IN THE SUPREME COURT OF BELIZE, A.D. 2008

ACTION NO. 695

BELIZE TELEMEDIA LIMITED	**First Claimant/Respondent**
DEAN C. BOYCE	**Second Claimant/Respondent**

BETWEEN **AND**

MAGISTRATE ED USHER	**First Defendant/Applicant**
ATTORNEY GENERAL	**Second Defendant/Applicant**

—

BEFORE The Honourable Abdulai Conteh, Chief Justice.

Ms. Lois Young SC for the applicants/defendants.
Dr. Elson Kaseke for the claimants/respondents

—

DECISION

By a Fixed Date Claim dated 20th October 2008, the claimants, Belize Telemedia Limited and Mr. Dean C. Boyce, who is the manager of the former, claimed the following against the two defendants in this action:

1. *A declaration that the issue of the arrest warrant by Magistrate Usher on 4 July 2008 was unlawful as it contravened s.112 of the Belize Supreme Court of Judicature Act and is therefore null and void;*

2. *Damages in respect of:*
   (i) the damage to Telemedia's reputation;

(ii) the damage to the reputation of Dean Boyce; and

(iii) compensation for the pecuniary loss caused to Telemedia due to it having to make the Initial Payment;

3. Exemplary damages on the basis of the egregious conduct of Magistrate Usher in issuing the arrest warrant on 4 July 2008;

4. Statutory interest on any damages awarded; and

5. Costs.

2. The first defendant is the Magistrate of the Revenue Court and the second defendant is the Attorney General sued in his capacity as representing the Government of Belize.

3. The defendants' attorney by an application dated 13th November 2008 sought originally pursuant to Rules 26.1(2)(j) and 19.2 (6) of the Supreme Court (Civil Procedure) Rules and the Court's inherent jurisdiction a striking out order against the defendants' claim.

4. Initially when the application was moved it was stated to be pursuant to Part 26.1 (2)(j) of the rules and the Court's inherent jurisdiction. This provision enables the Court, if it so decides, to dismiss or give judgment on a claim after a decision on a preliminary issue.

5. There is no preliminary issue for determination before the Court in this case. There is what is clearly a preliminary objection, in the Court's view, to the claim by the claimants, the two became merged in the course of the arguments on this application.

6. The applicant's attorney's attention was therefore drawn to **Rule 26.3(1)(c)** which contains provisions for sanction to striking out a party's statement of case. Paragraph (c) of this rule empowers the Court additionally to any other powers it may have under the rules, **to strike out a statement of case**, if it considers that the **statement of case** or the part to be struck out **discloses no reasonable ground for bringing or defending a claim**. It is to be noted that "statement of claim" is given, under the definition provision of the Rules in **Part 2.4**, an expansive meaning to mean **"a claim form, statement of claim**, defence, counterclaim, ancillary claim forms or defence and a reply."

7. The amended application itself is asking the Court for an order *"striking out the claim by the claimant …"*

8. I take it therefore that what the applicant is really asking for is a striking out order of the claim form or statement of case of the claimant.

9. I therefore think that in the circumstances of this application, **Part 26.3(1)(c)** is the most appropriate format for it.

10. I must point out here however, that there is a considerable overlap between the operation and effect of Part 15 of the Civil Procedure Rules (relating to summary judgments), Part 26.1(1)(j) and Part 26.3(1). They all speak to the power of the Court to summarily decide a case without the need for a formal trial. This much they all have in common. However Part 15 is for a **summary judgment** in circumstances set out in 15.2, that is, if the Court considers that (a) the claimant has no real prospect of succeeding on the claim or on a particular issue, or (b) the defendant has no real prospect of successfully defending the claim or the issue.

11. Part 15.3 enables the Court to give summary judgment in any type of proceedings except those stated which include proceedings by way of a fixed date claim, as the instant claim. Part 15.4 and 5 set out the procedure and evidence required for a summary judgment.

12. Importantly, in my view, an application for summary judgment presupposes that both parties have filed and exchanged their statements of case from which the Court may make the determination specified in 15.2.

13. **Part 26.1(1)(j)** empowers as well the Court to dismiss or give judgment on a claim after a decision on a preliminary issue. This power is among the general powers of the Court at case management of a case. It is however, in my view, only applicable **after** a decision on a particular issue.

14. **Part 26.3(1)** however, speaks to the armory of sanctions available to the Court at case management. In particular, it provides in terms as follows:

> *"26.3(1) 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:*
>
> *(a) that there has been a failure to comply with a Rule or practice direction or with an order of direction given by the court in the proceedings;*
>
> *(b) 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;*
>
> *(c) that a statement of case or part to be struck out discloses no reasonable grounds for bringing or defending a claim or*

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10." (Emphasis added)

15. An objective of litigation is the resolution of disputes by the Courts through trial and admissible evidence. Rules of Court control the process. These provide for pre-trial and the trial itself. The rules therefore provide that where a party advances a groundless claim or defence, or no defence, it would be pointless and wasteful to put the particular case through such processes, since the outcome is a foregone conclusion.

16. An appropriate response in such a case is to move to strike out the groundless claim or defence at the outset.

17. Part 26 on the powers of the Court at case management contains provisions for just such an eventuality. The case management powers conferred upon the Court are meant to ensure the orderly and proper disposal of cases. These in my view, are central to the efficient administration of civil justice in consonance with the overriding objective of the Supreme Court Rules to deal with cases justly as provided in Part 1.1 and Part 25 on the objective of case management.

18. The grounds urged by learned counsel in support of the instant application are that **the claim discloses no cause of action against either the first or second defendant/applicant, and that the declaration sought in the claim form is academic**. Three affidavits were filed in support of the application.

19. The provision of the Rules in Part 26.3(1)(c) which enables the Court to strike out a claim because it discloses no reasonable grounds for bringing

or defending the claim is undoubtedly a salutary weapon in the Court's armory, particularly at the case management stage. It is intended to save the time and resources of both the Court itself and the parties: why devote the panoply of the Court's time and resources on a claim such as to go through case management, pre-trial review and scheduling a trial with all the time and expense that this might entail, only to discover at the end of the line that there was no reasonable ground for bringing or defending a claim that should not have been brought or resisted in the first place? This provision in the rules addresses two situations:

> *(i) When the content of a statement of case is defective in that even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or*
>
> *(ii) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.*

(See **Green Book, The Civil Practice 2008**, CPR 3.4 [4] at p. 76 and **The White Book 2005**: **Civil Procedure** at paras. 3.4.1 and 3.4.2.

20. It is important to bear in mind always in considering and exercising the power to strike out, the Court should have regard to the overriding objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?

21. These are always important factors that perforce must attend any consideration in exercising the discretion to strike out or not to strike out a claim. – **Walsh v Misseldine (2000) CPLR 201, C.A.**, cited in **The Caribbean Civil Court Practice (2008)** at Note 23.35; and generally, **The White Book 2005**, particularly at pp. 88 to 92 at para. 3.4.1 and 3.4.2.

22. Although an application for striking out is essentially a summary process in which the Court makes a broad judgment after considering the available possibilities, the hearing of the instant application was like a virtual trial and covered three days with extensive oral and written arguments and submissions by Ms. Lois Young SC for the applicants/defendants; and Dr. Elson Kaseke for the claimants/respondents.

Determination

23. I have carefully weighed and considered the arguments and submissions of both Ms. Young SC for the applicants/defendants and Dr. Kaseke for the claimants/respondents, and have come to the considered view that in the light of the considerations I have stated in paras. 19 and 20 above, that I must accede to the application. This, I should make clear, is in no way shutting the claimants/respondents out of this Court; but I have in the circumstances of this claim, ineluctably come to the conclusion I have stated for the following reasons:

24. In the first place, I do not think, given the developments that have taken place since the first defendant issued the warrant of 4th July 2008, which is sought to be impugned by the declaration sought in the claim, that there would be any practical utility for the claimants/respondents themselves or anyone else for that matter in such a declaration. The present fixed date claim form to which the applicants/defendants have taken objection, was filed on 20th October 2008. The principal relief sought by way of a

declaration is that the issue of the arrest warrant by the first defendant on 24th July 2008 *"was unlawful as it contravened section 112 of the Belize Supreme Court of Judicature Act – Chapter 91 of the Laws of Belize, and is therefore null and void."* The effect of section 112 of Chapter 91 is generally to suspend the execution of any decision of a Magistrate Court, subject to certain exceptions, when an appellant has given notice of **and security for appeal as prescribed by rules of court**. (More on this later).

25. However, the indisputable position is that this section of the Act was amended on 18th July 2008 to exclude decisions and orders of Magistrates' Court under the Income and Business Tax Act, from being suspended in operation pending appeal against such decisions or orders. The arrest warrant sought to be impugn was evidently issued under this Act: see affidavit of first applicant/defendant dated 12 November 2008.

26. I am therefore of the view that on 20th October 2008, when the present claim was filed, there was no actual **lis** between the parties on the effect of section 112 of the Supreme Court Act that would sustain or warrant the declaration sought.

27. This, in my view, is so notwithstanding the fact that the claimants/respondents had on the same day as the amendment to section 112 was made, that is, 18th July 2008, obtained a declaration from the Court *"that the effect of s. 112 of the Supreme Court of Judicature Act, Chapter 91, was to suspend the execution of the decision dated 24 June 2008, made by the Revenue Magistrate … against the claimants."* Indeed, the learned judge who made the declaration was alive to the possibility that an amendment to section 112, as in fact happened, could "repudiate" his judgment. He expressly stated that he would need to peruse the amendment to see if it would have this effect. I do not understand the claimants/respondents to be arguing otherwise in

this application. If the learned judge had had the benefit of the amendment, it is certain his conclusion would have been different.

28. Therefore the effect of the amendment of 18 July 2008 to section 112 of Chapter 91 is such as to make the declaration sought in these proceedings to be of no practical utility in the circumstances. Therefore, I find that even if the factual statement about the first applicant/defendant issuing the arrest warrant on 4th July 2008 were established, the claimants/respondents will not succeed in obtaining the declaration they seek. This is so because at the time of their claim the relevant legislation, that is section 112 of Chapter 91, had been changed.

29. I draw support for this conclusion from the cases of **William Construction Ltd v Blackman (1995) 1 W.L.R. 102** and **R v Ministry of Agriculture, Fisheries and Food ex p Live Sheep Traders Ltd (April 12, 1975 10/554/93**. Both cases are cited in Zamir and Woolf, **The Declaratory Judgment**, Third Edition 2002 at paras. 4.084 and 4.085 at p. 159. In the former case, the applicant had challenged the Cabinet of Barbados' award of a contract for construction works to a rival despite the fact that the applicant's bid was lower. However, by the time the Privy Council heard the case, the construction works were almost complete. The Board indicated that it was, in such circumstances, inclined to accede to arguments that there was no utility in granting the declaratory relief sought.

In the latter case, that is, **the Live Sheep** case, the applicants challenged various refusals of licences to export animals or the grant of licences subject to conditions. The relevant legislation, which was the foundation of the claim, was repealed and replaced more than two months before the application. It was therefore decided that the application for declarations

had no direct utility and they would only determine facts which may be relevant to a possible speculative claim for damages,

30. In the instant case, the declaratory relief sought is seeking to impugn the order of the Magistrate because of what the claimants thought was the effect of section 112 of Chapter 91. But on the facts, for well over two months before the claimants/respondents' claim, the Legislature had spoken clearly to the effect that an appeal against a decision of a magistrate in the circumstances did nor operate as a stay of execution of that decision.

31. I am not, with respect, convinced or persuaded about the relevance or applicability of the decisions of the English House of Lords in **R v Secretary of State for Home Department, Ex parte Abdi (1996) 1 W.L.R. 298**; and **R v Secretary of State for the Home Department Ex parte Salem (1999) 2 W.L.R. 483**. These cases, relied upon by Dr. Kaseke, deal with asylum applications and not, as in the instant case, with a change in the law which makes a subsequent claim for a declaration regarding the former law academic. Indeed, in **Salem supra**, the House of Lords held that academic appeals should not be heard unless there was a good reason in the public interest for so doing. The House in fact refused the appeal to proceed. In the instant case, in the face of the express repeal of the effect of section 112 of Chapter 91 on decisions of magistrates under the Income and Business Tax Act, I find there is nothing to be gained by going ahead with the declaration the claimants/respondents seek. It is all now academic.

32. I can conclude accordingly, that the declaration sought by the claimants/respondents can only, therefore, in the circumstances, be academic and a possible peg to hang a speculative claim for damages. I will address this aspect of the claimants/respondents' claim later.

33. Secondly, on the evidence and the law, I am not satisfied that there was, in fact, a valid and subsisting appeal in this case at the time the warrant of arrest was issued, such as to engage the operation of section 112 of Chapter 91 at the relevant time, even before its amendment.

34. Mr. Tesecum on behalf of the claimants/respondents states in paras. 17, 18, 23, 24 and 25, the decision of the magistrate and the appeal to the Supreme Court against the decision and the issue of the arrest warrant. He exhibits as **ET 5**, a copy of the first claimant/respondent's notice of appeal dated 27th June 2008.

35. Two affidavits were filed in support of the applicants/defendants' contention that in point of fact, there was no appeal against the magistrate's decision of 27th June 2008, which could have operated, in virtue of the then unamended section 112 of Chapter 91, to have suspended that decision and thereby obviated the issue of the arrest warrant of 4th July 2008, which the claimants/respondents now seek to impugn: see in particular, the affidavits of Dwayne Broaster, the cashier of the Magistrate's Court, dated 25th November 2008; and that of Orleen Pitzold, the clerk of the Magistrate's Court, dated 1st December 2008. The pit and substance of both affidavits is that in respect of the first claimant/respondent's appeal against the said decision of the magistrate, there was not, contrary to rule 3 of the Supreme Court Rules, Chapter 82 of the Subsidiary Laws of Belize 1991, Volume 3, any deposit paid as required.

36. Therefore, Ms. Young SC for the applicants/defendants argued and submitted, that there was no appeal which could have stayed the magistrate's decision. Consequently, she urged, the claimants/respondents could not legitimately or property claim to impugn the arrest warrant issued by the magistrate on 4th July 2008.

37. There as been no refutation by affidavit evidence on behalf of the claimants/respondents that the security of $3.00 required by Order 73, Rule 3(1) was ever paid. This order made under Part X of Chapter 91 in terms provides:

> *"3(1) The appellant shall on lodging written notice of appeal other than in a criminal cause or matter,* ***deposit with the clerk the sum of three dollars as security for the due prosecution of the appeal*** *in accordance with the provisions of this order, and* ***if the appellant fails to make the deposit the notice of appeal shall be of no effect****." (Emphasis added)*

38. The sum of $3.00 may not be exactly a princely or prohibitive amount, but its payment is a statutory requirement. Failure to pay it is expressly stated to be to make the notice of appeal of no effect. This is, I find, a mandatory statutory requirement. The claimants/respondents did not, on the evidence, pay this security. Therefore, I find, as of 4th July 2008 when the magistrate issued the arrest warrant sought to be impugned in the instant claim, there was in fact and in law, no valid and subsisting appeal against the magistrate's decision of 27th June 2008 which could have operated to stay the issuing of the arrest warrant on 4th July 2008.

39. On behalf of the claimants/respondents on the other hand, Dr. Kaseke somewhat implausibly argued that the payment of the $3.00 security was not required or necessary. This is so, he boldly argued, because the first claimant/respondent's appeal against the magistrate's decision was made pursuant to Part 60 of the Supreme Court (Civil Procedure) Rules, 2005, which provide for appeals to the Supreme Court. The short answer to this is that this part of the Civil Procedure Rules *"deals with appeals to the Supreme Court from any* ***tribunal*** *or person under any enactment other than an appeal by way of case*

stated." And **tribunal** is defined as meaning ***"any tribunal other than a court of law established under an enactment."*** Surely, magistrates courts established as they are under the provisions of Chapter 94 of the Laws of Belize (inappropriately called "Inferior Courts") establishing the magistrates' Courts and Chapter 93 establishing the Family Court, can hardly, other than loosely, be described as "tribunals".

40. This it must be said, was a novel contention by Dr. Kaseke as he was hard pressed to find any appeal from a magistrate's Court that had been prosecuted under Part 60 of the Supreme Court (Civil Procedure Rules) 2005. In fact the claimants'/respondents' notice of appeal against the magistrate's decision makes no reference or allusion to Part 60 of the Civil Procedure Rules: see **Exhibit ET 5** to Mr. Tesecum's affidavit.

41. For the avoidance of doubt, it should be stated that appeals from magistrates' court continue to be governed by Part X of the Supreme Court of Judicature Act – Chapter 91; and contrary to Dr. Kaseke's contention, Statutory Instrument No. 75 of 2005 which brought the Supreme Court (Civil Procedure) Rules into operation from 4th April 2005 **did not** abolish or supersede Part X of the Supreme Court of Judicature Act and Rules made under it. What this instrument revoked were rules of Court relating to the **procedure in civil proceedings in the Supreme Court** other than those relating to insolvency, including winding up of companies and bankruptcy and matrimonial proceedings and non-contentious probate matters. It did not revoke Part X of Chapter 91 nor the Rules made under it. This much is clear, in my view, from a perusal of section 108 of this Act regulating appeals from magistrates' Courts.

42. In any event, for the purposes of the instant application, I am satisfied that there was no valid and subsisting appeal and that even if **arguendo**, it could be said that the appeal was under Part 60 of the Supreme Court

(Civil Procedure) Rules, the effect would be, as Ms. Young SC correctly submitted, pursuant to **60.3** not to operate as a stay – the appeal would not therefore in and of itself have operated as a stay.

43. Finally on the academic and non-utilitarian nature of the declaration sought in respect of the arrest warrant, I am satisfied that, on the evidence, neither of the claimants/respondents was arrested pursuant to it, not incarcerated as a result of it: see para. 18 of Mr. Tesecum's affidavit and para. 9 of Mr. Edd Usher's affidavit. I can't, in the circumstances therefore, conceive of any practical purpose that might be served by the declaration being sought in respect of an arrest warrant that was never effected.

44. I now turn to the claims for damages in the claim form. In respect of these, it is manifest from a perusal of the claim form that no facts are set out or stated indicating what the claim is for other than the nebulous reference to *"damage to the reputation"* of the two claimants/respondents.

45. The claim form, I find, is well short of the requirements of the Rules in Part 8 regarding the duty of a claimant to set out his case. I venture, with respect, to say that the claim form even borders on the incoherent and makes no sense: no cause of action, or delict by the applicants/defendants, is stated in respect of which the damages, including the exemplary damages are being claimed; nor for that matter, is the nature of *"the egregious conduct"* of the first defendant in issuing the arrest warrant on 4th July 2008 stated. I dare say that the claimants/respondents' claim form may be a model of brevity, but in this it fails to rise up to what is stipulated in Part 8.7 of the Rules on the claimant's duty to set out his case. In particular, 8.7(1) enjoins a claimant *"to include in the claim form or in the statement of claim, a statement of all the facts on which the claimant relies."*

46. The present claim is by way of a fixed date claim, but this fact does not in my view, absolve the claimants/respondents from the requirements of Part 8.7. A read through the claim form in this case left me wondering as to the cause of action the damages sought are being claimed. There is to be sure, the averment in Part C of Mr. Tesecum's **affidavit** to the tort of misfeasance in public office by the first applicant/defendant. But ominously, I find, nowhere in the claim form is this tort claimed by the claimants/respondents in their fixed date claim. The affidavit is of course **only** evidence. It is not the appropriate medium or place to make a claim, or make tendentious statements or conclusion on the law.

47. The so-called *"egregious conduct"* of the magistrate in issuing the arrest warrant on 4th July 2008 may or may not constitute the tort of malfeasance in public office. But the proper if not the only place in my view, to claim this is in the claim form, whether by way of a fixed date claim form or general claim form; and most certainly not in an affidavit.

48. If, as I suspect, the gravamen of the claimants/respondents' case is the possible damage to their reputation, then of course, the tort of defamation may well be open to them. But their present claim form in respect of the damages they seek to claim is, I find, incoherent and makes no sense and discloses no reasonable grounds for bringing the claim. It is bound to fail as a matter of law.

49. I find, as well, that the claim for compensation for the pecuniary loss alleged to have been caused to the first claimant/respondent in having to make the Initial Payment, makes no sense at all and there is in my view, no reasonable ground for advancing such a claim at all. At the very least, if the first claimant/respondent feels aggrieved at making the payment, the Income and Business Tax Act contains enough remedial provisions to

pursue this. The fixed date claim form with a claim for *"compensation for pecuniary loss"* is not the correct or appropriate medium to ventilate and pursue this in the circumstances of this case. This claim for compensation is equally doom to fail as advanced in the fixed date claim from in this case.

Conclusion

50. It is for all these reasons that I must accede to the applicants'/defendants' application to strike out the claim in this case. In the light of my findings in this case, I am convinced beyond peradventure that the claimants'/respondents' fixed date claim form discloses no reasonable grounds for bring this claim.

51. It is accordingly hereby ordered to be struck out.

52. Before I part with this decision, I must refer to the issue of the liability of magistrates for possible wrongs they might commit in the course of their judicial functions. This issue featured rather large in the arguments on the application. It is therefore in recognition of the learning and industry of both Ms. Young SC and Dr. Kaseke that I mention it briefly. It was sought to advance it under the broad sweep of misfeasance in public office. But it was not claimed **eo nomine** or at all in the claim form. It only appeared in Mr. Tesecum's affidavit on the advice, as he stated, of counsel. However, because of my findings and conclusion on this application, I do not feel called upon to address this issue now, despite the legal **tour d' horizon** both attorneys engaged in.

53. I therefore say no more on this, save to say that magistrates enjoy immunity for judicial acts when acting within their jurisdiction; and as justices of the peace, their immunity has long been subject to statutory

regulation – The Justices Protection Act 1848, which is an Imperial Statute that may still be applicable in Belize. This Act has now been replaced in England by the Justices of the Peace Act, 1979.

In the event, however, the issue was not relevant for my decision in this matter.

A. O. CONTEH
Chief Justice

DATED: 17th December 2008.