[2018] JMCA App 22

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 182/ 2017

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**NATIONAL SOLID WASTE MANAGEMENT AUTHORITY**	**APPLICANT**
AND	**LOUIE JOHNSON**	**1st RESPONDENT**
AND	**JOYA J HYLTON**	**2nd RESPONDENT**
AND	**LAMOY MALABRE (Sues by his mother and next friend Phyllipa Blake)**	**3rd RESPONDENT**
AND	**ERNEST SANDCROFT**	**4th RESPONDENT**

Jalil Dabdoub and Mrs Karen Dabdoub-Harris instructed by Dabdoub Dabdoub & Co for the applicant

William Panton and Kristopher Brown instructed by DunnCox for the respondents

19 and 23 February and 27 July 2018

MCDONALD-BISHOP JA

[1] I have read the draft reasons for judgment of F Williams JA. They accord with my own reasons for agreeing with the decision made on 23 February 2018.

SINCLAIR-HAYNES JA

[2] I too have read the reasons for judgment of F Williams JA and agree with his reasoning and conclusion.

F WILLIAMS JA

[3] This matter came before us as an application, filed on 6 October 2017, for leave to appeal against the judgment of Lindo J ("the learned judge") dated 22 September 2017. The learned judge, in that judgment, had refused the applicant's application to strike out the respondents' fixed date claim form and had also refused it leave to appeal.

[4] On 23 February 2018, we made the following orders:

> "i) The application for permission to appeal the judgment of Lindo J made on 22 September 2017, is refused.
>
> ii) Costs to the respondents to be agreed or taxed."

[5] These are the reasons we promised the parties for the making of our decision.

[6] The application before us was supported by the affidavit of Ms Tova Hamilton (legal director of the applicant), sworn to on 6 October 2017. The applicant filed its application on the basis (as is required by rule 1.8(7) of the Court of Appeal Rules - "CAR") that the proposed appeal has a real chance of success. The applicant's main contention was that the learned judge had failed to properly consider the law and evidence before her.

Procedural history

[7] The respondents, being the claimants in the court below, on 16 June 2014, had filed a fixed date claim form. In that claim they sought damages and several declarations from the court against the applicant for personal injuries suffered as a result of smoke and fumes emanating from a fire at the Riverton City Dump. The relief sought in the fixed date claim form was worded in the following manner:

> "1. A Declaration that the Defendant is in breach [of] its statutory duty to effectively manage solid waste at the Riverton City Dump in order to safeguard public health in violation of the of the [sic] National Solid Waste Management Act 2001 and amounted to a breach of the Claimants' constitutional right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse as guaranteed by section and [sic] 13(3)(l).
>
> 2. A Declaration that the said breach of statutory duty amounted to failure to safeguard public health and in so doing breached the Claimants' rights as guaranteed by section 13(3)(l) of the Charter.
>
> 3. Damages
>
> 4. Special damages- medical and transport expenses pursuant to the attached scheduled and continuing.
>
> 5. Interest on damages
>
> 6. An Order that the costs of this claim be the Claimants' to be taxed if not agreed.
>
> 7. Such further and other relief be given as this Honourable Court deems fit."

[8] The fixed date claim form was supported by affidavits deposed to by each respondent. (In the case of the 3rd respondent, Lamoy Malabre, a minor, his affidavit was sworn by his mother and next friend, Ms Phillipa Blake.) The affidavits

particularized the personal injuries alleged to have been suffered by the respondents, in addition to exhibiting medical reports.

[9] On 15 July 2016, a consent order was filed by both parties in which they agreed for a date to be fixed for the claim to be heard by the Full Court. Pursuant to that consent order, a hearing date was set by D Palmer J for 8-10 May 2017. However, on 20 February 2017, the applicant filed a notice of application (subsequently amended and re-filed on 20 April 2017) in which it sought the striking out of the respondents' fixed date claim form and requested that the applicant be awarded the costs of the application. Considered at the hearing of the application were affidavits sworn to by Mr Percival Stewart and Mr Kristopher Brown.

[10] The application to strike out the respondents' fixed date claim form was heard on 5 May 2017 and, on 21 June 2017, a written judgment was handed down, which is reported at [2017] JMSC Civ 130. The applicant being dissatisfied with the result of that application, it filed the application before us pursuant to rule 1.8(1) of the CAR.

Summary of submissions for the applicant

[11] The applicant has contended that there is merit in the proposed grounds of appeal and that, as such, this court should grant it leave to appeal against the decision of the learned judge. The proposed grounds of appeal are set out below:

> "(i) The Learned Judge erred in law by failing to appreciate that the Claimants/ Respondents failed to demonstrate that the means of legal redress available to them would not be adequate in the circumstances of the Claim.

(ii) The Learned Judge erred as a matter of law in failing to properly consider the provisions of the Constitution of Jamaica, at Chapter 3, Section 19(4).

(iii) The Learned Judge erred as a matter of law in failing to appreciate that the evidence failed to disclose any fact or feature which would cause the claim to amount to a Constitutional Claim.

(iv) The Learned Judge erred in law by failing to appreciate that the Claimants/Respondents had a cause of action in Common Law or by way of Statute for the alleged wrong; and as a result, the matter was not a constitutional claim.

(v) The Learned Judge erred in law by failing to appreciate that the evidence disclosed no reason (fact or feature) that would cause the Claim to properly be a Claim under the Constitution of Jamaica.

(vi) The Learned Judge erred in law by failing to appreciate that the Pleadings failed to properly lay a Claim under the Constitution of Jamaica for constitutional redress.

(vii) The Learned Judge erred in law by failing to appreciate that the evidence and the pleadings disclose no special circumstance to justify the filing of the Claim in the Constitutional Court.

(viii) The Applicant/Defendant will, if necessary, seek leave to add further grounds of appeal and to add additional grounds of appeal on finalization of the Judge's reasons for his Order."

[12] In written submissions filed on 16 February 2018, counsel sought to demonstrate that the learned judge had erred in refusing the application to strike out the respondents' fixed date claim form. Counsel argued that the fixed date claim form, which seeks constitutional redress, is an abuse of the court's process and that that redress would have been inappropriately sought because other adequate remedies were

available. As such, pursuant to section 19(4) of chapter III of the Charter of Fundamental Rights and Freedoms of the Jamaican Constitution ("the Constitution"), the court should have refused to deal with the claim.

[13] In support of this argument, counsel cited the cases of **Kemrajh Harrikissoon v The Attorney General of Trinidad and Tobago** [1980] AC 265, **Doris Fuller (Administratrix of the Estate of Agana Barrett Deceased) v The Attorney General** (1998) 35 JLR 525; **Jaroo v The Attorney General of Trinidad and Tobago** [2002] UKPC 5; and **The Attorney General of Trinidad and Tobago v Siewchand Ramanoop** [2005] UKPC 15.

[14] Counsel also contended that whatever factual disputes were contained in the fixed date claim form were properly to be resolved by recourse to the procedures and remedies available under the common law, such as through the torts of negligence and nuisance or breach of statutory duty.

[15] In relation to the learned judge's observation that the application to strike out was brought six months after the consent order was made for the matter to proceed to a hearing before the Constitutional Court, counsel submitted that the learned judge had erred. In that regard counsel submitted that there was no time restriction placed on when an application could be brought to strike out a fixed date claim form. In support of this submission, counsel cited the dictum of Hibbert JA (Ag) in **Hon Gordon Stewart OJ et al v Independent Radio Company Limited and Another** [2012] JMCA Civ 2, where it was observed at paragraph [17] that:

> "It is quite clear that this rule contains no restrictions or pre-conditions to the exercise of the court's power. In my view, there is nothing contained in this rule that would prevent the hearing of an application under it, even while the matter is awaiting mediation."

[16] It was also submitted that, in order for a matter to cross the threshold for hearing by the Constitutional Court, the evidence in support of it had to disclose some exceptional or special circumstances or an abuse or misuse of power. That was the position stated both by this court and by the Judicial Committee of the Privy Council ("the Board"), the submission went. That position was taken by the Board, it was argued, in the case of **Jaroo v The Attorney General of Trinidad and Tobago** in an appeal from Trinidad and Tobago – even though that country's Constitution is silent in respect of the course to be adopted when there are alternative remedies.

[17] In **Jaroo v The Attorney General of Trinidad and Tobago**, the Board stated, at paragraph 29 of its advice, that:

> "...the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy."

[18] There was, it was submitted, no evidence in the affidavits or fixed date claim form in this case of any such special circumstances.

[19] Mr Dabdoub further submitted that in several respects the learned judge erred in either misstating the law, making wrong statements of law or misapplying the law, examples of these being in paragraphs [38] and [39] of the judgment, where she found that the statement of case does not amount to an abuse of the process of the court.

[20] Additionally, he argued, the case before the court below involved significant disputes as to fact, which would make it not suited for hearing by the Constitutional Court (citing **Jaroo v The Attorney General of Trinidad and Tobago** and **Antonio Webster v Attorney-General of Trinidad and Tobago** [2011] UKPC 22).

[21] He further submitted that the facts of the case below constituted a "typical **Rylands v Fletcher** ([1861-1873] All ER Rep 1) situation".

[22] He sought to rely on the case of **The Attorney General of Trinidad and Tobago v Siewchand Ramanoop** which cited the dictum of Lord Diplock in the case of **Harrikissoon v Attorney-General of Trinidad and Tobago**, which dictum reads as follows:

> "...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 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".

[23] The court, he submitted, fell into error in failing to appreciate that the court ought to start from a position that there are adequate means of redress and that the burden of proving otherwise rests on the claimant. It is not for the defendant to prove that adequate means of redress exist, he further submitted.

Summary of submissions for the respondents

[24] It was submitted on behalf of the respondents that the learned judge correctly exercised her discretion in refusing to strike out the respondents' claim, as striking out was inappropriate in all the circumstances of the case. Counsel contended that the claim raises serious issues of fact and law to be tried. Furthermore, it was argued, the claim is not bound to fail and amounts to more than a mere allegation. These factors, counsel contended, distinguished the case at bar from the case of **Kemrajh Harrikissoon v The Attorney General of Trinidad Tobago**. Counsel argued that the constitutional relief was appropriately sought in the fixed date claim form as there was no other appropriate "parallel remedy" available. On the bases of the foregoing, it was submitted that the application for permission to appeal ought properly to be dismissed.

[25] Additionally, it was argued, the claim raised relatively-new points of law never before decided in this jurisdiction - specifically concerning the interpretation and application of section 13(1)(l) of the Charter – and that it would be beneficial to have these points heard and determined by the Constitutional Court. The claim raises, it was submitted, an arguable and important point of law.

Discussion

[26] Briefly, I would first observe that, when one uses the "application test", it will be seen that the application for striking out the fixed date claim form is interlocutory in nature (see, for example, the cases of **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1 and **Salaman v Warner and Others**

[1891] 1 QB 734). Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act prescribes that appeals from interlocutory applications require leave to appeal, except in certain limited circumstances, none of which are applicable in this case. This application having been made within the period prescribed by rule 1.8(1) of the CAR, it falls to be considered whether the applicant has satisfied the relevant criterion set out in rule 1.8(7) of the CAR in order for this court to exercise its discretion to grant the orders sought.

Rule 1.8(7)

[27] Rule 1.8(7) of the CPR provides that:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[28] Therefore, an applicant is required to satisfy the court that its proposed appeal has a "real chance of success". The English Court of Appeal in the case of **Swain v Hillman** [2001] 1 All ER 91, discussed the meaning of the word "real" in the context of summary judgments. The court opined that "real" called for an applicant to demonstrate that "there is a realistic as opposed to a fanciful prospect of success". Therefore, the onus is on the applicant to demonstrate what merit, if any, lies in its proposed grounds of appeal.

[29] The appellate court's review of the exercise of discretion by a judge, in an interlocutory application (for striking out or otherwise), has to be guided by the

admonition of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042. In that regard, I am mindful that this court:

> "...must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."

[30] On the basis of the foregoing, this applicant, on the hearing of any substantive appeal, would be tasked with demonstrating that the learned judge misunderstood the law or evidence, wrongly treated with the facts of the case or that there has been some change of circumstances subsequent to the making of her orders which would justify this court varying the orders that she made. At the same time, I am also mindful of the fact that this is not the hearing of the appeal itself; but an application for permission to appeal.

The issues

[31] When examined, the proposed grounds of appeal essentially encapsulate three broad issues which bring into focus the factors considered by the learned judge on the determination of the application which was before her. The issues relate to:

a) whether there was adequate alternative redress available to the respondents,
b) whether the learned judge correctly applied section 19(4) of the Constitution; and
c) whether the respondents' claim was properly a constitutional claim.

[32] Before examining these issues, it will be useful to briefly review the nature of the application to strike out.

The nature of the applicant's application to strike out

[33] Two grounds were stated in the notice of application to strike out the respondents' fixed date claim form. They were expressed thus:

"1. The Claim is frivolous and vexatious and;
2. The Claim is an abuse of the process of the Court."

[34] It is noted that it was not stated in the said notice of application that the application was made pursuant to any particular provision of the Civil Procedure Rules (CPR). The learned judge (at paragraph [33] of the judgment) observed that the applicant made scant submissions in relation to its first ground, that is, "the claim is frivolous and vexatious". The learned judge commented that the applicant's submissions in that regard were made in response to the respondents' reference to the case of **AG v Barker** [2001] 1 FLR 759 DC. The applicant in reply had posited that a claimant need not be a vexatious litigant for the claim to amount to an abuse of

process. Further (as the learned judge observed), the applicant's prayer in its skeleton arguments requested that "this claim be struck out as disclosing no cause of action and being an abuse of the process of the court pursuant to the Constitution of Jamaica".

Findings of the learned judge

[35] In the light of the observations expressed above, the learned judge found the applicable rule in the CPR to be rule 26.3(1)(c). That rule provides that:

> "In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> ...
>
> ...
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim..." (Emphasis added)

[36] The learned judge then proceeded to consider her power under that rule to strike out statements of claim. She found that a matter could only be struck out pursuant to rule 26.3(1)(c) of the CPR where the case was "plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is, on the face of it, obviously unsustainable, or where the case is unarguable". In coming to this view, the learned judge drew from the discussion in Halsbury's Law of England, 4th edition, paragraphs 430-435 in relation to the court's power to strike out pleadings. She relied on the following passage:

> "However, the summary procedure under this provision will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or

> defence is on the face of it obviously unsustainable, or where the case is unarguable...Nor will a pleading be struck out where it raises an arguable, difficult or important point of law."

[37] The learned judge also considered several cases, one of which was **Rudd v Crowne Fire Extinguishers Services Ltd** (1989) 26 JLR 565. In that case, this court had allowed, in part, an appeal against the order of a judge, striking out a claim. The judge below had struck out the claim on the ground that it disclosed no cause of action and/or was frivolous and vexatious, pursuant to section 238 of the Judicature (Civil Procedure Code) Law.

[38] This court, upon a review of the judge's exercise of discretion to strike out the claim, held that the applicant's statement of case should not have been struck out, as the applicant had an arguable case. Forte JA (as he then was), writing on behalf of the court, held that there were triable issues which the appellant should be allowed to advance at a hearing in respect of his allegation of breach of statutory duty.

[39] Other essential findings of the learned judge are reflected in paragraphs [36] to [45] of her judgment. She found that a proper determination of the application could only be made from an assessment of the "terms and contents of the statements of case". Having so done, the learned judge held that there was no factual basis on which to find that the respondents' statement of case amounted to an abuse of process. She further opined that there were novel points which included issues of constitutionality and redress which would best be resolved at a hearing by the Full Court. It was the

further finding of the learned judge that the respondents should not be "driven from the seat of judgment".

[40] The learned judge also found that the nature of the pleadings, as they stood, did not permit a striking out. Further, she found that, whilst the Constitution, as it originally stood, had been somewhat narrow in relation to its available relief, the Charter had broadened the avenues for redress and had empowered the court to grant orders to protect the very rights which were the subject of the claim.

[41] Ultimately, the learned judge concluded at paragraph [44] that:

> "...it is my view that the statement of case 'raises an arguable, difficult [and] important point of law' and should not be struck out at this stage especially not having received the benefit of a hearing before the Full Court, as is the usual practice in this jurisdiction and this is a matter which ought to be heard and determined by the constitutional court."

[42] Consequent on her ruling, the learned judge scheduled a pre-trial review to be held in the matter on 6 February 2018 and a hearing date for 14 May 2018 before the Full Court. These dates have since passed without those events occurring, pending the resolution of this application.

[43] At this point, the issue for this court to decide was whether the applicant had a real chance of success in showing that the learned judge had incorrectly exercised her discretion within the context of the applicable legal principles and the circumstances of the matter before her. It would seem that, as was done by the learned judge, what is

required here is an examination of the pleadings. These were the most significant portions of the pleadings in the fixed date claim form before the court:

> "6. On February 6, 2012, at approximately 7:00pm a fire started at the Riverton Disposal Site. The constant blazing of the fire lasted for six (6) days while the smoke abatement process lasted seventeen (17) days. The thick and persistent smoke lead [sic] to the closure of over twenty five (25) schools within the Portmore, Gregory Park, Ferry, Ken Hill Drive, Washington Boulevard, Three Miles and Six Miles area.
>
> 7. The Report on the fire by the Jamaica Fire Brigade dated March 2012 states:
>
> > 'Over the period the smoke and dust nuisance spread to communities as far as Portmore and Spanish Town. Persons suffering from allergies and other respiratory conditions such as asthma, had difficulty breathing along with other discomfort. The severity of the smoke and dust nuisance resulted in the Ministry of Health advising residents of Kingston and Saint Andrew and sections of Saint Catherine and in particular those living in the immediate surroundings of the Riverton City Landfill to take the necessary precautions to protect themselves until the fire was extinguished. Some schools and businesses were also ordered closed...'
>
> 8. The National Environmental and Planning Agency (NEPA) Report of March 2012 concluded that:
>
> > 'The general conclusion based on the results of the monitoring exercise is that the Riverton Disposal Site created a negative impact on the ambient air quality in Kingston and Saint Andrew and Portmore regions.
> >
> > The dates showed ambient air quality with respect to PM10, within a 1km radius of the site to be 'Very High Risk' according to the USEPA and the Canadian Air Quality Index definition.'

9. The NEPA Report recommended that:

> 'The NSWMA should improve its management at all solid waste disposal sites inclusive of the Riverton Disposal Site to prevent the recurrence of Major fires.'

10. There have been at least ten (10) reported fires at the Riverton City Disposal Site in the last twelve (12) years.

11. The emissions and toxic fumes from the fire between February 6, 2012 and February 29, 2012 resulted in each of the Claimants suffering injuries and damages [sic] to their health. The said injuries and damages [sic] were caused by the failure of the Defendant to effectively manage the disposal of solid waste at the Riverton City Disposal Site.

12. The Defendant public authority has repeatedly breached its obligations under the NSWM Act of 2001 and has failed repeatedly to 'take all such steps that are necessary for the effective management of solid waste at the Riverton City Disposal Site in order to safeguard public health and in doing so contravened the Claimant's constitutional rights as guaranteed by section 13(3)(l) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendments) Act 2011."

[44] These pleadings essentially call into question the applicant's standard of performance in managing the disposal of solid waste at the Riverton City Dump. The respondents thereafter seek to establish a causative effect between the emission of toxins from the fire at the Riverton City Dump and the personal injuries which it is alleged that they have suffered. It is that alleged lack of proper management or mismanagement which, the respondents contend, has resulted in breaches of their constitutional right and for which breaches they accordingly seek redress.

[45] The relevant provision of the Charter on which the respondents seek to rely in advancing their claim is section 13(3)(l), which guarantees:

> "(l) the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage."

[46] It will readily be seen that the proposed grounds of appeal raised interesting arguments. That aside, however, it is my view that the broad sweep of the grounds seems (on the part of the applicant) to have diverted the required focus from the substance of the application which was before the judge and her consideration of the matter pursuant to rule 26.3(1)(c) of the CPR. If the substance of the application that was before the learned judge is kept in mind, then it is unnecessary to comment in detail on the aspect of the claim that seeks to challenge the constitutionality of the alleged acts or nonfeasance on the part of the applicant and the availability and suitability of alternative remedies. What at this point must be stressed is that: (i) the learned judge was dealing with an application to strike out a statement of case; and (ii) a judge is not obliged to strike out a statement of case unless it is bound to fail (see **A Khan Design Ltd and another v Evanta Motor Company Ltd and another** [2017] EWHC 126 (Ch)).

[47] On my perusal of the fixed date claim form, I agree with the finding of the learned judge that the claim raises novel and interesting issues that, more importantly, are arguable, or cannot fairly be said to be unarguable. Being arguable, these issues are not suited for striking out. The respondents' claim cannot reasonably be said to be

obviously unsustainable. Moreover, the English Court of Appeal in **Biguzzi v Rank Leisure plc** [1999] 1 WLR 1926, has commented - per Lord Woolf MR (as he then was) - on the discretion of the English courts under rule 3.4(2)(c) of the Civil Procedure Rules 1998 (UK) to strike out a statement of case for failure to comply with a rule. The learned Master of the Rolls observed at page 1933 as follows:

> "...in many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

[48] In the final analysis, therefore, it is unlikely that, if leave to appeal were to be granted, the court hearing the appeal would form the view that the learned judge was palpably wrong in arriving at her decision. The applicant, therefore, cannot be said to have demonstrated that it had a real chance of success on this issue.

The constitutional points

[49] Section 19(4) of the Charter is also of relevance in a consideration of this matter. That section reads as follows:

> " (4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law." (Emphasis added)

[50] As should be apparent from a reading of this provision, the Supreme Court is given a discretionary power (as opposed to being made subject to a mandatory requirement) under section 19(4) of the Constitution. Pursuant to this section, that court may or may not refuse to exercise its powers to hear a matter in which

constitutional redress is inappropriately sought. That section empowers the court to decline to exercise its power to dismiss such a claim and permits it to remit to the appropriate court, tribunal or authority a matter applying for constitutional redress, even if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

[51] It is useful to compare the wording of section 19(4) with its predecessor - that is, section 25(2) of the Constitution and the proviso thereto before the Constitution was amended by the enactment of the Charter. Section 25(2) read thus:

> "(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law." (Emphasis added)

[52] This comparison lends itself to the preliminary view (without attempting, at this stage, to resolve the issue) that section 19(4) of the Constitution as it at present stands gives wider discretion to the court than the court had under the proviso that it replaced (if, under that proviso, it had any discretion at all). That might be seen in the permissive word "may" being used in the present provision, as opposed to the strictly prohibitory "shall not", used in the previous provision. So that, even if, for the sake of

argument, there is some merit in the applicant's submission that other remedies are available, with the wording of the provision as it stands, striking out is not a certain result and the court could either: (a) still hear the matter; or (b) remit it to another court that might more appropriately deal with it. Therefore, the learned judge cannot be faulted for how she treated with this aspect of the matter. This ground, therefore, does not disclose that the applicant has a real chance of success.

[53] The learned judge, at paragraph [31] of the judgment, had noted that the application to strike out was filed almost six months after the parties had filed a consent order for the matter to be heard by the Full Court. The applicant has complained about this. It appears to me, however, that this comment reflects an objective and unchallenged fact. In the circumstances of this case, it was a comment made as a part of the court considering the full background to the matter and was not given undue significance by the learned judge in her ultimate decision. Therefore, I conclude that neither in respect of this ground has the applicant established that it has a real prospect of success.

Conclusion

[54] In this matter, the applicant faced the hurdle of satisfying the court that the proposed appeal had a real chance of success. This necessitated a demonstration to our satisfaction that the learned judge had erred in refusing to strike out the claim, in that the claim is unarguable and that this was a plain and obvious case for striking out. Otherwise, the applicant had to show that the claim, as it stands, is an abuse of the process of the court. The applicant, though presenting engaging arguments in relation

to circumstances in which constitutional relief might be sought, has failed in its quest to do so. Those arguments, though they will no doubt make for an interesting hearing before the Constitutional Court, were nonetheless not enough to get the applicant past the threshold that it had to cross at this stage.

[55] In light of the foregoing, I agreed that the application for permission to appeal be refused, with costs to the respondents to be taxed, if not agreed.