2000 as amended. The Claimant contends that having filed a defence the Applicant has accepted the Court's jurisdiction.

THE RELEVANT PLEADINGS:

- [5] The Claimant's case is that the act of delict complained of was committed by Sgt. Ferdinand. The Claimant contends that at the material time Sgt. Ferdinand was acting under the direction and control of the Crown and in the purported performance of her duties as a Police Officer.⁴

³ Filed on May 18, 2022

⁴ Paragraph 3 of the Statement of Claim.

[6] The First Defendant admits that Sgt. Ferdinand was at all material times acting in the execution of her duties as a police officer.⁵

[7] Sgt. Ferdinand is not a party to this claim. No relief is sought against her. Consequently, no judgment can be rendered against her in this claim.

ISSUES:

[8] The central issue for determination is whether service of a notice of intended action on Sgt. Ferdinand is necessary as she is not a party to the claim and if so, is service of the notice on the Attorney General instead of the Public Officer is sufficient for the purpose of Article 28. The other issue which arises is whether the Applicant has submitted to the jurisdiction of the Court.

ANALYSIS:

[9] Both parties in their written submissions have referred to the judgment of the learned Chief Justice in **James Enterprises Limited –v- Attorney General; and Fast Kaz Auto Supplied –v- Attorney General**⁶. The facts of that case are the polar opposite to the facts in this case. In **Fast Kaz**, the notice of intended action was served on the public officer but not on the Attorney General. Pereira CJ stated that:

“Indeed I would consider it prudent for the Claimant to also serve the Article 28 Notice on the Attorney General based on my later reasoning in respect of the requirement to make the Attorney General the defendant in such proceedings. Rather, the point I am making is that the claim does not fail where the claimant has served the public officer with the Article 28 Notice but has failed to similarly serve the Attorney General. It may be arguable that where the claimant serves only the Attorney General with an Article 28 Notice that the claim does not fail but I need not decide this point on this appeal and I refrain from so doing.”

⁵ Paragraph 4 of the First Defendant's defence.

⁶ Consolidated appeals Nos. SLUHCVC2013/23 and 24 and SLUHCVP2014/0021

[10] The Claimant places heavy reliance on the decision of Smith J (as he then was) in **Danny Allison George –v- The Attorney General of Saint Lucia**.⁷ In **George**, the Court treating with an identical issue to the case at bar held that service on the Attorney General of the notice where the public officer was not served was not fatal. The judge relied on the case of **Bihari Chowdhary & Anr. –v- State of Bihar & Ors**⁸, Supreme Court of India in coming to his conclusion. **Chowdhary** dealt with Article 80 of the Civil Code of Bihar which states:

80. No suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of-

- (a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;
- (b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;
- (c) in the case of a suit against the Government of the State of Jammu and Kashmir, the Secretary to that Government or any other officer authorised by that Government in this behalf;
- (d) in the case of a suit against any other Government, a Secretary to that Government or the Collector of the district;

* * * * and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and relief which he claims; and plaint shall contain a statement that such notice has been so delivered or left."

[11] Section 80 of the Bihar Code is different to Article 28 of the Civil Code of Saint Lucia. It creates a prohibition on suing the **Government or the public officer**. Article 28 of the Civil Code of this jurisdiction prohibits the bringing of an action against the **public officer only**. It does not impose an obligation to serve notice on the Government or authority responsible for the public officer, which in this case would be the Attorney General pursuant to the Crown Proceedings Act. This point was already decided in **FastKaz**.

⁷ SLUHCVP2014/007

⁸ 1984 AIR 1043

[12] Article 28 of the Code speaks to 'no judgment being rendered against him or her' (the public officer). It does not refer to judgment against the Attorney General. In my view the Article seeks to protect the public officer from personal liability. It does not prevent judgment being rendered against the Attorney General in the event that no notice was served. The Attorney General is vicariously liable, for the acts and/or omissions of public officers who are carrying out a public function unless that liability is circumscribed. This liability not only grounds itself in vicariously liability or the common law position of master/servant, it is also codified in the Crown Proceedings Act.

[13] In my view **Chowdhary** dealt with a slightly different issue. It dealt with the commencement of a claim before the expiry of the two months' notice before action required in their Civil Code. Notably, the Court of Appeal recognized that it was bound to strictly apply Section 80 regardless of its effect. It stated:

"When the language used in the Statute is clear and unambiguous, it is the plain duty of the Court to give effect to it and considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the legislature."

The Judicial Committee of the Privy Council had occasion to consider the scope and effect of Section 80 C.P.C. in an almost similar situation in *Bhagchand Dagadusa and ors. v. Secretary of State for India in Council & Ors.*(1) In that case, though a notice had been issued by the plaintiffs under Section 80 C.P.C. on 26th June 1922, the suit was instituted before the expiry of the period of two months from the said date. It was contended before the Privy Council, relying on some early decisions of before the Privy Council, relying on some early decisions of High Court of Bombay, that because one of the reliefs claimed in the suit was the grant of a perpetual injunction and the claim for the said relief would have become infructuous if the plaintiffs were to wait for the statutory period of two months prescribed in Section 80 C.P.C. before they filed the suit, the rigour of the Section should be relaxed by implication of a suitable exception or a qualification in respect of a suit for emergent relief, such as one for injunction. That contention did not find favour with the Privy Council and it was held that Section 80 is express, explicit and mandatory and it admits no implications or exceptions. The Judicial Committee observed:

"To argue as appellants did, that the plaintiffs had a right urgently calling for a remedy, while s. 80 is mere procedure, is fallacious, for s. 80 imposes a statutory and unqualified obligation upon the Court."

This decision was subsequently followed by the Judicial Committee in *Vellayan v. Madras Province*.(7) The dictum laid down by the Judicial Committee in *Bhagchand*

Dagadusa v. Secretary of State for India.⁽³⁾ was cited with approval and followed by a Bench of five Judges of this Court in Sawai Singhai Nirmal Chand v. Union of India.⁽¹⁾ It must now be regarded as settled law that a suit against the Government or a public officer, to which the requirement of a prior notice under Section 80 C.P.C. is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the Section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable.

[14] Section 13 (2) of the Crown Proceedings Act makes it clear that proceedings against the Crown shall be instituted against the Attorney General. Section 4 of the Act⁹ provides that where any delict is committed by an officer of the Crown while performing or purporting to perform those functions, the liability of the Crown in respect of the delict shall be such as they would have been if those functions has been imposed solely by virtue of instructions lawfully given by the Crown.

[15] The Crown will only be liable for the actions of its servants and/or agents if the officers were acting in the execution of a public duty imposed by a lawfully given instruction. If the officer was not performing or purporting to perform those functions, then no doubt that person would be personally liable.

[16] The literal words of Article 28 in my view contemplates a situation where the public officer is a named party. It does not contemplate situations where the public officer is not a party to the claim, as in this case, where the public officer is not a party. This however has to be considered with Section 13 (2) of the CPA.

[17] The effect of the two pieces of legislation is that proceedings for the alleged delict of a public officer must be commenced in the name of the Attorney General. A notice

⁹ Section 4(3) of the Crown Proceedings Act states "Where any functions are conferred or imposed upon an officer of the Crown as such by any enactment having the force of law in Saint Lucia and that officer commits a delict or quasi-delict while performing or purporting to perform those functions, the liabilities of the Crown in respect of such delict or quasi-delict shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown."

pursuant to Article 28 must be served on the public officer personally if the public officer is named as a party to the claim. This in my respectful view creates no ambiguity.

[18] If no notice of intended action is served on the public officer and the Crown denies that that the public officer was at the time of the alleged delict a servant and/or agent of the Crown, the Claimant runs the risk of being non-suited as against the public officer once the claim is commenced. It therefore makes good practice that the public officer is always served with the Article 28 notice unless it is definitely determined before the claim is commenced that the public officer was acting as a servant and/or agent of the Crown at the material time.

[19] The scheme set up by the Code provides for the public officer to have notice of the intended claim and bring it to the attention of his superiors or employers. This provides an opportunity for the proposed claim to be investigated or considered much like what happens during the process of pre-action protocols.

[20] The function of the Court is to give effect to the laws passed by Parliament. This goes to the heart of the separation of powers. In my respectful view, if the literal interpretation is clear and unambiguous, there is no need to examine the intention of Parliament. As stated by Carrington JA in **Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited**:¹⁰

The court's first recourse in determining the meaning of a statutory provision should be to the grammatical meaning of the words used and their context. If the grammatical meaning of the words used is clear and the context does not lead to the conclusion that the words used may have more than one meaning or a different meaning from the natural grammatical meaning, then effect should be given to the clear grammatical meaning as disclosing the intention of Parliament in using them'.

[21] The ordinary grammatical meaning of the words in Article 28 imposes a mandatory obligation on an intended Claimant to serve a notice of intended action on the public officer. The Code is clear if this is not done, no judgment may be rendered against the

¹⁰ BVIHCVAP2016/0013

public officer. The obligation to serve this notice on the public officer in my view cannot be circumvented by service of a notice on the Attorney General in a situation where the public officer is a party. Where the public officer is a party, he/she must be personally served with the notice. As stated by the learned Chief Justice in **Fast Kaz**, it may be prudent to serve the Attorney General but the obligation remains on the Claimant to serve the public officer, not the Attorney General.

[22] In **Fire Services Association –v- Public Service Association et al, Civil Appeal No: SLUHCVP2010/0013**, Baptiste JA in treating with the applicability of Article 28 to judicial review proceedings stated:

Article 28 is fairly limited in scope. It simply seeks to protect persons falling within its purview from being sued for damages by reason of any act done by them in the exercise of their functions and prohibits the rendering of judgment against them unless written notice of the suit for damages is served upon them in the time prescribed and in the terms stipulated.¹¹

[23] Further, Article 28 provides a defence to the public officer, not the Crown. Before the public officer can avail himself or herself of the Article 28 defence, they must show that they were fulfilling a public duty or function. Baptiste JA of **Fire Services Association**¹² stated that:

17. A public officer or person fulfilling a public duty or function who is sued for damages would not be entitled to an article 28 notice if he was not in the legal exercise of his functions at the time of committing the act complained of. Thus in *Lachance v Casault* (mentioned in *Roncarelli v Duplessis* at page 186) a bailiff attempted to take possession of books and papers in the hands of a judicial guardian without preparing a procès-verbal of the seized articles, as required by the order of the court requiring the guardian to give up possession to the seizing creditor. The guardian resisted the bailiff's action as being unauthorised. The bailiff caused the guardian to be arrested. The charge having been subsequently dismissed, the bailiff was sued in damages for false arrest and malicious prosecution. It was held that, even assuming such bailiff was a public officer within the meaning of article 88 he was not

¹¹ At Paragraph 9 of the decision

¹² at paragraphs 17 and 18 of the decision

entitled to notice under article 88 since at the time the act complained of was committed, he was not 'in the legal exercise of his functions.

18. **Roncarelli** makes it clear that a public officer acting outside of his statutory functions cannot rely on the absence of notice. When dealing with article 28 of The Code it is necessary to establish whether the act was done by the officer in the legal exercise of his functions. It may be that on the statement of case there is no dispute that he so acted. It is only where a public officer acting in the legal exercise of his functions is sued for damages that he can be protected by article 28, keeping in mind that article 28 does not apply to judicial review proceedings.

[24] For these reasons, I hold that there was an obligation on the Claimant to serve a notice of intended action on Sgt. Ferdinand pursuant to Article 28 if she was named as a party to this claim. Sgt. Ferdinand being the tortfeasor and the public officer in respect of whose conduct this claim is brought not being served with such a notice is not fatal in my view in circumstances where she is not named as a Defendant on a literal interpretation of Article 28.

[25] Whilst it was submitted by Counsel for the Claimant that service on the Attorney General of the Article 28 notice was sufficient in reliance of **Fast Kaz**, I respectfully disagree. Firstly, the learned Chief Justice made it clear that she was not deciding that issue in the case. Secondly, for such a submission to have merit it would mean that the Court has to read into Article 28 of the Code the words that "unless notice of such suit has been given him or her or the Attorney General at least one month before the issuing of the writ of summons". There is no need to interfere with the laws of Parliament in this instance, in my view, as the language in Article 28 is plain and unambiguous.

[26] Counsel for the Crown also submitted that the effect of the provision of Section 4 of the Crown Proceeding Act operates to permit the Crown to take advantage of any benefit that the public officer would be entitled to under the Code. Whilst I agree that this is the general position I do not agree that this is so in the case of Article 28. If that position were to be correct, then the Crown ought to be able to avail itself of the defence provided. This in my view cannot be the position where the Article 28 only prevents the Court from

rendering judgment against the public officer. The protection in Article 28 does not apply in favour of the Crown. In my view, Section 4 of the Crown Proceedings Act does not assist the Crown.

[27] Now I move on to consider whether the failure to serve the public officer is fatal to the claim against the Attorney General where the public officer is not a party. Article 28 is a defence to the public officer. It prevents judgment being rendered against the public officer. Judgment can only be rendered against a public officer if he or she is a party. In the absence of being a party, the admission by the Crown that the public officer was acting as a servant and/or agent of the crown in the execution of her duties at the material time and the decision in **Fast Kaz** that there is no obligation by Article 28 of the Code to serve the Attorney General with notice. I agree with the Claimant that a failure to serve the public officer is not fatal where judgment is not sought against the public officer.

[28] I find support for this view in the decision of Rawlins CJ in the case of **Bertha Compton v Dr. Christiana Nathaniel**¹³:

“It is noteworthy that Article 28 relates to public officers generally whilst Order 54 rule 3 spoke specifically to the method by which service was to be effected on the Attorney General in proceedings against the Crown. Article 28 does not speak about service upon the Attorney General. It speaks to service upon persons in the position of 1st and 2nd named defendants. Under the Article, if they are sued for anything done in the exercise of their functions, they must be given notice at least 1 month prior to the commencement of the action. The notice must be served on them personally, or at their domicile. Order 54 rule 3(2) provides for service on the Attorney General.”

[29] In my view the Attorney General being the sole Defendant in this claim, Article 28 of the Code has no applicability whatsoever to this case. I adopt and agree with the reasoning

¹³ Civil appeal No. 12 of 2004

of Gill, M in **Roydel Solomon v Shem Nanton and Another**¹⁴. Where it is admitted that the public officer was at the material times acting as a servant and/or agent of the Crown, the only proper defendant to a claim for damages would be the Attorney General. This, however in my view, does not create a parallel obligation to serve the Attorney General with a notice pursuant to Article 28. Similar provision for adequate notice, albeit without the sanction set out in Article 28, is provided for by the pre-action protocols.

[30] In respect of the jurisdiction point, it does not arise for determination given my determination above.

[31] For these reasons, the Defendant's application filed on May 12, 2022 is dismissed.

COSTS:

[32] The general rule is costs follows the event. The application has been unsuccessful. Costs is always discretionary however and given the importance of this point to not only this case but future matters and the equal work done on both sides, I believe that it is fair that both parties bear their own costs of this application.

ORDER:

[33] It is hereby ordered that:

- (a) The First Defendant's application filed on May 12, 2022 is dismissed;
- (b) Each party to bear their own costs of the application;
- (c) Permission is granted to either party to appeal this decision;

¹⁴ Claim No.SVGHCV2020/0052

- (d) This claim is stayed pending the hearing and determination of the interlocutory appeal.

POSTSCRIPT:

[34] I would like to place on record my gratitude to Counsel for both sides for well-articulated submissions which were on time and of great assistance to the Court on this issue.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar