

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: CV0323 of 2014

BETWEEN

**NORMAN MACDONALD NURSE
(Duly Qualified Administrator of
The Estate of Marie Delcina Nurse)**

CLAIMANT

AND

FLORENCE NURSE

DEFENDANT

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2016: April 14

2018: August 31

Appearances:

Mr. M. Tariq Khan, Attorney-at-Law on behalf of the Claimant

Ms. Vonda M. Pile, Attorney-at-Law on behalf of the Defendant

DECISION

Introduction

[1] This is an application by the Claimant's attorney M. Tariq Khan pursuant to an order made by **Richards J.** on the 24th day of April, 2015 in the following terms: "That the Claimant's attorney-at-law file an

application applying to the Honourable Court that the Defendant's attorney-at-law be denied a right of audience before the High Court because her practising certificate is invalid and in breach of the provisions of the Legal Profession Act, Cap. 370A of the Laws of Barbados."

- [2] It should be noted that the same order referred to in paragraph 1 is not on file and a search made in the Supreme Court Registry revealed that the order was not filed.

Brief Factual Background

- [3] In the substantive matter the Claimant is the widow and administrator of the estate of Marie Delcina Nurse (Deceased). On the 27th day of February, 2014, the Claimant, by fixed date claim form, brought an action against the Defendant for possession of property situate at Wellington Street, Bridgetown, St. Michael and profits at the rate of \$2,500.00 a month from the date of service of the claim form until possession is delivered up together with interest pursuant to **section 35A** of the Supreme Court of Judicature Act, Cap. 117A, the application was accompanied by an affidavit of equal date.
- [4] The Defendant, Florence Norde resides at Wellington Street, Bridgetown, St. Michael and is the sister of the deceased. On the 6th

March, 2014, the Defendant filed an acknowledgment of service indicating her intention to defend the matter.

- [5] It was when the matter reached the stage of pre-trial memorandum, which was filed on the 2nd February, 2015 that Mr. Khan, attorney-at-law for the Claimant made an oral application to have the Defendant's attorney Ms. Pile, denied a right of hearing before the court since she had failed to pay the Bar Association subscription fee as prescribed by **section 44** of the Legal Profession Act, Cap. 370A (hereinafter referred to as the LPA).

The Claimant Attorney's Contention

- [6] The instant application came into being on the 24th April, 2015 when Mr. Khan, in the absence of the parties to the substantive matter made a preliminary application before **Richards J.** to the effect that Ms. Pile be denied a right of audience before the court.
- [7] The Notice of Application was filed on the 4th May, 2015 and essentially was based on the premise that Ms. Pile was in breach of provisions of the LPA since she failed to pay the annual subscription fee to the Bar Association and as a result the practising certificate issued to her was invalid. The accompanying affidavit to the application was prepared and executed by Mr. Khan.

- [8] Mr. Khan, then President of the Bar Association, contended that Ms. Pile was aware of the requirements of the LPA since he wrote her on the 26th March, 2015 informing her of her failure to comply with the provisions of the LPA which rendered her practising certificate invalid.
- [9] He claimed that on the 22nd April, 2015, he received confirmation from the Bar Association indicating that Ms. Pile had failed to date to pay the said annual subscription fee. He stated that he immediately wrote to Ms. Pile warning that he would raise the issue of her standing and her right of audience as an attorney-at-law before the court.
- [10] In his submissions, Mr. Khan highlighted that the LPA is the law that remains in force and it governs the admission of an attorney-at-law and the requirement that an attorney-at-law must meet including compulsory membership of the Bar Association before he/she can be issued with a valid practising certificate.
- [11] Additionally, he submitted that the LPA Code of Ethics 1988, in particular, **section 57** and **90** states an attorney-at-law shall not practice unless issued with a practising certificate in accordance with the LPA.
- [12] Mr. Khan also made an application for a waste order contending that he felt there was no need for the present application since attorneys should comply with the LPA. He further noted that attorneys are seised

of their obligations and the steps they should take to comply with them, which will allow them an audience before the law courts.

- [13] It must be noted here that the Claimant's attorney relied solely on the LPA and no cases were submitted in support of his contention.

The Defendant Attorney's Submissions

- [14] In reply, Ms. Pile submitted that Mr. Khan did not follow the procedure set out in the Supreme Court (Civil Procedure) Rules 2008 (hereinafter referred to as the CPR) Rule 3.12 since he swore the affidavit and signed and executed the certificate of truth which accompanied the application.

- [15] She also stated that having sworn the affidavit for his client in a matter for which he was acting, he was in breach of Rule 39(2) of the LPA Code of Ethics 1988.

- [16] She further contended that Mr. Khan did not have the authority to act for his client in the present application and it was the Bar Association who should have instituted the action. In support of her contention she relied on **section 2(2)** of the Barbados Bar Association Act, Cap. 363 which provided that "The Association by that name shall and may sue and be sued in all courts and before all magistrates and others in all manner of suits, actions, complaints, matters and causes whatsoever...".

- [17] Ms. Pile submitted that at the 2007 Annual General Meeting a resolution and decision was taken that the Bar Association could undertake any action on litigation against an attorney-at-law for failure to pay the annual subscription fee. She added that no resolution was ever made by the Bar Association authorizing Mr. Khan to file any application in respect of her failure to pay the said subscription fee.
- [18] In fact she further submitted that a year later at the Bar Association's Annual General Meeting, when the issues of payment of subscription fees were raised, the Chairman confirmed that after meetings with the Chief Justice and the Registrar, it was decided not to pursue the matter as it would be too costly to litigate. Therefore it is her opinion that in the absence of a resolution, the matter of non-payment of subscription fees were mute and Mr. Khan had no authority to act in this matter.
- [19] According to Ms. Pile **section 44** of the LPA should be read in conjunction with **section 45** of the same Act and when read together they are in direct conflict with **section 21(1)** of the Constitution of Barbados.
- [20] To support her contention, she relied on the cases of *Attorney General and Anor v. Smith (1984) 19 Bar. L.R. 56* and *Trinidad Island-Wide Cane Farmers' Association Inc.* and *Attorney General v. Prakash Sureeram (1975) 27 W.I.R.* She also referenced *Collymore v. Attorney*

General (1967 12 W.I.R. 5 to show that the court as the guardian of the Constitution had a duty to make binding declarations if and whenever warranted, that an enactment passed by Parliament was ultra vires and void.

[21] Ms. Pile also submitted that she had always paid the relevant registration and compensation fees since becoming an attorney-at-law in 1992. However on one occasion when she sought to pay fees she was informed that she also had to pay VAT and she decided not to do so since the Bar Association did not fall under the VAT Act and was exempt from VAT.

[22] Therefore, out of an application to have the Defendant's attorney-at-law Ms. Pile denied a right of audience before the High Court because her practising certificate was invalid due to non-payment to the Bar Association of subscription fees, have arisen three issues for the court's determination.

Issue 1: Whether **section 44** of the LPA is unconstitutional and of no effect because it violates the Defendant attorney's right under **section 21** of the Constitution which protects her freedom of association.

Issue 2: Whether the application made by Mr. Khan, attorney-at-law for the Claimant is fatal to the proceedings since he failed to provide the reasons

for him giving the certificate of truth pursuant to Rule 3.12(4).

Issue 3: Whether the Claimant's attorney Mr. Khan is a proper person to make the instant applicant before the court.

Law and Discussion

[23] On 31st March, 1973 Parliament enacted the Legal Profession Act, Cap. 370A ("the LPA"). It was described in the preamble as "an Act to provide for the fusion of the branches of the legal profession, for the legal education and discipline of attorneys-at-law, and for connected purposes." The provisions of the Act with respect to compulsory membership can be found at **sections 44-46**. The pertinent clauses are set out below:

"44.(1) An attorney-at-law shall, on each occasion on which a Practising Certificate is issued to him, pay to the Bar Association the annual subscription which is or would be payable under section 45 as a member of the Association, and shall thereupon (if not already a member), notwithstanding anything in any by-law, ordinance, order, rule or regulation of the Association, become by virtue of this section and without election or appointment by the Association, a member of the Association.

45.(3) A Practising Certificate issued to an attorney-at-law shall be of no effect until the annual subscription required by section 44 has been paid."

[24] Attorneys-at-law upon admission to the Bar who are desirous of practising before the courts, automatically become subjected to this

system of compulsory membership of the Bar Association. So that in order to obtain a practising certificate, the attorney-at-law is mandated to pay an annual subscription to the Association and until that fee is paid, any practising certificate issued to that attorney-at-law is ineffective.

[25] It should be mentioned here that the Defendant's attorney Ms. Vonda Pile has for some years now, failed to pay the subscription fee as prescribed by **section 44** of the LPA. Her position is that she was consistent in the payment of these fees from the time she was admitted to practice. However, she desisted from paying the fees after being informed by the Bar Association that she had to pay Value Added Tax (VAT) on the fees. She believes that since the Bar Association does not fall under the VAT Act Cap. 87, it was exempt from VAT and therefore the subscription fees paid by attorneys-at-law should not be subjected to this tax.

[26] The issue which Ms. Pile at the time had was therefore not with the compulsory membership of the Bar Association and the payment of subscription fees, but was with the legality of the payment of VAT on the subscription fees. VAT or Value Added Tax is a tax assessed at each step in the production of a commodity, based on the valued added at each step by the difference between the commodity's production cost

and its selling price – it effectively acts as a sale tax to the ultimate consumer. The subscription fee is not an imposition for a public purpose and therefore is not a tax; on the contrary it is for the benefit of the Association. There is no provision in the VAT Act, the LPA or any other legislation that I have found which suggests that the Bar Association is amenable to VAT requirements. If this is the case, then there can be no legal basis for the payment of VAT on subscription fees. I therefore uphold the Defendant’s counsel contention on this issue.

[27] With no determination having been made before with respect to whether or not the subscription fees were subject to VAT, the issue has now developed into one concerning the constitutionality or unconstitutionality of **section 44** of the LPA.

Issue 1:

[28] The issue therefore being whether **section 44** of the LPA is unconstitutional since it violates the Defendant attorney’s right under **section 21** of the Constitution which protects her freedom of association. It has already been stated that **section 44** of the LPA speaks to compulsory membership of the Bar Association.

Section 1 of the Barbados Constitution provides:

“This Constitution is the Supreme Law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution

shall prevail and the other law shall, to the extent of the inconsistency, be void.”

Section 21(2) of the Constitution speaks to the protection of freedom of assembly and association. It provides that:

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the protection of his interests.”

[29] These fundamental rights and freedoms are stated as the right of every individual and **section 21** is a provision intended to afford protection to the rights and freedoms, subject to proper limitations expressly set out in the Constitution itself. The court is therefore charged with the responsibility of interpreting and applying the constitutional provisions in accordance with the rights afforded thereto.

[30] In the celebrated case of *Minister of Home Affairs v Fisher [1980] AC 319*, a case which dealt with the interpretation and application of the Constitution, the court noted at page 329

“A Constitution is a legal instrument giving rise, amongst other things to individual rights capable of enforcement in a court of law. Respect must be paid to the language, which has been used, and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation of the character and origin of the instrument, and to be guided by the principle of giving full recognition

and effect to those fundamental rights and freedoms with a statement of which the constitution commences”.

- [31] The court further stated that “a constitutional instrument such as this [should be treated] as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to litigation of private law.”
- [32] It is therefore submitted that in interpreting the Constitution, the court should not apply a legalistic interpretation but rather a generous interpretation is applied in order to give full recognition and effect to an individual’s exercise of his or her fundamental rights and freedoms.
- [33] The expression “freedom of association” was interpreted by **Wooding CJ** in *Collymore and Another v. Attorney General (1967) 12 W.I.R. 5* to mean “no more than freedom to enter consensual arrangements to promote common-interest objects of the associating group...”
- [34] In this case the issue was whether freedom of association included the right to strike. It was held that “the Industrial Stabilization Act abridged the freedom to bargain collectively and the freedom to strike, but that neither of those freedoms could be equated with the freedom of association and assembly which merely connotes the right of persons to associate or assemble and does not include the purposes for which they associate or the objects which in association they pursue.”

The question therefore becomes whether the right to associate includes the concomitant right not to associate. The case of Attorney General and Anor v. Smith is instructive here, there **Williams J** opined:

“But it would seem to me that in a society of free men and women freedom of association must guarantee the individual as well the right to choose with whom he wishes to have social, business and other relationships. A man or a woman must be free to choose his or her spouse, his or her friends, his or her business partner, his or her employer or employee. And conversely, he or she must be entitled to reject social, business and other relationships which they do not wish and to object to such relationships being forced on them against their will.”

[35] The court in the Canadian case of R. v. Advance Cutting & Coring (2001) 3 S.C.R. 209 was also of the view that “freedom of association” included the right not to associated.

Furthermore in the text “Commonwealth Caribbean Constitutional Law 2002 at page 38, Sir Fred Phillips noted that:

“All of the constitutions to which reference has been made provided for the protection of the right of persons to be associated freely, whether it be for political, cultural or business purposes. But as the courts have ruled, this does not mean that a person can be forced to become a member of an association against his will, even though it is established by statute...”

[36] On the basis of the above, it would seem that the right to associate includes the right not to associate. In spite of this it still becomes necessary to consider the purpose of “the LPA”. One of the purposes is to regulate the legal profession, it was also enacted as a measure to

control attorneys-at-law abuse of the public and vice versa. Moreover an attorney-at-law on becoming a member of the Bar Association is bestowed with certain benefits, so that it maybe argued that with these benefits come obligations and one such obligation would be the payment of the annual subscription fee which is fixed by the Bar Association.

[37] The LPA therefore requires an attorney-at-law to pay the stipulated subscription fee to the Bar Association and that failure to comply with the provision results in the attorney-at-law being unable to practice. The Constitution however is the Supreme Law of the land and where any law is inconsistent with its provisions, then it is void to the extent of its inconsistency.

[38] **Section 21** of the Constitution speaks to the freedom of association and as can be seen from the case law and commentary, this right to associate includes a right not to associate. Since **section 44** of the LPA compels an attorney-at-law to be part of the Association, it can be deemed as inconsistent with the Constitution. In addition since the right to associate includes a right not to associate, it can be argued quite successfully that Ms. Pile has a right not to be a member of the Bar Association if she so desires. Furthermore in exercising her

constitutional right not to belong to the Bar Association, she should not be denied audience before the law courts.

- [39] It is the function of the courts to protect the fundamental rights and freedoms of every person against legislation that seeks to interfere with or erode their rights and freedoms. **Section 44** of the LPA clearly violates Ms. Pile's right under **section 21** of the Constitution which protects her freedom of association. Therefore it is the opinion of this court that in so far as **section 44** of the LPA is inconsistent with the Constitution, the inconsistency is void.

Issue 2:

- [40] In relation to the application by Mr. Khan to have Ms. Pile denied a right of hearing, it is Ms. Pile's position that this application should not succeed due to the failure of Mr. Khan to provide the reasons for his giving the certificate of truth as opposed to the party to the action, pursuant to Rule 3.12(4).

Part 3 Rule 3.12 provides that "every statement of case must be verified by a certificate of truth." Rule 3.12(2) states that:

"The certificate should be signed (a) by the claimant, defendant or other litigating party, as the case maybe";

Rule 3.12(3) states that:

“Where it is impracticable for the litigating party to sign the certificate required by sub-rule (1) it may be given by the legal practitioner”, and

Rule 3.12(4) provides that:

“A certificate of truth given by a legal practitioner must (emphasis mine) also certify (a) the reasons why it is impracticable for the litigating part or any litigating party, as the case may be, to give the certificate and (b) that the certificate is given on the instructions of the litigating party or of both or all the litigating parties.”

[41] Where there has been failure to comply with a rule, Rule 26.3 stipulates that “the court may strike out a statement of claim or part of a statement of claim where it appears to the court that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.” However by Rule 26.4 the court is given power to rectify matters where there has been a procedural error and this can be done on or without an application by a party.

[42] In the Trinidadian case of *Afriken Option and Walcott v. Bank of Baroda (Trinidad and Tobago) Limited TT 2014 HC 350* the defendants sought to have the claimant’s claim struck out on the ground that there was no certificate of value as required by CPR Part 8.7 and there was no certificate of truth by the second claimant as required by CPR Part 8.8. **Mohammed J.** reference the case of *Fitzroy Phillips v. the Attorney General Civ App. No. 148 of 2010* where **Kangaloo J.** noted that there was a certificate of truth, which may have contained a

procedural shortcoming but was of the view that Part 26.8 provided rectification for the shortcoming. He also highlighted that the proper approach to such technicalities was to be found in the English Court of Appeal case of *Hannigan v. Hannigan [2000] All E.R. (D) 693 CA* where it was stated in effect by **Brooke LJ** that even though the Civil Procedure Rules were drawn to ensure that civil litigation was brought up to a higher degree of efficiency, one had to bear in mind the overriding objective and not get carried away with technicalities and unnecessary arguments which eat away into the parties resources. The court found that the defect was not of a kind that cannot be rectified by Part 26.8 bearing in mind the approach taken in *Hannigan and Fitzroy Phillips supra*. **Mohammed J.** also found that the statement of case ought not to be struck out as a result of any procedural shortcoming.

[43] In the case at bar it should be noted that this is not a case where a certificate of truth was not filed but rather that the certificate of truth was not filed in compliance with the procedure set out in Rule 3.12(4). The application therefore is procedurally flawed, but it is the opinion of this court that this shortcoming is not fatal to the proceedings and can be rectified by Rule 26.1 of the CPR – the application ought not to be struck out as a result of this procedural error.

Issue 3:

[44] It has also been raised by the Defendant’s attorney that Mr. Khan is not the proper person to make the instant application.

Section 2(2) of the Bar Association Act, Cap. 363 provides that:

“The Association by that name –

- (a) shall and may sue and be sued in all courts before all magistrates and others in all manner of suits, actions, complaints, matters and causes whatsoever;”

Part 5 of the LPA Code of Ethics however addresses an attorney’s duty to the court and the administration of justice. In particular, Rule 44 states that “an attorney shall expose without fear or favour before a proper tribunal, unprofessional or dishonest conduct by any other attorney-at-law...”

[45] Based on the facts, Ms. Pile failed to pay the subscription fees pursuant to **section 44** of the LPA. It can be argued that said failure to pay these fees is unprofessional and an act of bad faith. Mr. Khan is a member of the Bar Association and an attorney of proper standing and as such it is the court’s opinion that in those circumstances he is entitled to make the current application.

Disposal

[46] In light of all of the foregoing this court finds as follows:

- (1) Mr. Khan, the Claimant’s attorney-at-law is a proper person to make the instant application before the court

- (2) The application though procedurally flawed in respect of the Certificate of Truth is not fatal to these proceedings and can be rectified by Rule 26.1 of the CPR
- (3) **Section 44** of the LPA violates Ms. Pile's right under **section 21** of the Constitution which protects her freedom of association. Therefore in so far as **section 44** of the LPA is inconsistent with the Constitution, it is void
- (4) The application to deny Ms. Pile a right of audience before the court is dismissed.

PAMELA A. BECKLES
Judge of the High Court