

IN THE SUPREME COURT OF BELIZE A.D. 2019

CLAIM NO. 55 OF 2019

BETWEEN (FRANK EDWARD PACO

CLAIMANTS

SMITH JR et al

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(ESTEVAN PERERA et al

1<sup>ST</sup> DEFENDANT

*BEFORE THE HONOURABLE ACTING CHIEF JUSTICE MICHELLE ARANA*

Mrs. Michelle Trapp-Zuniga and Mr. Arthur Saldivar for the Claimants

Mrs. Samantha Matute Tucker for the Defendants

1. This is an Application to Strike Out Claim. The substantive claim is a claim for judicial review of the Elections and Boundaries Commission's (the Commission) failure to comply with the Constitution of Belize under section 90(1) (a). The Claimants seek declarations and orders that the Commission comply with the Constitution, that electoral divisions be altered or re-divided, that the Commission be ordered to comply with section 90(1) (a) within a specified time, that continued violation of section 90(1) (a) is a violation of Section 6 of the Constitution and that elections scheduled for the year 2020

be stayed until the Commission complies with section 90(1) (a) of the Constitution. The Defendants/Applicants have brought this Application to strike out this claim on several grounds, including failure of the Claimants/Respondents to comply with the Supreme Court (Civil Procedure) Rules, the declaration sought to prevent the General Elections now rendered moot and academic, and the prohibition against courts interfering in matters of politics and high policy. The Claimants/Respondents resist this Application on the basis that the Respondents should be allowed to interrogate breaches of their fundamental rights under the Constitution of Belize, the overriding objectives of the Supreme Court (Civil Procedure) Rules requires that the court deal with cases justly, declarations are free standing orders under the CPR and striking out is an option of last resort and should only be used in the clearest cases, and the case at bar is not such a case. The court now examines these legal submissions and determines this Application.

## **2. Legal Submissions on Behalf of the Defendants/Claimants**

Mrs. Samantha Matute-Tucker contends on behalf of the Defendants/Applicants that this claim should be struck out for several reasons. The first is that there is no reason on record for the Claimants/Respondents' failure to comply with the Supreme Court (Civil

Procedure) Rules 2005 (CPR). The Claimants have failed to promptly file an application for relief from sanctions supported by evidence on affidavit. The Court would therefore be unable to assess whether the failure by the Claimants/Respondents was intentional, whether there was a good explanation for this failure and whether there has been general compliance with the Rules. Mrs. Tucker cites **Anthony Clyne v The Guyana and Trinidad Mutual Insurance Co. Ltd. HCVAP 2010/011** where the Eastern Caribbean Court of Appeal emphasized the mandatory nature of the Rule dealing with relief from sanctions. Misapprehension of the law and lack of diligence on the part of counsel are not good reasons.

3. Mrs. Tucker also submits that the declaration sought to prevent the use of section 93 of the Constitution for electoral divisions for the purposes of General Elections and the injunctive relief sought to prevent the election are now moot and academic. The courts would generally not adjudicate on matters where no legal controversy exists. In **Ainsworth v Criminal Justice Commission (1992) 175 CLR 564**, the Australian Federal Court held that declaratory relief is confined by considerations which mark out the boundaries of judicial power. Hence declaratory relief must be directed to the determination of legal controversies and not to answering abstract or

hypothetical questions. The person seeking relief must have “a real interest” and relief will not be granted if the question is “purely hypothetical”, if relief is “claimed in relation to circumstances that have not occurred and might never happen” or, if “the court’s declaration will produce no foreseeable consequences for the parties.” Mrs. Tucker says that the elections have gone and as a consequence the injunction to stop the use of electoral divisions is not an issue in controversy, and the declaration to have the divisions not used is spent. If the court is to continue to address these reliefs, it would be an affront to the overriding objectives of the Rules.

4. Mrs. Tucker also argues that the Court should not interfere in matters of politics and high policy. The drawing of electoral divisions and boundaries is one of policy and within the remit of the legislature and the executive. The establishing of the committee to address the technical issues of redistricting are matters for the executive and the legislature and the evidence is that the executive has started to do their work. The Affidavit evidence of Mr. Oscar Sabido SC dated the 14<sup>th</sup> December 2021 speaks to the steps that have been taken by the Commission in establishing a task force to carry out the re-division so that the electoral divisions may have as nearly as may be an equal number of persons eligible to vote, and the timeline to get the re-division done,

as well as steps taken in the budget. Mrs. Josephine Tamai also gave Affidavit evidence that the Task Force is now formed and prepared to commence the redistricting process and that she has been appointed Chairperson of the Task Force. The Elections and Boundaries Department has requested supplemental funds of \$452,934.00 until the budget has been approved for the fiscal year 2022/2023 so that the Task Force could commence its work.

5. Mrs. Tucker submits that while the courts are the guardians of the Constitution and as such, tasked with the duty to ensure that the right to protection of law is not infringed, in the case at bar, this is a very narrow line and the court has to be careful that it does not breach the separation of powers doctrine. This was the caution made by Justice Saunders (as he then was) in the High Court of Anguilla in **Benjamin et. al. v the Ministry of Information et. al.** at page 17:

*“Our democracy rests on three fundamental pillars, the legislature, executive and judiciary. All must keep within the bounds of the Constitution. The judiciary has the task of seeing to it that legislative and executive action does not stray outside those boundaries onto forbidden territory. If that occurs and a citizen withstanding complains, the court declares the trespass and grants appropriate remedies.*

*Within the constitutional parameters, the legislative and the executive are responsible for enacting and implementing such policy measures as they consider being most appropriate for the people. The judiciary has to be careful that it too does not stray from its function and usurp the authority and role reserved for the other two pillars.” (Emphasis added)*

6. Mrs. Tucker cites the decision of Belize’s apex court the Caribbean Court of Justice in **Christopher Ram v The AG [2019] CCJ 14 (AJ)** where the Court held in an elections case that it was not within the court’s remit to direct the executive or constitutional players on their duties:

*“Article 106 of the Constitution invests in the President and the National Assembly (and implicitly in GECOM), responsibilities that impact on the precise timing of the elections which must be held. It would not therefore be right for the court, by the issuance of coercive orders or detailed directives, to presume to instruct these bodies on how they must act and thereby preempt the performance by them of their constitutional responsibilities. It is not for example, the role of the Court to establish a date on or by which the elections must be held, or to lay down timelines and deadlines that, in principle, are the preserve of political actors guided by constitutional imperatives...”*

7. In conclusion, Mrs. Tucker submits that this CCJ decision shows that matters of high policy such as electoral boundaries should be left to the constitutional players especially the Elections and Boundaries Commission. Whilst declarations are free standing orders that the court can make, if they would serve no useful purpose, the Court should not grant them. The Court ought to leave the constitutional players to do their work and have the issues addressed to have boundaries properly revised. For all these reasons, the claim should be struck out as an abuse of the process of the court.

#### **8. Legal Submissions on behalf of the Claimants/Respondents**

Mr. Arthur Saldivar argues that this Application should not be granted. He says that the Claimants/Respondents should be allowed to interrogate breaches of their fundamental rights under the Constitution of Belize and that the court is vested with the discretionary power to grant the declarations and orders sought. While the State has grounded their Application to Strike on Part 26.3(1) of the CPR which give the court a general discretion under its case management powers to strike out a claim where there has been an abuse of the process of the court, especially if there has been failure to comply with an order or direction given by the court, or where the part to be struck out discloses no reasonable grounds for bringing the claim. However, the

Claimants/Respondents contend that the Court in addressing this rule ought properly to call in aid part 1.1 of the CPR which addresses the overriding objective.

9. Mr. Saldivar submits that declarations are free standing orders under the CPR as stated in **Belize Bank Ltd. v the Association of Concerned Belizeans Civil Appeal no. 18 of 2007**, where the Court of Appeal of Belize found that Part 56 of the CPR conferred a free standing entitlement on litigants to move the court for a declaration, whether it be in respect of a public or private law right.

10. Mr. Saldivar further argues that striking out a claim should be an option of last resort and should only be used in the clearest cases. The Affidavit in support of the application does not accurately reflect the state of the evidence in this matter. The affidavit of Mr. Sabido suggests that the Claimants/Respondents did not file or submit their witness statements in the time mandated by the court. This is inaccurate since issues with the Registry's online filing system and not the purported inaction or delinquency of the Claimants/Respondents resulted in what appeared to be late filing. There are substantive issues for the court to interrogate and if the court ultimately in a



trial finds against a party, costs will be awarded. This is not a proper case for strike out based on the conduct of the parties and the state of the evidence.

11. Mr. Saldivar submits that striking out a case is a draconian measure of last resort. He prays in aid of this submission Justice Sonya Young's decision of **Barbara Estella Romero v Minister of Natural Resources et. al. in Claim No. 302 of 2012** where Her Ladyship adopted the position of the learned authors of Blackstone Civil Practice 2004 at page 341 that striking out must be "limited to plain and obvious cases where there was no point to having a trial." The court in its active case management role must identify the issues at an early stage and decide which issues need full investigation and to dispose summarily of the others.

12. Mr. Saldivar submits that the Constitution requires that the court's ability to judicially review executive action and omissions must remain autonomous and impartial in order to perform the court's function as the guardian of the Constitution. The court should not relegate its responsibility to ensure constitutional compliance based on a technical objection in order to maintain a clear and apparent, unconstitutional state of affairs that taints the electoral and democratic process, and denies citizens their ability to vindicate their

constitutional rights. The Claimants/Respondents rely on the warning of Fraser J.A. in **Collymore v. The AG of Trinidad and Tobago (1967) 12 WIR 5**, where it was held that no one can disobey the Constitution with impunity. The Elections and Boundaries Commission cannot be allowed to violate the right to protection of law guaranteed by the Constitution to every citizen and get away without judicial scrutiny. Section 90(1) of the Constitution is clear:

*“The Elections and Boundaries Commission shall, after considering the distribution of the population throughout Belize, make proposals from time to time for dividing Belize into electoral divisions in such a way that*

*(a) Each electoral division shall have as nearly as may be an equal number of persons eligible to vote”*

13. Mr. Saldivar also submits that despite the appointment of an expert witness who has produced a report on the grossly severe state of malapportionment impacting all thirty one (31) electoral constituencies, the Election and Boundaries Commission has had at least the past two years to consider the distribution of the voting population throughout the country and has made no effort to comply with the Constitution in addressing the gross inequality created. The setting up of a task force by the Applicants is not sufficient to

address this issue and does not warrant the Court to strike out this claim. A task force is not a proposal and it is submitted that only a proposal made pursuant to section 90(3) of the Constitution of Belize can achieve the ends that the Claimants/Respondents seek:

*“The proposals of the Commission made pursuant to this section shall be laid before the National Assembly by the Chairman of the Commission, and the electoral divisions specified in those proposals shall be the electoral divisions of Belize for the purposes of any law for the time being in force relating to the election of members of the House of Representatives when, and shall not be such electoral divisions until, enacted as law by the National Assembly.”*

**14.** The court’s attention is also drawn to the development of the Protection of the Law as a fundamental right. In support of the submission, Learned Counsel cites **The AG of Barbados v. Joseph [2006] CCJ 3 (AJ)** where the CCJ held that in order to afford the protection of the law to a condemned prisoner, an ouster clause could not prevent the court from enquiring into the decision of the mercy committee in Barbados. The CCJ in **Maya Leaders Alliance v The AG of Belize [2015] CCJ 15 (AJ)** held that the evolving concept of ‘protection of law’ “encompassed a multi-dimensional, broad and pervasive

constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights.”

Mr. Saldivar argues that these cases underscore the importance and special feature of the nature of the right to protection of the law under the constitution, equality under the law is inclusive of the weight to be attributed to each vote of every citizen. When the process of elections is so afflicted by malapportionment that the weight of a vote in the smallest constituency is 20 times greater than that in the largest, the guiding principle of one man, one vote and the equality it underscores is undermined.

**15.** In conclusion, Mr. Saldivar submits that what the Applicants propose is not fair, just, reasonable or in the interest of justice. The Elections and Boundaries Commission simply attempts to substitute an intradepartmental initiative vis a vis a task force for the express requirement of making a proposal to Parliament. The proposal should be the initial step to apprise parliament of the need for re-divisioning and the specific constituencies to be affected;

thereafter the Commission can appoint a task force after receiving parliamentary approval and funding for the effort to address the methodology to be utilized to accomplish the task. To strike out this claim based on this application would amount to sanctioning of unconstitutional behavior and tendencies. The omission of the Commission to act is so egregious that it violates the Respondents/Claimants' constitutional right to the protection of the law. The Application to Strike out Claim should be dismissed with costs to the Respondent.

## **16.RULING**

I thank both counsel for the written and oral submissions made on this Application to Strike Out this claim. I have carefully considered the submissions both for and against this application. Let me say at once that Mrs. Tucker is correct that the specific issue of the declarations sought by the Claimants/Respondents in reliefs 4 and 6 of the Fixed Date claim form to prevent the use of section 93 of the Constitution for electoral divisions for the purposes of General Elections has now been overtaken by events and rendered moot and academic. Therefore, the court will not adjudicate on those declarations sought since the General Elections have been held. And a new political administration now has the reins of power; the court will not engage in an exercise in futility. While I agree that generally the Civil Procedure

Rules should be followed by counsel, and relief from sanctions should be sought from the court by the party who has failed to comply with court orders, this is not an ordinary case where the court made an order setting out timelines for compliance by parties. In this particular case, counsel came to an informal arrangement between themselves as to the dates by which certain matters should honor agreements made between themselves, but the matter becomes nebulous where there is no perfected order and therefore no order fashioned by the court on which such an application to strike out would be grounded. More importantly, the issue which has persuaded me to rule in favor of the Claimants/Respondents is the gravity, complexity and importance of the nature of this claim. This court is ever mindful and respectful of the doctrine of the separation of powers so ably articulated by Mrs. Tucker in her arguments on behalf of the Defendants/Applicants on this application. However, as Mr. Saldivar has submitted on behalf of the Claimants, quite correctly in my view, this claim goes to the heart of our democracy by raising vital questions for this court's consideration. Has there been compliance by the Election and Boundaries Commission with the 'one man, one vote' principle as mandated by the Constitution of Belize as this nation's highest law? Is there malapportionment of electoral constituencies and is there a proposal laid before parliament as expressly required by the mandatory

language used in section 90 of the Constitution to remedy that malapportionment? Striking out is a draconian measure of last resort and to my mind this claim is ill suited to be struck out on procedural irregularities. It is a claim of fundamental constitutional importance which calls for the court to fulfill its role as the vigilant and fearless watchdog of the constitutional rights of the citizenry. I therefore refuse to grant this Application to Strike Out Claim.

Costs awarded to the Claimants/Respondents to be agreed or assessed.

Dated this 26th day of April 2022.

Michelle Arana

Chief Justice (Ag.)

Supreme Court of Belize