Dr Streram a/l Sinnasamy v Amino Agos bin Suyub & Anor

[2018] MLJU 1335

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HIGH COURT (KUALA LUMPUR)

DARRYL GOON JC

CIVIL SUIT NO WA-21NCVC-35-05 OF 2018

3 September 2018

Haniff Khatri (Irzan Iswatt with him) (Haniff Khatri) for the plaintiff.

Sathya Kumardas (Shearn Delamore & Co) for the defendants.

Darryl Goon JC:

JUDGMENT

[1]By a Notice of Application dated 16th June 2018 (Enclosure 7), the Defendants applied to strike out the Plaintiff's action pursuant to Order 18 Rule 19(1)(a), (b) or (d) of the Rules of Court 2012 and/or under the inherent jurisdiction of the Court. Thus by this application the Defendants contend that the Plaintiff's Statement of Claim discloses no reasonable cause of action, is scandalous, frivolous or vexatious and/or is otherwise an abuse of the process of the Court and the action should be struck off.

[2]The Plaintiff's action in this case is against the 1st Defendant, who is alleged to be a duly appointed returning officer in respect of the 14th General Elections for the State Legislative Assembly ("DUN") for Rantau N27 in Negeri Sembilan, and the 2nd Defendant, the Suruhanjaya

Pilihan Raya Malaysia. Paragraph 4 of the Statement of Claim encapsulates the Plaintiff's cause of action. It states as follows:

> "B. KAUSA TINDAKAN
>
> **[4]**Defendan-defendan telah mengagalkan secara salah dengan gagal melaksanakan tanggungjawab di bawah Akta Pilihan Raya 1958 akan pencalonan Plaintiff pada 28.4.2018 bagi kerusi DUN Rantau N27. Defendan- Defendan bertanggungjawab terhadap salah-laku tort misfeasans dalam jawatan awam yang dilakukan oleh Defendan-Defendan."

[3]The Plaintiff's Statement of Claim then sets out the alleged material facts and circumstances in support of the pleaded cause of action against the Defendants. For the purposes of the Defendants' application, it is to my mind also relevant that the reliefs sought by the Plaintiff in the prayers be referred to and taken into account. The remedy the Plaintiff seeks in this action is entirely in damages, albeit in a variety of forms. In paragraph 40 of the Statement of Claim the prayers sought are:

> "40. Oleh yang demikian Plaintif memohon seperti berikut:-
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> (a) Defendan-Defendan membayar Plaintif Gantirugi Khas;
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> (b) Defendan-Defendan membayar Plaintif Gantirugi Am sebanyak RM5,000,000.00, ataupun mana-mana jumlah sepertimana yang ditaksirkan oleh Mahkamah yang Mulia ini;
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> (c) Defendan-Defendan membayar Plaintif Gantirugi Teladan (Exemplary Damages) sebanyak RM2,600,000.00, ataupun mana-mana jumlah sepertimana yang ditaksirkan oleh Mahkamah yang Mulia ini;
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> (d) Defendan-Defendan membayar Plaintif Gantirugi Berpanjangan (Aggravated Damages), ataupun mana- mana jumlah sepertimana yang ditaksirkan oleh Mahkamah yang Mulia ini;
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> (e) Defendan-Defendan membayar Faedah 5% setahun terhadap jumlah-jumlah Gantirugi yang diperintahkan di bawah perenggan (a), (b), (c) dan (d) di atas, dari tarikh pemfailan Writ Saman sehingga penyelesaian penuh;
>
> (f) Kos tindakan ini dan yang bersangkutan dengannya;
>
> (g) Mana-mana relif dan/atau perintah lanjut yang difikirkan adil dan/atau suai manfaat oleh Mahkamah yang Mulia ini."

[4]The Defendants in their application maintained, however, that this Court has no jurisdiction to hear this action. They alleged that it is an action, the subject matter of which may only be addressed by way of an election petition. Reliance was placed on Article 118 of the Federal Constitution which states as follows:

"**Method of challenging election**

[118]No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held."

Quoting from the decision of the Supreme Court in *Election Commission Malaysia v Abdul Fatah bin Haji Haron* [1987] 2 MLJ 716, the Defendants contended that:

"Any dissatisfaction with or challenge to an election should be brought up by way of an election petition before an election judge and nowhere else".

Reliance was also placed by the Defendants on the decisions of the Court of Appeal in *Parti Islam Se-Malaysia & Ors v Tan Sri Dato' Seri Abdul Aziz bin Mohd Yusof & Ors* [2015] 4 MLJ 439 and *Jamil Dzulkarnain v Mohd Kamil Shafie* [2015] 2 CLJ 1079.

[5]It seems to me, for the purposes of this case at least, the words of Article 118 of the Federal Constitution are quite clear in that, "No *election to the House of Representatives or to the Legislative Assembly of a State* shall be called in question except by an election petition…". In this action, the Plaintiff does not seek to call into question any election to the Federal or State legislature. What the Plaintiff seeks to do is to call in question the conduct of the 1st and 2nd Defendant, which he maintains, amounts to a wrong in law, namely the tort of misfeasance in public office, and in respect of which he is entitled to bring this action for damages. The restriction under Article 118 and the right of an individual to bring a private action for damages in respect of tortious conduct, are distinct and discrete issues.

[6]In *Parti Islam Se-Malaysia & Ors*, the Plaintiffs sought to render the election results of the 13th General Elections null and void. The following was what Alizatul Khair JCA, delivering the majority judgment of the Court, stated:

"[5] The plaintiffs alleged that the failure of the indelible ink which was intended to prevent multiple voting by dishonest voters was caused solely by the defendants' breach of their constitutional duty to properly conduct the GE13. The plaintiffs further alleged that the defendants have practiced fraud on the electorate by the misuse of the indelible ink.

[6]The plaintiffs contended that the failure of the indelible ink rendered the election results null and void."

In that case, the remedies sought by the Plaintiffs were set out by Alizatul JCA in paragraph 8 of the judgment and they were as follows:

> "[8] The reliefs sought by the plaintiffs in this action are, inter alia, the following:
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> (a) a declaration that the defendants whether acting individually or collectively as the Elections Commission, failed in their constitutional duty and obligation to properly conduct the GE13;
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> (b) a declaration that the defendants whether acting individually or collectively as the Elections Commission maliciously and dishonestly practiced fraud on the Malaysian electorate by the misuse of indelible ink for voting in the GE13;
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> (c) by reason of the aforesaid action and omissions of the defendants, a declaration that the results of the GE13 for all the 222 parliamentary seats be declared null and void;
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> (d) in consequence of the above, an order setting aside the results for all the 222 parliamentary seats in the GE13;
>
> (e) in consequence of the defendants' aforesaid conduct, an order that each of the defendants be removed from office as members of the Elections Commission;
>
> (f) an order that a newly constituted Elections Commission conduct fresh general elections for all the 222 parliamentary seats; and
>
> (g) exemplary damages."

Thus, elections to the House of Representatives and to the State Legislative Assemblies were called into question and claimed to be null and void.

[7]In *Jamil Dzulkarnain*, Idrus Harun JCA, delivering the judgment of the Court of Appeal, stated at page 1087 of the report:

> "[15] Thus, based on these authorities, it is hard to resist the conclusion that the present action, under the guise of the originating summons seeking to declare the respondent not qualified to be a member of the Legislative Assembly is in pith and substance a bid to disqualify him from being a member of that Assembly. It is indeed an attempt to get around art. 118 of the Constitution and the election law which are intended to resolve election disputes. Whether the respondent is qualified or otherwise is actually related to an election dispute which should and ought to be resolved in the manner specified under art. 118 of the Constitution and s. 32 of the Act 5".

Therefore, the attempt in *Jamil Dzulkarnain* was to call into question the qualification of a person elected to the Legislative Assembly by way of an Originating Summons, contrary to Article 118 of the Federal Constitution.

[8]In this case, the Plaintiff's cause is very clearly pleaded. Read with the reliefs sought, there is no attempt to call into question any election to the Legislative Assembly in DUN N27. The Plaintiff's cause of action is grounded in the tort of misfeasance in public office and the relief sought is in damages. In addition, it would be pertinent to point to the fact that the Plaintiff has in fact challenged the election to the State Legislative Assembly for Rantau N27 in Negeri Sembilan, by way of a separate petition filed in the High Court in Seremban *viz* Election Petition No. NA-26PP-1-05/2018. This fact magnifies the distinction between the two discrete and distinct actions taken by the Plaintiff. No authority on point was offered to support the contention that this action, as framed by the Plaintiff, is not available in law or that it may not be brought separately from the Election Petition filed in the High Court in Seremban. In this regard it may also be added that the Plaintiff's cause of action is not predicated on the breach of any statue or the Federal Constitution, but on allegations that the alleged conduct of the Defendants were tantamount to the tort of misfeasance in public office. As was pointed out by Lord Millet in *Three Rivers District Council and others v Bank of England (No 3)* [2000] 3 All ER 1 at p 48, in respect of the tort of misfeasance in public office, the "core concept is abuse of power."

[9]It is next contended by the Defendants that neither Defendant is a "public officer" and therefore, in the absence of that necessary ingredient, the tort of misfeasance in public office cannot be made out. For this contention, reliance was placed by the Defendant on the decision of the Court of Appeal in *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2018] 3 MLJ 466, where it was held that the Prime Minister of Malaysia is not a public officer. Also cited by learned counsel for the Defendants is the case of *Tony Pua Kiam Wee v Kerajaan Malaysia and another appeal* [2018] MLJU 891, in which the Court of Appeal followed its decision in *Tun Dr Mahathir bin* Mohamad *& Ors*. Yeoh Wee Siam JCA, in delivering the judgment of the Court, stated as follows:

> "Consistent position of the Court
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> **[44]**In the light of the decision of the Court of Appeal in the earlier case of Tun Dr Mahathir (supra) which spelt out clearly the statutory interpretation of the term "public officer" which the same Court opined ought to apply to the common law interpretation of such term, and in harmony and being consistent with the position taken by the Court of Appeal in that case, we decided to similarly rule that for the purpose of the present case, the 1st Defendant, in his capacity as the Prime Minister, is not a "public officer."

[10]There is, however, no decided authority to the effect that the position held by 1st Defendant is not a public office. Learned counsel for the Defendants contended that the reasoning to be applied is the same and the conclusion would be arrived at that the 1st Defendant is not a public officer, just as the office of the Prime Minister of Malaysia is not a public office. Counsel for the Plaintiff maintains that the position is not so clear. Section 7 of the Election Commission Act 1957 which states as follows, was referred to:

> "**Members, officers and servants of Commission deemed public servants**
>
> **[7]**Every member, officer and servant of the Election Commission shall be deemed to be a public servant within the meaning of the Penal Code [Act 574]".

In *Three Rivers District Council and others* Lord Steyn stated in no uncertain terms that:

> "***(1) The defendant must be a public officer***
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> It is the office in a relatively wide sense on which everything depends. Thus a local authority exercising private law functions as a landlord is potentially capable of being sued (see Jones' case). In the present case it is common ground that the Bank satisfies this requirement."

If a local authority exercising private law functions as a landlord is potentially capable of being sued as a public office, it would be difficult to my mind to conclude that the tort of misfeasance in public office is obviously not available against the 2nd Defendant, or the 1st Defendant who is to be regarded as a public servant albeit for the purposes of the Penal Code. Numerous authorities have been filed by learned counsel for the parties. The status of the Defendants in the context of the tort of misfeasance in public office, and whether such an action would lie against, them have not been authoritatively determined by a Court of law. To my mind, this is an issue that needs careful and thorough consideration. Learned counsel for the Defendants contended that this is merely a point of law and it may be decided by the Court, even in an application under Order 18 Rule 19 of the Rules of Court 2012. In my view, however, contentious and complex issues of law ought not to be considered in an application under Order 18 Rule 19, particularly if the factual allegations in the pleadings have not even been proven.

[11]It is then contended for the Defendants that there would be immunity for the 1st Defendant to this action. Section 6 of the Election Commission Act 1957 states as follows:

> "**Protection of Members**
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> **[6]**Every member of the Election Commission shall have the like protection and privileges in case of any action or suit brought against him for any act done or omitted to be done by him when acting in the execution of his office as is by law given to a Magistrate acting in the execution of his office."

Thus the immunity afforded a member of the Election Commission is that afforded by law to a Magistrate acting in the execution of his office. That immunity is found in section 107(1) of the Subordinate Courts Act 1948 which states as follows:

> "**Protection of judicial officers**
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> **[107]**(1) No Sessions Court Judge, Magistrate or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of this jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of."

The case of Indah *Desa Saujana Cort Sdn Bhd & Ors v James Foong Cheng Yuen & Anor* [2006] 1 MLJ 464 was cited. However, that case was concerned with section 14 of the Courts of Judicature Act 1964. The immunity afforded in section 107(1) of the Subordinate Courts Act 1948 is not without limitation. It is subject to the proviso that the person seeking immunity thereunder must, "…at the time in good faith believed himself to have jurisdiction to do or order the act complained of." It is in the very nature of the tort of misfeasance in public office that there be abuse of power and malice or reckless indifference to the illegality of one's actions. As Lord Steyn said of the tort in *Three Rivers* at page 8 of the above cited report, "It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful." The tests and the bases for liability for this tort are elaborately set out in the *Three Rivers Case* and have been followed by our Courts (see the decisions of the Federal Court in *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184 and *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] MLJU 259). Thus if upon the facts of the case the

Plaintiff is able to prove that the tort was committed, the immunity provided under section 107(1) of the Subordinate Courts Act 1948 cannot be said to be obviously sustainable.

[12]It is a well established principle that pleadings should not be struck out and actions dismissed *in limine* unless it is plain and obvious that the pleaded cause, and thus the action, is unsustainable (See *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36). The applicable principles set out in *Bandar Builder Sdn Bhd & Ors* by the Supreme Court remains good law. In *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1 at p 15, Ramli Ali FCJ, in delivering the judgment of the Federal Court, reiterated in clear terms, the principles applicable to applications under Order 18 Rule 19 of the Rules of Court 2012:

> "[25] The principles for striking out pleadings pursuant to O 18 r 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted when it can clearly be seen that a claim on the face of it is obviously unsustainable (see *Bandar Builder*; *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86; *A-G of Duchy of Lancaster v London and North Western Rly Co* [1892] 3 Ch 274).
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> **[26]**The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, inter alia, as follows:
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> (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it '*obviously unsustainable*' (Emphasis added);
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> (c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; and
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> (d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and
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> (e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.
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> **[27]**The Court of Appeal, in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473, had adopted the well settled principle of striking out in the following passage:
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> > A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial, (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (Federal Court))…"

His Lordship Ramli Ali FCJ's statement in paragraph 28 of the judgment merits particular emphasis:

> "[28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial."

[13]Courts of law do not exist to shut out litigants but to afford litigants the right to be heard, to enforce their rights or to defend themselves. Exceptionally, summary procedures exist to prevent, for example, abuse of the Court's process or the disposal of a case that discloses no triable issues. In such instances the Court's process may be curtailed and a case brought to an early end without a full trial. This case, however, is not one that should see an early end without trial. It cannot be said that the Plaintiff's case as pleaded is plainly and "obviously" unsustainable. Whether the Plaintiff's case would ultimately be proven meritorious is another matter but it cannot, to my mind, be summarily dismissed without hearing the evidence, determining the facts and, without carefully considering the applicable law.

[14]For the reasons given above, the Defendants application in Enclosure 7 is dismissed with costs in the cause.

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