

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A No. 1861 of 2001

BETWEEN

JOSEPH GEORGE

Applicant

AND

**THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO**

Respondent

Before the Honourable Justice Mira Dean-Armorer

Appearances:

Ms. Margaret Rose for the Applicant

Mr. Caryl Douglas for the Respondent

REASONS

Introduction

1. The instant matter is a Constitutional Motion which was filed on the 4th July, 2001. By this Motion the Applicant sought redress under s. 14 of the Constitution for declarations under Sections 4(a) and (d) of the *Constitution* as well as for monetary compensation and costs.

2. The Constitutional Motion is supported by the Affidavit of the Applicant in which the Applicant alleges that he had been arrested in circumstances which render the arrest unconstitutional
3. Three (3) Affidavits were filed by the Attorney General namely:
 - the Affidavit of Mathura Singh on 14th February, 2002;
 - the Affidavit of Ulric Benjamin filed on 14th February, 2002;
 - and the Affidavit of Irwin Joseph filed on the 15th February, 2002.
4. Attorneys for the Attorney General filed a Notice indicating their intention to take a preliminary point that the Constitutional Motion should be dismissed on the basis of the decision of the Privy Council in *Thakur Persad Jaroo v. The Attorney General of Trinidad and Tobago*.
5. On the 1st May, 2002, the Applicant filed a Notice of his intention to seek the Court's leave to amend the Originating Notice of Motion in terms of an annexed draft or in the alternative for an Order that the filed proceedings continue as if begun by writ.
6. Ms Rose, who appeared on behalf of the Applicant, has agreed with the attorney-at-law for the Attorney General as to the effect of *Jaroo*. She has conceded that the Applicant has a parallel remedy, and that the procedure of the Originating Motion has become inappropriate because of the facts which have been disputed by the Attorney General. Ms Rose has argued however that the Originating Motion can be amended so as to transform it into a Writ. Ms Rose has argued

in the alternative that the Court may under its inherent jurisdiction order that the proceedings be continued as if begun by Writ.

7. Attorney for the State is of the view that neither an amendment nor a continuation of the proceedings as if begun by Writ would be procedurally correct.

The Applicant's Application to Amend

1. As to the Applicant's application to amend, it is to be noted that the process of amendment has received the indirect blessing of the Privy Council at paragraph 36 of the Advance Copy of the Judgment of the Privy Council where the Learned Law Lord admits of the possibility of amending the Originating Motion:

“But instead of amending his pleadings to enable him to pursue the common law remedythat has always been available to him the Appellant chose to adhere to what had now become an unsuitable and inappropriate procedure.....”

Law Relating to Amendments

2. Order 20 Rule 7 of the Rules of the Supreme Court permit the amendment of Originating Motions on the same terms as the amendment of a Writ:

“Rule 5 shall have effect in relation toan Originating Notice of Motion as it has effect in relation to a Writ”

3. The guiding principle on applications for amendments is that all such amendments ought to be made for determining the real question in

controversy between the parties to any proceedings or of correcting any defect or error in any proceedings. See *G. L. Baker Ltd. V. Medway Building and Supplies Ltd. [1958] 3 All E.R. 540.*

4. The objective of the Court is to decide the rights of the parties and not to punish them. The words of Lord Justice Bowen in the case of *Cropper Smith (1983) 26 Ch. D. 700* are pertinent in this regard:

“It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ...I know of no kind of error or mistake which, if not fraudulent or intended or overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right”

In the light of this learning, this Court is of the view that there is no prohibition on amendment which will transform an Originating Motion into a writ. In the instant case, the Applicant was entirely without fault at the time of the commencement of the Constitutional Motion. The prevailing thinking, at the time of filing, permitted an approach to the Court by way of an Originating Motion regardless of the existence of alternative remedies or of the existence of disputed facts in the case. The issues to be determined under

the Constitutional Motion are parallel to those that would have been canvassed for the Court's determination had the Applicant begun his proceedings by way of Writ. The only factor which prevents the Applicant from having the real questions in controversy determined by a Court is his newly discovered procedural error. Counsel for the Attorney General has argued that the term "amendment" does not contemplate the transformation of one document into another. Admittedly, the term "amendment" has traditionally been applied to an alteration within a document. However, having regard to the learning on amendments this Court is of the view that in the absence of prejudice to the Respondent, the Originating Motion can be amended in terms of the annexed draft.

Treating the proceedings as begun by Writ

1. Mr. Douglas has argued quite correctly that the *Rules of the Supreme Court* do not expressly permit Originating Motions to be treated as begun by Writs, in the same way that a matter begun by Originating Summons can be ordered under 0.28 r 8(1), R.S.C to proceed as if begun by Writ.
2. Ms Rose argued that it was within the inherent jurisdiction of the Court to make such an order.
3. Order 2 r. 1(3) of the *Rules of the Supreme Court* provide:

"The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed."

4. In the case of *ANR Robinson v. The Attorney General, (Unreported Judgment H.C.A No. 941/76)* attorneys for the Attorney General has been argued *in limine* that constitutional relief could not be sought by a Writ. In the course of that judgment, Justice Deyalsingh referred to the case of *Harkness v. Bells Asbestos and Engineering Ltd (1966) 3 A.E.R. 843 at p. 845 paragraph I* in which Lord Denning considered the British equivalent to O. r. 1, *Rules of the Supreme Court*. Lord Denning considered the case of *Re Pritchard*, which led to the introduction of O. 2r. 1 (3) *R.S.C.* and said:

“Every omission or mistake in practice ...is henceforward to be regarded as an irregularity which the Court can and should rectify so long as it can do so without injustice. It can at last be asserted that

“it is not possible ...for an honest litigant in Her Majesty’s Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.””

5. This Court has noted that in *Jaroo*, the Learned Law Lord held that the **continued** use of the Originating Motion is an abuse of process. At paragraph 39 of the Judgment the Learned Law Lord said:

“If it becomes clear after the Motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the Motion, as its continued used in such circumstances will also be an abuse ...”

6. There was no abuse of process prior to the ruling in *Jaroo*. In fact, prior to *Jaroo* the Court of Appeal in the case of *Mayor and Aldermen of San Fernando v. Ramlogan C.A. 54 of 1985* had laid to rest the long held doctrine that it was an abuse of process to approach the

Court by way of s.14 of the Constitution without having exhausted alternative remedies. Justice of Appeal Warner considered the pronouncements of the Privy Council and stated:

“...it is where the unlawful administrative action involves no contravention of any human right or fundamental freedom that the invocation of Section 14 of the Constitution is an abuse of process ...”

7. The decision of the Court of Appeal was considered and applied in the case of *Rajendra Seereeram H.C.A No. 1097 of 1984*, where Justice Deyalsingh set out the relevant authorities.
8. Following the Ramlogan decision, an applicant could proceed by way of S.14 as long as there was a *prima facie* case of a breach of his constitutional rights and accordingly there was no fault in the Applicant in instituting the proceedings which he did. The application with which the Court now grapples is a clear indication that the Applicant does not wish to persist with the use of the Originating Motion procedure but wishes to abide by the ruling of the Learned Law Lords of the Judicial Committee to seek the vindication of his rights by another procedure.
9. This Court has considered the exact words of their Lordships at paragraph 39 of the Advance Copy, where the Learned Law Lord said:

*“If it becomes clear after the Motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to **withdraw** the Motion, as its continued used in such circumstances will also be an abuse ...”*

The Court has grappled with the likelihood that their Lordships intended the word “withdraw” to mean the withdrawal of the entire proceedings. It is noted that their Lordships did not consider the possibility of an Order that the proceedings continue as if begun by Writ. Indeed, such a question had not been canvassed for the consideration of their Lordships. In the light of O.2 r. 1 (3) **R.S.C.**, however, this Court is of the view that the Court should lean in favour of rectifying the procedural error and of saving the proceedings, if in so doing an abuse of the Court’s process can be avoided and no prejudice accrues to the State.

10. In this Court’s view, the clear effect of 0.2 r.1 (3) **R.S.C.** is to prevent the defeat of litigation on technical grounds and in particular on the ground that the proceedings were required by the Rules to be begun by an originating process other than the one employed.
11. Attorneys for the Attorney General could not seriously argue that the State would suffer any prejudice to their client if the proceedings were continued as if begun by Writ. Moreover the available learning suggests that the Court has wide curative Powers. In the *Harkness* case, Lord Denning said of the British equivalent of 0.2 r.1:

“... ..it gives the Court ample power to correct the mistake and put things right”

12. The court is therefore of the view that pursuant to 0.2 r.1 (3) **R.S.C** and to the learning in respect thereof the Applicant ought not to be defeated by the error in procedure and the Court can exercise curative powers under 0.2 r.1.

13. This Court accordingly holds that the Applicant is entitled to the Leave sought. The Originating Motion may be treated as begun by Writ with consequential directions.

Dated this 13th day of May 2002

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MIRA DEAN-ARMORER
JUDGE