

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**CV 0099 of 2021**

**Between**

**FRED D. ARCHER**

**CLAIMANT**

**And**

**JUSTICE JACQUELINE CORNELIUS**

**DEFENDANT**

**Before The Hon. Mr. Justice William J. Chandler, Judge of the High Court**

**Dates of Hearing: 2021: May 20; June 25; and November 17**

**2022: January 20; April 20; June 22; October 11, 21; and  
December 5**

**Date of Decision: 2023: January 30**

**Appearances: The Applicant in person.**

**Mr. Ralph A. Thorne QC, Mr. Harlow Broomes with him for  
the Respondent.**

**Ms. Marsha Lougheed for the Solicitor General.**

*Administrative Justice Act Cap 109B – Proceedings against a judge of the High Court acting within her jurisdiction- Alleged breaches of the Constitution and Cap 109B- Application for recusal of judge from ongoing proceedings- Application to strike out claim against the Defendant-Whether High Court Judge amenable to proceedings under Cap 109B-Whether Claim an abuse of process of Court- Whether High Court Judge immune from suit.*

## DECISION

### **Introduction**

- [1] This matter involves an application by the Claimant for judicial review against the Defendant under the provisions of the **Administrative Justice Act, Cap 109B (AJA)** of the Laws of Barbados on the grounds that the Defendant “has infringed on the Claimant’s rights, is in conflict of interest and failed to submit any written judgments or decisions in a matter entitled *CV 1096 of 2008 The Bank of Nova Scotia v Fred D. S. Archer (CV 1096 of 2008)* which the Claimant alleges that The Defendant presided over between 2008-2010.” The Claimant also alleges that the Defendant failed to perform basic functions by not providing written judgments and/or transcripts between 2008-2010 while presiding over *CV 1096 of 2008*.
- [2] The Claimant further alleges that the Defendant made a verbal judgment for him to pay \$101,038.71 to the Bank of Nova Scotia for settlement of a mortgage although the actual sums owed were \$56,356.59 which Order he felt compelled to comply with as he had no proper legal representation at the time of judgment.
- [3] It was his contention that neither the **Constitution of Barbados** nor the **Supreme Court of Judicature Act Cap 116 (Cap 116)** authorizes the Defendant or any judge to deny justice in Barbados by “instructing claimants

to pay usury interest rates, Odious Debt nor government fees/penalties to/through local commercial banks.”

[4] He also alleged that the Defendant is in breach of **section 16(2) of the Constitution of Barbados** in that, by ordering him to pay usurious debts and interest rates, his financial resources had been depleted rendering him unable to facilitate maintenance of the property the subject matter of the mortgage.

[5] The Claimant further alleged that the Defendant was in a conflict of interest since she failed to disclose that she had a long standing relationship with counsel for the bank and that they were on a shopping trip together just prior to the hearing. He alleged further that he heard the Defendant and the Bank’s counsel discussing the matter.

[6] The Claimant claimed the following relief:

- (a) Costs incurred since 2008 in *CV 1096 of 2008* totalling \$500,000.00 together with interest at 8% compounded daily.
- (b) Loss of value and enjoyment of property since 2008- \$250,000.00 plus interest at 8% compounded daily.
- (c) Loss of earnings and business opportunities of USD 500,000.00 plus interest at 8% compounded daily.
- (d) Production of all outstanding written judgments and transcripts by the Defendant.

- (e) That all documents, including written judgments and court documents pertaining to *CV 1096/2008* be provided to the Claimant.

[7] The application is supported by an affidavit filed by the Claimant on 20 August 2021.

[8] The Claimant's affidavit largely repeats his assertions in the Claim form.

### **The Application to Strike Out**

[9] On 15 November 2021, the Defendant filed a Notice of Application for an Order that the Fixed Date Claim Form and affidavit in support be struck out on the ground that they are frivolous, vexatious and an abuse of the process of the court. The Defendant also applies for a cost order against the Claimant.

[10] The grounds of the application are:

1. That **Rule 26.3 (3) (b)** of the **Supreme Court (Civil Procedure) Rules 2008 (CPR)**, provides that the court may strike out such an application if it appears to the court that
  - (a) The statement of case is an abuse of its process; and
  - (b) The statement of case discloses no reasonable ground for bringing the claim.

2. That there has been no breach of the **AJA** by the Defendant and consequently, there is no reasonable ground for bringing the claim.
3. There is no provision in law, nor under the **AJA**, for challenging the decision of a Judge of the High Court by judicial review in the manner pursued by the Claimant.

### **The affidavit in support**

[11] The application is supported by an affidavit sworn to by the Defendant on 15 November 2021 and filed on even date, the contents of the affidavit are referred to in full in paragraph [24] of this decision.

### **The Defendant's Submissions**

[12] On 17 December 2021, the Court ordered the Defendant to file and serve written submissions in support of the application to strike out on or before 1 December, 2021, those submissions were filed by Counsel on 23 June 2022. Mr. Ralph Thorne KC, Attorney-at-Law for the Defendant, submitted that the Applicant's claim for judicial review is misconceived and baseless since a High Court Judge is not amongst the persons listed in **section 2** of the **AJA** whose acts or omissions may be judicially reviewed. In consequence, counsel argues, any purported administrative act or omission of a Judge cannot be the subject of proceedings under the **AJA**.

[13] Mr. Thorne KC also submitted that there has been no breach of the **AJA** by the Defendant and consequently there is no reasonable ground for bringing the claim.

[14] It was counsel's opinion that there is no provision in law, nor under the **AJA** for challenging the decision of a High Court Judge by judicial review in the manner pursued by the Claimant.

[15] Mr. Thorne KC further submitted that the action lacks any proper jurisdiction and is misconceived and baseless and, when weighed together with the affidavit in support of the application, constitutes a scurrilous and scandalous attack on the integrity of the Defendant.

[16] Finally, counsel submitted that the Application is of a species that has no identity in law and is actuated by malice, spite and ill will and that it springs from conduct that is clearly intended to injure the Defendant's reputation in her capacity as Judge of the High Court and personally.

### **The Respondent's Submissions**

[17] The written submissions of the Respondent filed on 20 July 2022 do not address the submissions of the Defendant but merely contain a letter addressed to the **Registrar of the Supreme Court (RSC)** and copied to the Honourable Attorney General lamenting the Defendant's failure to address his claims and enclosing a copy of his prayer for relief.

[18] No submissions were received from the Solicitor General.

[19] By letter dated 27 June, 2022, the **RSC**, on my instructions, requested all parties to file written submission with respect to the personal immunity of Judges from suit on or before 21 July, 2022. None was received by that date.

### **The issues**

[20] There are two issues for decision (1) whether the claim ought to be struck out as being (a) an abuse of process of the Court or (b) frivolous and vexatious or (c) as disclosing no reasonable cause of action and (2) whether the matter can be sustained having regard to the law relating to a judge's personal immunity from suit.

### **The Law on striking out**

[21] **CPR 26.3 (3)** provides that:

**“(3) The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court**

**(a) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;**

**(b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim, or;**

**(c) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.”**

## **The provisions of the AJA**

a. **Section 3** of the **AJA** provides as follows:

**“(1) An application to the Court for relief against an administrative act or omission may be made by way of an application for judicial review in accordance with this Act and with rules of court.”**

**Section 2** of the **AJA** provides as follows:

**“In this Act,**

**"act" includes any decision, determination, advice or recommendation made under a power or duty conferred or,**

**imposed by the Constitution or by any enactment;**

**"administrative act or omission" means an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment;”**

## **Discussion & Analysis**

[22] The application to strike out is posited on **Part 26.3(3)** of the **AJA** set out above. The onus on this application is on the Defendant to prove that the application is frivolous, vexatious and/or an abuse of the process of the Court on a balance of probabilities.

[23] The application is supported by an affidavit sworn to by the Defendant on 15 November 2021 and filed on even date, in which the Defendant deposed under paragraph 4, that the claim is an abuse of the court’s process under

**CPR 26.3 (3) (a)**; paragraph 5 the claimant is exploiting this baseless process to express vile, puerile, scurrilous, and mendacious statements with the sole intention of scandalizing the Defendant in her professional capacity and personal life, that there is no place in a civilized system of justice to abide this misconduct.

[24] The affidavit in support does not depose to any of the classic indicia of a claim that is frivolous, vexatious or an abuse of process. I am unable also to discern from the affidavit any support for the allegation that the Claimant is expressing any “vile, puerile, scurrilous, and mendacious statements with the sole intention of scandalizing the Defendant in her professional capacity and personal life.”

[25] I agree with the proposition that the power to strike out a litigant’s pleadings is an awesome power not to be lightly employed. No litigant ought to be driven away from the judgment seat except where necessary to prevent the abuse of the process of the Court described by *Lord Bingham, CJ in Attorney General V Barker [2000] The Times 7 March 2000 (AG v Barker)* as “...*a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process...*”

[26] Mr. Archer’s affidavit evidence is that the Defendant made a verbal judgment for him to pay \$101,038.71 to the Bank of Nova Scotia for settlement of a mortgage although the actual sums owed were \$56,356.59

which Order he felt compelled to comply with as he had no proper legal representation at the time of judgment.

[27] On this and other allegations of usurious conduct by the Bank, Mr. Archer pegs his submissions that neither the **Constitution** or any other law gives the Defendant the right to subject him to the conduct complained of. Mr. Archer had a right of appeal against the judgment complained of under **Part 62** of the **CPR** by virtue of **section 52** of **Cap 116** and failed to avail himself of that right. Instead he brought this action under the **AJA**. The fact that he is self-represented does not absolve him of the need to follow the law. The invocation of the **AJA** is no substitute for an appeal and neither is impecuniosity an excuse for failing to appeal.

[28] It is my view that this application is misconceived. It is an attempt to use the Court's process under the **AJA** to achieve what cannot now be achieved by way of appeal, namely a review of the Defendant's order, accordingly, it is an abuse of the process of the Court.

[29] I now turn to the question whether the Claim against a judicial officer can be sustained under the **AJA**.

[30] Having raised the issue, the Claimant must provide some evidential basis for his application to strike out. Mr. Thorne KC has invoked **section 3** of the **AJA** which he alleges does not embrace judicial officers. The Claimant's

submissions in response do not speak to this submission. This does not end the matter, since the Claimant is a litigant in person, the court must look to the pleadings to see whether or not the Claim can be maintained.

[31] “Act” is described in **Section 2** of the **AJA** as including any decision, determination, advice, or recommendation made under a power or duty conferred or imposed by the Constitution or by any enactment, whilst “administrative act or omission” is described as meaning any act or omission by a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise, or failing to exercise any power or duty conferred or imposed by the Constitution or any other enactment.”

[32] The Claimant must establish that the alleged omission by the Defendant’s alleged actions or failures to act come within the definition of “administrative act or omission.” In short the conduct complained of must be that of “...a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise, or failing to exercise any power or duty conferred or imposed by the Constitution or any other enactment.”

[33] The Claimant must therefore prove that the Defendant is “a public official or other authority of the Government of Barbados” for the matter to be properly before the Court since the other categories are inapplicable to the Defendant.

### **What is a public official?**

[34] Public Official is not defined in the **AJA**. *Black’s Law Dictionary 6<sup>th</sup> Edn.* *West Publishing Co, 1990*, at page **1230** defines a public official as:

“A person who, upon being issued a commission, taking required oath, enters upon for a fixed tenure, a position called an office where he or she exercises in his or her own right some of the attributes of sovereign he or she serves for benefit of the public. ...The holder of a public office, though not all persons in public employment are public officials, because public official’s position requires the exercise of some portion of the sovereign power, whether great or small.”

In Barbados, we can say that Public Officers are those persons who, upon taking the Oath of Office, under the **Public Service Act, Cap 29** enter upon the service of the Crown. The Public Service in **section 2** means:

“...the service of the Crown in a civil capacity in respect of the Government of Barbados,

**but shall not be construed as including service in**

- (a) ...
- (b) ...
- (c) ...; or
- (d) **except as otherwise provided in the *Constitution*, the office of a Judge;(emphasis mine)**

[35] The office of Judge is *sui generis*. He/she is appointed by the President of the Republic on the advice of the Prime Minister to whom recommendations are made by the Judicial Appointments Committee. Formerly the Prime

Minister was required to consult with the leader of the Opposition. The process of appointment and removal of judges is designed to ensure that judges are independent of the Executive and Legislative branches of government. Judges have security of tenure to further reinforce this concept of judicial independence.

[37] A judge's oath of office binds him or her to the State and the concept of the independence of the judiciary demands that a judge is not answerable to the Executive or Legislative branches of Government.

[38] The Claimant alleges a breach of constitutional rights. **Section 117(1)** of the **Constitution** provides that:

(7) In this Constitution references to the public service shall not be construed as including service in

(a) ...

(b) ...

(c) ...or

(d) **except as otherwise provided in this Constitution, the office of a Judge. (emphasis added)**

In *Ramesh Lawrence Maharaj v The Attorney General of Trinidad and Tobago* (1978) 30 WIR 310, Lord Hailsham of St Marylebone, in discussing the immunity from suit of judges, reflected on the position of public servants, judges and the State noted that:

“A judge, of course, is not in the ordinary sense a servant.”

[39] The principal issue before the court is whether the actions of the Defendant, a judicial officer, are amenable to judicial review. Having regard to **section 2 of Cap 29**, a judge cannot be described as a public official or authority of the Government of Barbados. A judicial officer is expressly excluded from the definition of Public Official in **section 2** and where the **Constitution** is concerned by **Section 117(1)**.

[40] The remedies of certiorari, mandamus and prohibition in **Section 5** of the **AJA**, are remedies which a High Court exercises over an inferior tribunal and not over a Court of concurrent jurisdiction. It would appear unlikely that Parliament intended in the **AJA** to give to a judge of the High Court the power to review or oversee the actions of a judge of concurrent jurisdiction.

[41] A judge, whose decision is sought to be impugned is subject to appeal and that remedy was available to the Claimant, subject to the time limits contained in the **CPR**. As previously mentioned, the Claimant failed to avail himself of his right of appeal.

[42] It is therefore my opinion that the Claimant cannot utilise the provisions of the **AJA** as a substitute for appeal.

### **Immunity from Suit**

[43] I now consider the immunity of judicial officers from suit. The law recognizes that judges are not personally liable in civil actions for things

done in the execution of their judicial functions. The rationale may be found at *Halsburys' Laws of England Vol 20 2014 ed.* at **paragraph 607** which states that persons exercising judicial functions in a court are exempt from all civil liability at common law for anything done or said within their jurisdiction even if there is bias, malice or corruption. It is a rule of the highest antiquity which has been accepted as a respected principle of Public Policy.

[44] In *Maharaj, Lord Hailsham*, having made the observation above quoted at para [38], continued:

“... Judges, particularly High Court judges, were not, and are not, liable to civil actions in respect of their judicial acts; although, of course, in cases of corruption or criminal misconduct, they have never been immune from criminal process or impeachment. This is trite law, and I need do no more than refer to the very full and interesting discussion on the subject in the Court of Appeal in *Sirros v Moore* ([\[1974\] 3 All ER 776](#), [\[1975\] QB 118](#), [\[1974\] 3 WLR 459](#), CA). This civil immunity protected the judge whether he committed a mere error of law or, in the case of a High Court judge (and perhaps not only then), if he exceeded his jurisdiction, or if he committed a breach of natural justice, or, subject to what I have said about criminal liability, if he acted maliciously or corruptly.”

[45] I earlier referred to the independence of the judiciary, *Lord Denning MR.* in *Sirros v Moore [1975] 1 QB 118* contextualised the immunity of judges from suit in relation to judicial independence when he opined as follows:

“Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by absolute privilege. The orders which he gives and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some

gross error or ignorance, or was actuated by envy, hatred and malice and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or writ of error or certiorari, or take some such step to reverse his ruling. Of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear.”

[46] In *Straughn v. Cornelius et al.* BB 2016 HC 29, **Reifer J**, quoted approvingly, inter alia, *Maharaj* and *Sirros v Moore [1975] 1 QB 118*, and having carefully analysed the principles in relation to judicial immunity from suit concluded that such immunity is the law in the Commonwealth Caribbean and Barbados. I am in complete agreement with the opinion of **Reifer J** having regards to the doctrine of *Reception of Law* – see *The Impact of the English Common Law on Caribbean Societies* by **Desiree Bernard J CCJ**.

## Conclusions

[47] The Claimant alleges that the Defendant and counsel for the Bank are good friends. He also deposed to overhearing a conversation between them relative to his case. This appears to be the basis of his allegation that the Defendant has a conflict of interest. It is my view that the instant proceedings are not the appropriate methodology for dealing with an allegation of conflict of interest. If the Claimant felt that the Defendant was

conflicted, he ought to have used the procedures for recusal which would have given the Defendant the opportunity to defend herself. Instead he has chosen to mount an application under the **AJA**, having chosen not to ask the Defendant to recuse herself before she pronounced judgment against him or, judgment having been pronounced, not having appealed it.

[48] This is not a classic case of what is termed frivolous and vexatious. It partakes more of the nature of a case where jurisdiction has not been established under the **AJA**. Further, the immunity from suit to which a judge of the High Court is entitled does not permit these proceedings to be taken against the Defendant in her personal capacity.

[49] Having regard to my findings above, I am of the view that the Claim cannot be sustained and ought to be struck out.

### **Disposal**

[50] In the circumstances, the Court Orders that:

1. The Claim is struck out,
2. The issue of costs is reserved, and
3. The matter is adjourned until 11 May, 2023.

**WILLIAM J CHANDLER**  
**High Court Judge**