

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
REGULAR JURISDICTION
CIVIL JURISDICTION

2019-HC-DEM-CIV-SOC-435

In the matter of an Application of Orders and/or Declarations pursuant to the Bank of Guyana Act, Chapter 85:02, and the Financial Institution Act, Chapter 85:03, and the Supervision Guidelines No.5 (No. 1 of 1995) issued under part ix S. 61 of 1995, Laws of Guyana and Anti Money laundering and Countering of Financing of Terrorism Act, chapter 10:11, Laws of Guyana.

BETWEEN:

1. RONALD BULKAN
2. RUSTUM BULKAN

Claimants

-and-

1. DR. GOBIN GANGA, in his representative and/or Personal capacity as Governor of Bank of Guyana
2. Bank of Guyana, a body Corporate established under the Bank of Guyana Act, Chapter 85:02, Laws of Guyana with its

Principal Place of Business at Lot 1 Avenue
of the Republic, Georgetown, Guyana.

Defendants

Ms Chase for the Applicant

Mr Henry for the Respondent

**Ruling by the Honourable Madame Justice Priya Sewnarine-Beharry
dated 14 September 2020.**

The Applicants filed a Notice of Application dated 7th February 2020 seeking:

- An Order that the action intituled **Ronald Bulkan et anor vs. Dr Gobin Ganga et anor** 2019 HC DEM CIV SOC 435(SOC 435) be struck out and/or dismissed;
- An Order that the Statement of Claim in SOC 435 be struck out;
- Alternatively, an order dismissing the SOC 435 against the first named Applicant;

The Respondents filed SOC 435 claiming inter alia damages for the torts of Deceit and Negligence, breach of Statutory Duty, Misfeasance in Public Office and “potential harm, distress and unease.” Essentially they contended that the first Applicant failed to investigate a deposit of \$82,068,617 (eighty-two million, sixty-eight thousand, six hundred and seventeen dollars)(the deposit) on 16th day of June 2011 into an account held by and in the name of Precision Woodworking Ltd(PWL) at Republic Bank (Guyana) Limited(RBL).

The Applicants contend that the SOC 435 is based on an erroneous premise that the deposit was made by an individual into the account. They stated that the deposit was not cash but a credit by way of provisioning pursuant to the Bank of Guyana Guidelines No 5 on “Loan Portfolio Review, Classification, Provisioning and other Related Requirements” issued under the authority of the Financial Institutions Act(FIA), the account having been classified by the second Applicant and RBL as non performing with effect from 31 May 2011 as a result of the company being unable to satisfy its debts and obligations to RBL. Further, PWL had two credit exposures

totalling \$405,000,000(four hundred and five million dollars) which was secured by collateral totalling \$323,000,000(three hundred and twenty-three million dollars). The sum of \$82,000,000(eighty-two million dollars) was unsecured and in accordance with the guidelines, provisioning for the said sum was made so as not to overstate the Bank's assets. The Applicants contended that Precision Woodworking Limited et al vs. Kashir Khan & Republic Bank Action 298 of 2018 on which the Respondents place reliance that the deposit was made by an individual and not provisioning by the Bank was erroneous and misplaced as Action 298 of 2018 has not been determined. They contended that the Respondents failed to demonstrate in the Statement of Claim a breach of statutory duty whether supervisory or investigatory under Sections 11 and 38 of the Bank of Guyana Act Cap 85:02 as the Applicants have at all times discharged their statutory duties in accordance with the Bank of Guyana Act, Cap 85:02 and the Financial Institution's Act Cap 85:03. The Applicants stated that on 22 March 2016 the Respondents were informed that an investigation was conducted pursuant to their request by letters dated 13 March 2013 and 25th July 2014, for prosecution of RBL under Section 60 of the FIA and the results thereof. Consequently SOC 435 was without merit, misconceived and an abuse of process of the court. Finally the Applicants argued that the first named Applicant was not a proper party in his personal capacity or otherwise since at all times he acted in the capacity as Governor of the second named Applicant, a statutory body corporate pursuant to section 4 of the Bank of Guyana Act(BOGA).Further , the duties on which the Respondents rely, particularly Section 38 of the BOGA and Section 60 of the FIA are that of the Bank of Guyana and not the second named Applicant personally.

The Respondents deny that any investigation was done and contended that if it was, it was done, without the due care, skill and diligence commensurate with the gravity and seriousness of the allegation of suspicion of money laundering. They argued that their request to investigate was of a continuing nature and included a request dated 5th March 2018 by their then Attorney-at-law Mr Nigel Hughes. It was also contended that the first Applicant was a proper party to the action by necessary implication of the separate immunity under Sections 64 of the FIA and Section 22 (1)(a) of the Anti Money Laundering and Countering the Financing of Terrorism Act Cap 10:11.

It is trite that the court has powers under the CPR 2016 on its own initiative or upon application to strike out a Statement of Claim if it does not disclose any reasonable ground for bringing the claim, or to grant summary judgement(dismissal) where the Claimant has no reasonable prospect of succeeding on the Claim. See Parts 14:01 and 15:01 of the CPR 2016.This power is used in appropriate cases to save expense and judicial time.

Having read the submissions filed and relied upon by the parties and after mature deliberation this court finds it appropriate to exercise these powers as the Statement of Claim does not disclose any reasonable ground for bringing the claim. Further the Claimant has no reasonable prospect of succeeding on the Claim. The reasons for the court's finding are set out below.

LOCUS STANDI

The action ought to have been brought by the company itself and not its shareholders.

It is trite that a company has a separate legal personality from its directors and shareholders: **Salomon vs Salomon** & Co Ltd [1897] 2 AC 22. Individual shareholders have no cause of action in law for any wrongs committed on the corporation. If an action is to be brought in that respect it must be brought by the corporation itself. See **Foss vs. Harbottle** (1843) 2 Hare 461

According to paragraph 1 of the SOC 435 the account in which the deposit was made is held by and in the name of PWL at RBL. PWL is a company registered under the Companies Act Cap 89:01 and is currently in Receivership.

Any action filed must be brought by and in the name of the company. Further since the company is in receivership matters touching and concerning the company's assets must be brought by the company through its Official Receiver.

It is noteworthy that this fact did not escape the attention of the Respondents as it was the company, PWL and not Respondents that communicated/corresponded with the Applicants. For example, Exhibit D

attached to the Affidavit in Answer of the Respondents dated 18th June 2020, the firm of Hughes, Fields and Stoby specifically indicated that they were acting on behalf of PWL. Exhibits B and C were also sent by PWL to the Applicants.

Moreover, the Respondents/shareholders have not pleaded or prayed for relief for the infringement of any individual/ personal rights to bring them within the exceptions of the rule in **Foss vs. Harbottle** to file an action. They have also failed to demonstrate how the actions and/or inactions of the Applicants could give rise to a cause of action to them as shareholders.

LIMITATION

The action is statute barred.

An action for the recovery of damages must be brought within 3 years after the cause of action arises: See **Section 8 of the Limitation Act Cap 7:02**.

Assuming that the cause of action arose from (1) June 16, 2011, the date of the alleged deposit, (2) March 13, 2013 when the matter was first raised by letter, (3) July 15, 2014, the request for prosecution, or (4) March 22, 2016 by letter intimating to the Respondents that there was no evidence to prosecute RBL, each fell outside the limitation period, the action having been filed on December 23, 2019.

The contention by the Respondents that a further request by letter dated March 2018 could bring a fresh cause of action is without merit as Section 10 of the Limitation Act applies to liquidated claims.

NO CAUSE OF ACTION

The Statement of Claim does not disclose a cause of action against the Applicants.

Halsbury's Laws of England 4th ed page 558 para 1201 define *rights of action in tort* to be those civil rights of action which are available for the recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of right imposed or conferred by law.

It is undisputed that an investigation was conducted and second Defendant found no evidence of wrong doing against RBL.

The Claimants have not demonstrated by the pleadings what duty existed in relation to them; that the duty was breached and they suffered any damage.

Paragraph (e) of the Prayer for relief seeks damages for breach of Statutory duty pursuant to sections 11 and 38 of the BOGA but those sections do not prescribe any duty of investigation; Further Para (d) prays for damages for breach of statutory duty of the "said financial legislation" without specifying/identifying under what legislation relief is claimed.

The prayer in the Statement of Claim for relief seeks damages for "jeopardising and exposing the claimants to accusations, allegations, investigation and potential prosecution for money laundering", "potential ruin to reputation" and exposure to "injurious business deal and good will", "failing to act with due diligence to neutralize the harm of prosecution for money laundering, besmirching the character of the claimants and by extension any business good will" and "potential harm, distress and unease."

The Statement of Claim avers to potential harm and not any real harm, loss or damage and at best is speculative.

Also the purported discovery statement on which the Claimants rely emanate from proceedings which have not yet concluded and from which no finding of fact has been made.

IMPROPER PARTY

The First Applicant is improperly sued in his personal capacity.

Section 4(1) of the BOGA provides that the Bank of Guyana shall be a body corporate;

Section 11 of the said Act provides that the Governor shall be the Chief Executive Officer and shall be responsible for the management of the Bank;

Section 38 provides that the Bank shall have exclusive responsibility for the supervision and regulation of licensed financial institutions under this Act and the Financial Institutions Act.

Actions for alleged wrongs must be instituted against the Bank of Guyana itself since it is a body corporate. The Claim is devoid of any particulars that support a cause of action against the first named defendant in his personally capacity.

Abuse of Process

The Statement of Claim is an abuse of the process.

“Statements of Case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons, or rhetoric.” Per Leggatt J in **Tchenguiz and others vs. Grant Thornton UK LLP and others** [2015]EWHC 405.

The Statement of Claim is incoherent, prolix, lacks precision and is obscure.

In the circumstances this court orders:

- (1) the Statement of Claim shall be struck out and action dismissed pursuant to Part 14.01(1) (a)(i)ii)(iii) and 14.03(2) respectively;
- (2) alternatively, the Statement of Claim shall be dismissed summarily pursuant to Part 15.01(3)(b);
- (3) Costs shall be awarded to the Applicants in the sum of \$250,000 to be paid by the Respondents on or before 30th October 2020;
- (4) Costs shall awarded to the Applicants against Counsel for the Respondents, personally, in the sum of \$75,000 to be paid on or before 30th October, 2019, for prolixity of pleadings;
- (5) That costs awarded herein shall be paid before any further steps are taken in the proceedings.

Priya Sewnarine-Beharry

Puisne Judge

14 September 2020