IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M 34/97

BEFORE: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE ELLIS
THE HONOURABLE MR. JUSTICE CLARKE

BETWEEN	BERTHAN MACAULAY	APPLICANT
AND	THE HONOURABLE ATTORNEY GENERAL	1ST RESPONDENT
AND	MARGARETTE MAY MACAULAY	2ND RESPONDENT

The Applicant in Person
Mr. Lennox Campbell, Senior Assistant Attorney General and
Miss Avlana Johnson for 1st Respondent
Mrs. Pamela Benka Coker, Q.C., and Miss Aisha Mulendwe
instructed by Mrs. Merlin Bassie for 2nd Respondent

Heard: May 12, 13 and July 31, 1997

WOLFE C.J.

The applicant and the second respondent are lawfully married to each other. The marriage has fallen upon rocky ground and the applicant has taken steps to have the marriage dissolved. There have been a number of interlocutory proceedings since the filing of the petition.

The applicant now seeks redress under section 25 of the Jamaica Constitution via a motion in which he alleges that his fundamental rights are being and have been contravened contrary to sections 18(1), 18(2)(e), 19(1) and 20(2) of the Jamaica Constitution.

The motion is set out hereunder:

> "1. A declaration that his fundamental rights and freedoms contained in Chapter III of the Jamaica Constitution that is to say, sections 18(1), 18(2)(e), 19(1) and 20(2) have been and are being contravened in relation to him by making ex parte Orders without full disclosures to single Judges of the Supreme Court at the instance of the second respondent, Margarette May Macaulay and also by removing his professional files from his former office at 21 Duke Street, Kingston, Jamaica and classifying

same after inspection as old files which she obviously searched contrary to Attorney/client privilege under section 19(1) of the Jamaica Constitution.

2. An Order that the said Orders:

(a) An Order on Exparte Summons for interim injunction made on the 31st day of October, 1996 and for the subsequent interlocutory injunction made on the 8th day of April, 1997.

(b) An order made on the 24th day of February, 1997 on an interim injunction and for the subsequent interlocutory injunctions made on the 8th day of April, 1997, BE SET ASIDE for their unconstitutionality."

3. General Special Damages (sic)

4. Such Orders and Directions as the Court may think appropriate in this particular case."

Upon this matter coming on for hearing before us on the 12th day of May, 1997, Mrs. Benka-Coker for the second respondent raised a preliminary objection.

Mrs. Benka Coker contended that the motion seeking constitutional redress was unfounded, misconceived and baseless in law. She urged that the essence of constitutional redress is protection for the contravention of his rights by an individual against the state or by some other public authority endowed with coercive powers. Constitutional redress sounds in public law and not in private law.

Continuing Mrs. Benka Coker submitted that the substance of the applicant's claim is two fold, to wit. It complains of -

(i) Acts done by the second defendant, and of

(ii) Orders granted by a Judge of the Supreme Court on the 24th day of February, 1997 and the 8th day of April, 1997, which the applicant contends are unconstitutional.

It was further submitted that it was not open to the applicant to seek constitutional redress for acts committed by a private individual, such as the second respondent is.

The remedies of the applicant, if he is in fact entitled to any remedies, lie in the ordinary law of the land - Contract or Tort.

In support of this submission ***Ramesh Lawrence Maharaj v. Attorney General of Trinidad & Tobago (No. 2) [1978] 30 W.I.R. p.310 at p.318 letters c,d.*** was relied on.

Lord Diplock delivering the opinion of the majority of the Board said:

> "Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in s 1 already existed, it is in their Lordships' view, clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and, as regards the infringement by one private individual of the rights of another private individual, s 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedom to satisfy the requirements of the new constitution as respects those rights and freedoms that are specifically referred to."

In the second limb of her submission Counsel argued, that if the applicant's complaint was about judicial error, his application was equally mis-conceived, as the proper course would have been to pursue remedies in a court of law on appeal or otherwise.

In ***Chokolingo v. Law Society of Trinidad and Tobago [1978] 30 W.I.R. p. 372 at p.379.*** Sir Isaac Hyatali C.J. adopting the words of Lord Diplock in Maharaj v. Attorney General (No. 2) c.d. 30 W.I.R. p.310 said:

> "In the first place, no human right nor fundamental freedom recognised by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is

> infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

It is to be noted that the applicant has not pursued his rights of appeal in respect of the injunctive orders.

The third limb of Mrs. Benka Coker's submission is that section 18(1) of the Constitution cannot avail the applicant.

I set out the provisions of section 18(1)

> "18(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under provisions of a law that -
>
> (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
>
> (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of -
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> (i) establishing such interest or right (if any);
>
> (ii) determining the amount of such compensation (if any) to which he is entitled;
>
> (iii) empowering his rights to any such compensation."

As to the operation of section 18(1) Counsel relied upon the work by Dr. Lloyd Barnett, titled ***"The Constitutional Law of Jamaica" at p.394.*** The learned author states:

> "On the other hand the terms 'taken possession of' and 'acquired' seems to involve a transfer of the possession, right to possession or ownership of the property or interest and not mere regulation of its use unless such regulation amounts to such a high degree of control that the rights in the property are in effect transferred from one person to another."

Finally, Mrs. Benka-Coker submitted that the application was an abuse of the process of the Court in that it was frivolous and vexatious.

Mr. Campbell for the first respondent adopted the arguments of Mrs. Benka-Coker.

The applicant submitted -

(i) that if an order is made by a Judge which contravenes the fundamental rights of a citizen then the Attorney General being the representative of the state is the proper person to be cited in a matter for constitutional redress.

(ii) An order of a judge of the court whether rightfully or wrongfully constitutionally or unconstitutionally made must be obeyed and anyone who puts forward such an order as a defence is immune to civil or criminal liability.

In my view, the applicant failed to address the submissions made by Mrs. Benka Coker.

Relying upon the dictum of ***Lord Diplock in Maharaj v. Attorney General of Trinidad and Tobago*** (supra), it is clear beyond the peradventure of a doubt that the applicant's remedy lies in challenging the injunctive orders by way of Appeal.

Having examined the Motion and the Affidavit in support thereof, I am satisfied that the submission of Mrs. Benka Coker are well founded in law. There is absolutely no breach of the Constitution. The motion is as Mrs. Benka Coker contends, an abuse of the process of the Court. It is frivolous and vexatious. The remedies of the applicant are available in tort.

Even if there had been a breach of the applicant's constitutional right, by virtue of the proviso to section 25(2) of the Constitution of Jamaica, this motion

would have been wholly misconceived, as there are adequate means of redress for the wrongs complained of under other law.

The proviso to section 25(2) states:

> "Provided 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."

Nothing allegedly done by the second respondent was done as a result of the injunctive orders. The injunctive orders did not authorise the respondent to act. The injunctive orders restrained the applicant from acting. To contend therefore, that an action by the applicant could be met with the defence that the second respondent acted as a result of a judicial order is untenable.

The applicant could have commenced an action for trespass, if he so desired.

It is for the reasons stated herein that I concurred with my learned brothers that the preliminary objection ought to succeed and ordered that the motion be dismissed with costs to the second respondent to be taxed, if not agreed, and no order as to costs in respect of the first respondent.

ELLIS, J.

The applicant moves this court to declare that his constitutional rights as enshrined in Chapter III of The Constitution particularly S.S. 18, 19 and 20 have been and are being contravened.

He says the contravention arises because exparte orders were made by judges of The Supreme Court in the absence of full disclosure of the circumstances by the second Respondent.

He seeks additionally, to have the orders set aside and to have awards in his favour for general and special damages.

Mrs. Benka-Coker for the second Respondent took the following points in limine:-

(1) The applicant's motion is unfounded, misconceived and baseless in law.

The essence of constitutional redress is the protection of the rights of an individual against their contravention by the State or other public authority.

In support of this point the dictum of Lord Diplock in **Maharaj v. Attorney General** (No. 2) (1978) 30 W.I.R. 318 was cited.

(2) The applicant's complaint is in two parts namely:-

(a) he complains against the second Respondent who is a private party, and

(b) he complains that the orders of the Supreme Court are unconstitutional.

The argument here is that Constitutional Redress is not available for the actions of a private person. Redress for the action of a private person sounds in either tort or contract which is private law. Constitutional Redress being public law has no relevance in a matter of private law.

As to the complaints that the Supreme Court orders are unconstitutional the applicants remedy is not in the Constitutional Court. He should have first exhausted all other remedies before. See cases of **Chokolingo and Harrikissoon**.

The applicant on his part, conceded the authorities cited by Mrs. Benka-Coker Q.C., as being against his contention. He however sought to say that his application is proper since if he had sought

other redress the second Respondent would set up the judicial orders as her defences. In any event the contraventions of which he complains would have already taken place to his injury.

I am not convicned that the applicant's arguments in any way challenges the points raised in limine.

The applicant took no steps to have the impugned orders set aside. That was an available remedy and he did not exhaust that.

The orders against which he complains are, in any event, clearly within the court's competence as laid down in S.10 of The Matrimonial Causes Act.

The preliminary objection succeeds and I too would dismiss the Motion with costs to the second Respondent to be agreed or taxed.

CLARKE, J.

The applicant, Mr. Berthan Macaulay, Q.C., alleges in his notice of motion that his fundamental rights and freedoms under sections 18(1), 18(2)(e), 19(1) and 20(2) of the Constitution of Jamaica have been and are being contravened. He asserts that the contraventions on which he bases his application arise in these circumstances:

> (a) Four **ex parte** interim injunctions against him in relation to his proprietary interests were granted respectively on 31st October, 1996, 24th February 1997 and 8th April 1997 by single judges of the Supreme Court at the instance of his wife, the second Respondent, without full disclosure to each judge; and
>
> (b) the second Respondent, removed his professional files from his former office and searched them contrary to attorney/client privilege under section 19(1) of the Jamaica Constitution.

So, the application is predicated on the basis that the second Respondent's conduct as well as the impugned judicial orders are unconstitutional and are redressible under section 25.

At the threshold, Mrs. Benka-Coker broadly submitted that the notice of motion is misconceived. She urged that even assuming that the allegations of non disclosure and misconduct by the second Respondent were proved, the appropriate rights and freedoms of the applicant could not have been contravened by the State or by some other public authority endowed with coercive powers against which protection under the Constitution is afforded. As it would therefore be the infringement by one private individual (the second Respondent) of the rights of another private individual (the applicant) the latter's remedies would lie not in section 25 of the Constitution but in the ordinary law of the land, whether in tort or in contract.

Mr. Campbell adopted those submissions and submitted that the Attorney General is therefore not a proper party to the proceedings.

The applicant conceded (and rightly so) that Chapter 3 of the Constitution under which the notice of motion is brought is concerned with public law, not private law. He submitted, however, that the **ex parte** injunctive orders made, as they were, without full disclosure to the single judges breached the fundamental rights referred to in the notice of motion and in respect of which he is entitled to protection.

The Attorney General, he submitted, is a proper party, as that officer represents the judicial arm of the State through whom the **ex parte** orders were made.

The applicant further argued that since the orders still subsist they provide immunity from civil and criminal liability as a consequence of which the second Respondent and others are continuing to act in reliance on them, to the great loss and damage of the applicant.

For those submissions the applicant relied on the case of **Maharaj v. The Attorney General** (No. 2) (1968) 30 W.I.R. 310; [1978] 2 All E.R. 670. That case is clearly distinguishable from the case before us. Unlike that case there is here no allegation of any fundamental procedural or constitutional impropriety on the part of any of the single judges who made the orders which the applicants calls into question. Rather, it is the second Respondent's conduct that forms the basis of the applicant's allegation that some of his rights under sections 18, 19 and 20 of the Constitution have been contravened.

The cited case is a case from Trinidad and Tobago. It went up on appeal to the Judicial Committee of the Privy Council and concerned the contravention of the fundamental rights and freedoms provisions of the Constitution of Trinidad and Tobago. So far as those provisions are relevant they are in **pari materia** with the protected provisions enshrined in Chapter 3 of the Constitution of Jamaica.

In that case the appellant had been committed to prison for contempt of court by Maharaj J. The order for committal was subsequently held to have been improperly made because the judge had not specified the nature of the contempt with which he charged the applicant.

The Privy Council held that the failure of the judge to inform the appellant of the specific nature of the contempt charged before committing him constituted a deprivation of liberty without due process and contravened a fundamental constitutional right in respect of which he was entitled to protection under the Constitution. Accordingly, his claim for redress fell within the original jurisdiction of the High Court of Trinidad and Tobago under the Constitution of that country.

There is nothing in the case before this Court to suggest that by reason of some fundamental procedural impropriety any of the single judges contravened any of the applicant's constitutional rights under the protective provisions of the Constitution of Jamaica. "[N]o human right or fundamental freedom recognized [in the protective provisions] of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law ...": **Maharaj v Attorney General** (No. 2) (1978) 30 W.I.R. 310 at 321a - per Lord Diplock.

As Mrs. Benka-Coker put it, if the applicant is complaining of judicial error in making the **ex parte** orders, his proper course is to appeal or to apply to have them set a side in applications **inter partes**. This he has not done.

The Constitutional Court is plainly not a forum for the applicant to seek to vindicate rights, the alleged breach of which can raise no public law or constitutional law issue, but only issues of contract law or tort law between private individuals. Those are what the notice of motion discloses.

Accordingly, I concurred with my learned brethren that the preliminary objection ought to succeed and that the motion be dismissed.