JUGNAUTH P K v THE SECRETARY TO THE CABINET AND HEAD OF THE CIVIL SERVICE AFFAIRS & ORS

2013 SCJ 132

Record No. 105863

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Pravind Kumar Jugnauth

Plaintiff

v.

1. The Secretary to the Cabinet and Head of the Civil Service Affairs
2. The State of Mauritius
3. The Attorney General

Defendants

In presence of:

The Independent Commission Against Corruption

Co-Defendant

JUDGMENT

The plaintiff has lodged the present plaint with summons for constitutional redress under Section 17 of the Constitution. He has averred that his constitutional rights under Section 3, 10 and 15 have been, are being or are likely to be further contravened. The plaintiff is seeking authority, under Section 4(2) of the Official Secrets Act, so as to be allowed to refer and publish to the co-defendant for the purposes of a statement recorded from him the following documents:

(1) A paper submitted by the Honourable Minister of Health on 5 March 2010; (The Jeetah paper);

(2) The minutes of proceedings of a Cabinet meeting of the 18 June 2010;

(3) Documents and discussion papers relating to the setting up of a National Geriatric Hospital for the period June 2010 to December 2010.

The plaintiff's request pertains to an enquiry which has been started by the co-defendant regarding the acquisition of MedPoint Clinic by The State, for the setting up of a National Geriatric Hospital. Pursuant to that enquiry, the plaintiff who was Deputy Prime Minister and Minister of Finance and Economic Development from May 2010 until his resignation in July 2011, has on 8 September 2011, been requested by the co-defendant to give a statement under caution in connection with corruption offences under the Prevention of Corruption Act (POCA) more specifically offences relating to conflict of interest and/or unlawful use of office or position. Prior to giving such statement, the plaintiff made written requests to the defendant No. 1 for authority to be allowed to refer and publish to the co-defendant the abovementioned documents.

The plaintiff has averred that the defendant No. 1 did not accede to his request and on 22 September 2011, he gave his statement without being able to refer to Cabinet matters to prepare and substantiate his defence, as provided by the Constitution. The co-defendant however informed him that upon receipt of further communication from the office of the defendant No. 1, he would have the opportunity to give a further statement and elaborate on the issues.

Following the recording of his statement, the plaintiff was provisionally charged with the offence of conflict of interests under the Prevention of Corruption Act and was thereafter released on bail.

The plaintiff has averred that his defence to the charge against him, rests entirely on Cabinet matters and he has a complete defence to that charge. It is his contention that his fundamental rights to personal liberty, protection of law and freedom of movement under

Sections 3, 10, 15 of the Constitution have been, are being or are likely to be further contravened. He is accordingly praying that the court:

> *"A: Orders the defendant No. 1 to give to the plaintiff prior authority in writing under section 4(2) of the Official Secrets Act to refer to and to publish to the co-defendant:*
>
> *(i) The information Paper or Cabinet Memorandum submitted by the then Minister of Health, Hon. R. Jeetah on the 5th March 2010 with regard to the setting up of a National Geriatric Hospital;*
>
> *(ii) Minutes of proceedings of the 18th Cabinet Meeting dated 18th of June 2010 relating to the construction of hospitals; and*
>
> *(iii) All documents and discussions papers relating to the construction of hospitals covering the period June 2010 to December 2010."*

Under paragraph 28(B) he is seeking:

> *"A declaration to the effect that:*
>
> *"in the absence of such authority in writing from defendant No. 1, in furtherance of the plaintiff's rights under section 10(2)(c) of the Constitution that he is entitled by lawful authority to refer to and to publish to the co-defendant"* the above mentioned documents.

Under paragraph 28(C) he is praying that the court gives *"such directions to the defendants or any one of them allowing the plaintiff to refer to and to publish to the co-defendant"* the aforesaid documents.

The defendants have put in a plea on the merits and have further raised the following plea *in limine:*

"Defendants move that the amended plaint with summons be set aside with costs in as much as:-

(a) there is no live issue left in the present case;

(b) the amended plaint with summons discloses no cause of action quoad defendants in view of the stand taken by the defendants at the sitting of 20 March 2012 and 16 October 2012 with respect of prayers 28A and 28B of the plaint; and

(c) *in the circumstances, the maintaining of the current proceedings amounts to an abuse of the process of the Court."*

On the 20 March 2012, the Senior State Attorney made a statement on behalf of the defendants before the Deputy Master and Registrar to the effect that the defendant No. 1 had no objection that the first two documents requested at paragraph 28 of the plaint i.e. the Cabinet document and the Jeetah paper, be communicated to the co-defendant and with its authorisation that plaintiff has access to them for the purposes of his defence in the enquiry conducted by the co-defendant.

On the 10 May 2012, the Chief State Attorney filed the aforesaid documents in Court and submitted that the first two prayers at paragraph 28A(i) and 28A(ii), had been satisfied.

Regarding the third set of documents sought under paragraph 28A(iii) namely documents and discussion papers relating to the construction of hospitals covering the period June 2010 to December 2010, the Attorney submitted that these were not subject to discovery under Section 4(2) of the Official Secrets Act. These could be documents secured by The Independent Commission Against Corruption (ICAC) as part of their investigation

At the same sitting, the Attorney for the co-defendant confirmed that the first two documents had been communicated to it and the plaintiff had been asked to call at the ICAC, to refer to same and give a further statement if he so wished.

Regarding the third set of documents, the co-defendant's Attorney stated that these documents "*may be"* documents secured in the course of the enquiry. These are not subject to disclosure under the Official Secrets Act. If these documents are relevant to the charge, they will be shown to the plaintiff in the course of the investigation so as to record his explanations thereon.

He added that if the plaintiff had a specific document in mind, which is relevant to his defence and should this be in the possession of the co-defendant, the plaintiff will have access to such documents, when calling at the ICAC for the purpose of his defence.

On 16 October 2012 the Senior State Attorney appearing for the defendants made a statement to the effect that:

> *"… she has been instructed to inform the court that documents and discussion papers, if they exist, are not Cabinet papers and defendant No. 1 is not in possession of same. However defendants have no objection that plaintiff refers to any document in his possession for the purposes of his defence in the inquiry initiated by the co-defendant. There is therefore no live issue left in this case."*

The plaintiff is however insisting upon the prayer under paragraph 28A(iii). According to him, there still remains a live issue inasmuch as the third set of documents, has not been communicated to him and the case should be proceeded with.

In the present matter the plaintiff is invoking the original jurisdiction of the Supreme Court to obtain constitutional redress under Section 17 of the Constitution. One of the first questions which arises in law is whether *ex facie* the plaint Section 17 of the Constitution would find its application for the reasons set out in the plaint.

Section 17(1) of the Constitution provides:

> "*Where any person alleges that any of sections 3 to 16 has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress*". (Emphasis added)

Section 17(2) goes on to provide –

> *"The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of sections 3 to 16 to the protection of which the person concerned is entitled …"*

Section 17(2) however contains the following proviso:

> *"… Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."* (Emphasis added)

Rule 2 of The Supreme Court (Constitutional Relief) Rules 2000 hereunder reproduced makes it clear that an application under Section 17(1), must state with precision the provision of the Constitution which has been or is likely to be contravened –

> *"2(1) An application to the Supreme Court under section 17(1) or 83(1) of the Constitution shall be made by way of a plaint with summons, which shall state with precision –*
>
> *(a) the provision of the Constitution which has been, is or is likely to be contravened; and*

(b) the nature of the relief sought. (Emphasis added)

In that connection what the plaintiff has averred is that under the provisions of Section 10 of the Constitution he must *"be given adequate time and facilities"* to prepare his defence. Furthermore his "*fundamental rights to personal liberty, protection of law and freedom of movement under Sections 3, 10 and 15 of the Constitution have been, are being or are likely to be further contravened".*

However both in the plaint as well as in the submissions made on his behalf, it has not in the least been demonstrated with any sufficient precision how, if at all, either Section 3 or Section 15 of the Constitution is being or is likely to be contravened in the light of the plaintiff's complaints as set out in his plaint.

The submissions of Counsel for the plaintiff rests solely and specifically on Section 10(2) (c) which provides that -

10(2) "Every person who is charged with a criminal offence -

(c) shall be given adequate time and facilities for the preparation of his defence"

The plaintiff has further averred that he "*has exhausted, without success, all measures to be able to refer to and publish Cabinet matters to show disclosure and to show absence of participation in proceedings and decision for the acquisition of MedPoint Clinic, in the preparation of his defence to answer the criminal charge put to him".*

It is not in dispute that the complaint of the plaintiff as set out in his plaint, relates to his rights being jeopardised at the stage of the enquiry by the co-respondent. It is to be noted that

the plaintiff is only entitled to bring an action under Section 17 if it can be shown *ex facie* his plaint that he can successfully invoke the application of Section 10 of the Constitution, at this juncture. It is clear from the wording of Section10 that the said provision only applies when a person is *"charged with a criminal offence*". In the case of **Police v. Labat [1970 MR 214]** the court explained the ambit of the provisions of Section 10 as follows:

> *"… When these subsections are examined together it is evident that the legislator had in view the regulation of the procedure of a court of law to ensure the protection of the rights of an individual answering a charge before it, that is to say, his rights to a fair hearing, within a reasonable time, by an independent and impartial court; to be presumed innocent until he is found or has pleaded guilty; to know the nature of the offences preferred against him, to retain counsel of his choice, to be given time to prepare his defence, to be afforded facilities to examine witnesses of the prosecution, and to secure the attendance of his witnesses.*
>
> *It is therefore clear that in the context of section 10 the meaning of the term "charged" is to be restricted to the arraignment of a person, the charging of a person with an offence before a court of law by which he is to be tried. The words "case" and "hearing" in subsection (1) can refer only to that court and to the duty it has to ensure that the accused is given a fair trial within a reasonable time. We are reinforced in our opinion by an examination of subsection (8) of section 10 ...*
>
> *…The subsection thus makes a similar provision for the determination of civil rights by a civil court or authority within a reasonable time and it is evident that under the subsection a fair hearing within a reasonable time can only be afforded by the Court or authority before which the proceedings are instituted"* (Emphasis added).

The powers of the co-respondent under the POCA are limited only to the carrying out of an investigation in the manner set out under Section 46(1)(2)(3)(4) of the Act. The co-respondent is precluded from taking any prosecutorial decision and is bound by law under the provisions of Section 47(6) of the Act, after the conclusion of an investigation, to submit the matter to the Director of Public Prosecutions (DPP) for his advice and decision. It is only the DPP who is empowered both by law and under the Constitution, to take decisions regarding prosecution or otherwise of the matter.

In the present case the averments of the plaint reveal that the plaintiff has not been "charged" with any criminal offence. He is only facing a provisional charge whilst the ICAC is conducting an investigation into the acquisition of the MedPoint Clinic by the State and it is in that context, that the plaintiff has been requested to give a statement.

When a provisional charge is lodged against an accused party at the stage of the investigation, this does not mean that he is brought to trial on that charge. The provisional charge is merely a preliminary stage when the prosecution is still carrying its investigation and has not made any decision whether to lodge a criminal charge or not. The provisional charge does not lead to a determination of issues of guilt or otherwise and an accused party does not run any risk of being convicted or of being sentenced at this stage. A provisional charge may culminate into a criminal charge or it may be purely and simply struck out without any further charge.

In the case of **The State v. Bundhun [2006 SCJ 254]** the court explained the meaning of a provisional charge in relation to the application of the Judges Rules:

> *"… A provisional charge in the Mauritian context is simply an indication of the offence which a person is suspected of having committed and is normally lodged at a very early stage of the enquiry, when investigation may have hardly started and is certainly not over. The purpose of such a charge is to serve as a basis for the detention or conditional release of the suspect. Accordingly when only a provisional charge has been laid against a suspect, he cannot be considered as a person "charged" within the meaning of Rule III(b). …"*

The court found that Rule (III)(b) of the Judges Rules which provides that questioning should not normally take place after a suspect has been "charged", did not apply to a person who is provisionally charged. Similarly a provisional charge lodged in the course of an

investigation, does not amount to a criminal charge within the meaning of Section 10. It has not in any way been demonstrated *ex facie* the plaint that there is in relation to the plaintiff any actual or likely breach, of any of his rights to a fair trial as safeguarded under Section 10 of the Constitution.

It is worthy of note that the Supreme Court has mainly a residual constitutional jurisdiction which can be invoked to ensure the protection of fundamental rights under Chapter 2 of the Constitution in the absence of any adequate means of redress available for any actual or apprehended contravention. The fundamental rights enshrined in the Constitution relating to the safeguards of a fair trial have to be strictly observed in the course of any trial process before any court or jurisdiction.

Although the plaintiff has averred that for the purposes of his defence, it is important for him to obtain authority to refer to and publish the documents *in lite* to the co-defendant, *ex facie* the plaint, it has not been shown how the absence of authority, if any, for the plaintiff to refer to and publish the documents at this stage of the investigation, will result in a breach of the Sections of the Constitution averred in the plaint namely Sections 3, 10 and 15.

The plaintiff's case to the effect that he has not been able to present his defence in the investigation inasmuch as he has not had authority to refer to and publish to the ICAC the documents *in lite,* is not to be equated with an inability on his part to present his defence before a trial court. As at present there is no criminal charge against the plaintiff before any court of law. It is only in the eventuality of a criminal charge being lodged against him that the safeguards of Section 10 would come into operation.

It is only where the trial or appellate process fails to afford adequate protection to an accused party that he can seek redress under Section 17. Section 17(2) makes it clear that an action for constitutional redress under Section 17 can only be entertained when the court is satisfied that the plaintiff has "*no adequate means of redress for the contravention alleged under any other law"*. The rationale behind this was explained by the Supreme Court in the case of **Vert v. District Magistrate of Plaines Wilhems [1993 MR 28]** as follows –

> *"….. given the nature and extent of the substantive fundamental rights and freedoms guaranteed under Chapter II both as to person and property, including the procedural measures designed to enforce those rights, the restrictions that govern the grant of a section 17 remedy as enacted in the proviso have for their object the prevention of such abuses as may short-circuit the jurisdiction of subordinate courts, stultify other forms of action available in the Supreme Court itself or else gain an unfair priority over cases entered by other litigants who, themselves, might have made use of other forms of action provided by the law to vindicate a Chapter II right".*

In the present case it cannot be said that the plaintiff has no adequate means of redress under any other law. In the eventuality that a criminal charge is lodged against the plaintiff, he will enjoy all the safeguards under Section10 in the course of the trial process. He can raise any alleged breach of the Constitution, including breach of Section 10, before the trial court. He will have a means of redress during the normal trial process. He will have full opportunity for instance in the course of a trial, if any, to raise any of the issues that he is presently invoking namely that he has not been afforded adequate time and facilities for the preparation of his defence or that he has been in any manner deprived of a fair trial according to law in conformity with the provisions of the Constitution.

The safeguard of a fair trial in fact includes and encompasses the methods of investigation by the prosecuting authorities. It will be open to the plaintiff to aver, if such is his contention, that the investigation has not been fairly conducted and, if need be, to move for a

stay of the proceedings against him, on that account. The following extract from the case of **The State v. Velvindron [2003 SCJ 319]** is explicit on this issue –

> ***"****Although in practice the most common ground on which abuse of process is invoked is that based on delay, the alleged abuse may arise in various different forms. It may involve complaints about the methods used to investigate an offence* ***(R. v. Hector & François [1984 1 AER 785])****. It is significant to note, however, that it was stressed in that case that the trial process itself is equipped to deal with the bulk of complaints on which applications for stay of proceedings are founded…."* (Emphasis added)

The Learned Judge in the case of **Velvindron** also cited the following cases which deal with the issue of a stay of proceedings on the ground of abuse of process –

> *"In* ***D.P.P. v. Hussain, The Times June 1 1994,*** *the Court reiterated the exceptional nature of an order staying proceedings on the ground of abuse of process and stated that such an order should never be made where there were other ways of achieving a fair hearing of the case, still less where there was no evidence of prejudice to the defendant.*
>
> *Further, in determining abuse of process, the Court in* ***R. v. Derby Crown Court ex p. Brooks [1985 80 Cr. App. R. P. 164],*** *after quoting with approval the statement of Lord Diplock in* ***Sang [1979 2 AER 1222 p. 1230]*** *pointed out that "the ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution."*

I must hasten to add that by virtue of the extent and nature of the constitutional jurisdiction and powers vested in this court under Section 17, this court would not in the least hesitate and would indeed readily intervene at any stage, including at the stage of an enquiry, where it is amply demonstrated that such intervention is essential in the absence of any existing appropriate solutions to secure the protection of any of the fundamental rights under Chapter II, including the guarantee of a fair trial under Section 10. The plaintiff's case as disclosed in his plaint does not however in any manner fall in this category of cases.

The present matter has not yet reached the trial stage and it may not reach that stage. As already pointed out, the plaint fails to reveal that in the eventuality of a trial, the plaintiff might not have the safeguards of the trial process before the trial court or his rights under any of Sections 3, 10 or 15 might be jeopardised. Should there be any failure on the part of the trial court to comply with any such norms, there will be further and adequate remedies afforded to the plaintiff in the course of the various stages of appeal provided by law and by the Constitution. On the contrary, there is nothing to indicate *ex facie* the plaint that any of the issues raised by the plaintiff in his plaint, cannot be adequately and conveniently dealt with and be adjudicated upon by the trial court in accordance with the norms of a fair trial as guaranteed by the Constitution.

It is therefore clear that the plaint neither discloses any actionable breach of any provision of the Constitution that warrants the intervention of the court under Section 17 of the Constitution, nor do the averments reveal that the plaintiff has no adequate means of redress under any other law. It has not been established therefore, that the plaint discloses a fit and proper case for this court to intervene under Section 17.

The plaint must accordingly for these reasons, be set aside.

There is however another compelling reason as to why the plaintiff cannot proceed with his plaint. The defendants had also raised in their plea *in limine* that there is no live issue left in the present case and that "*in the circumstances, the maintaining of the current proceedings amounts to an abuse of the process of the Court."*

In that connection, Counsel for the defendants submitted that under paragraph 28A the plaintiff has asked for authority to refer to and publish to the co-defendant three items, the first two of which, have in fact been communicated and filed in court. In so far as item 28A(iii) is concerned, counsel referred to the protracted pleadings in relation to these. He pointed out that the defendants have asked for particulars, further and better particulars and have also moved that the case be fixed for arguments on the issue of particulars in an attempt to identify the documents that the plaintiff is referring to.

It is the contention of counsel for the defendants that all information sought by the plaintiff and which is in the possession of the defendant No. 1, has been communicated to the plaintiff. In the circumstances, there is no live issue in the case and the plaintiff's insistence upon the third limb of the prayer pertaining to documents and discussion papers relating to the construction of hospitals, is merely protracting matters and constitutes an abuse of the process of the court.

Counsel for the co-defendant concurred with these views and further moved to be put out of cause inasmuch as there was no prayer against it.

In his reply counsel for the plaintiff has pointed out that the stand of the defendants regarding the documents at the initial stages when the request for communication was made, is to the effect that such disclosure was premature. The defendants' stand, according to counsel, reveals that the documents were available but that the defendants did not consider it necessary to release them at that stage.

Counsel submitted that the plea *in limine* must be set aside inasmuch as the court needs to hear evidence on the issue and the case must accordingly proceed on its merits.

I have given due consideration to the arguments on behalf of all parties.

At the outset it must be noted that although the arguments have been conducted seemingly on the basis that the plaintiff is seeking communication of the documents in issue, the averments of the plaint make it clear that the plaintiff is in fact seeking authority to refer to and publish to the co-defendant, the abovementioned documents under Section 4(2) of the Official Secrets Act.

Under Section 4(1) of the Official Secrets Act –

> *"Any person who in any manner publishes a report of, or a comment on any matter and alleges, expressly or impliedly, that the report or comment, as the case may be, relates to what took place at a meeting of the Cabinet shall commit an offence and shall, on conviction, be liable to imprisonment for a term of not less than one month and not more than 12 months together with a fine not exceeding 2,000 rupees, unless he proves that the publication was made with lawful authority or as a result of information obtained from a person authorised to communicate it."*

and under Section 4(2) –

> *"Any person who in any manner publishes any document which purports to be, in whole or in part, a document which was submitted to the Cabinet or was or is intended to be submitted to the Cabinet by or on behalf of any Ministry or government department shall, unless he shows that he had obtained the prior authority in writing of the Secretary to the Cabinet to do so, commit an offence."*

It is agreed that the plaintiff's request in respect of the Cabinet memorandum and the Jeetah paper, subject matter of prayer 28(A)(i) and (ii), have been met inasmuch as the documents have been filed in court and are no longer live issues before this court. The only issue left is in relation to paragraph 28A(iii) which concerns the authority to refer to and publish to the co-defendant "*all documents and discussion papers relating to the construction of hospitals covering the period 1st June 2010 to December 2010*".

The defendants asked the plaintiff to precise his request and give specific particulars such as the date, title and the subject matter of such documents and discussion papers. Indeed on 20 October 2011 the defendants have applied for particulars in respect of the information sought and *inter alia* under paragraph 28A asked the following question:

> *"Q.4 Defendants move for full and detailed particulars of the dates, titles and subject matter of the "documents and discussion papers" as referred to in sub paragraph (iii),*

and under paragraph 28B –

> *Q.5 Is plaintiff in presence of the documents mentioned in sub paragraphs (i), (ii) and (iii)?*
>
> *Q.6. Defendants move for full and detailed particulars of the dates, titles and subject matter of the "all documents and discussions" as referred to in sub paragraph (iii)."*

On the 12 December 2011 the plaintiff made the following reply:

> *"A4 & A6: The information paper or Cabinet Memorandum submitted by the then Minister of Health, Hon. R. Jeetah on the 5th of March 2010 with regard to the setting up of a National Geriatric Hospital;*
> *Minutes of proceedings of the 18th Cabinet meeting dated the 18th of June 2010 relating to the construction of hospitals; and*
> *All documents and discussions relating to the acquisition of land and building for the setting up of a National Geriatric Hospital covering period January 2010 to December 2010."*

After a copy of the documents referred to under paragraph 28(A)(i) and (ii) had been filed in court, on 29 May 2012, the defendant filed a demand of further and better particulars as follows:

> *"1. Under paragraph 28A(iii) of the Plaint with Summons –*

(a) *Defendants insist on full and detailed particulars of each and specific documents and discussion papers by providing dates, titles and subject matter of such documents and discussions papers.*

(b) *Defendants move for full and detailed particulars of what other documents, apart from documents already communicated to plaintiff, are required and in what way those documents are relevant for the preparation of plaintiff's defence.*

(c) *Would plaintiff indicate with precision on which specific dates "all the documents and discussions papers" referred to were submitted or intended to be submitted to Cabinet by the relevant Ministry or Government Department."*

On 25 June 2012, in his answer to further and better particulars, the plaintiff has related the background and history of the present case as well as the reason why the plaintiff wishes to be communicated with these documents. He has *inter alia* averred that the exchange of correspondence between the plaintiff and the defendant No. 1 reveals that the defendant No. 1 is in possession of all the documents sought but was of the view that it was premature to authorise their disclosure. The plaintiff did not supply the details requested by the defendants.

The defendants being dissatisfied with the reply moved that the case be fixed for arguments on the issue of particulars. On the day scheduled for hearing the argument i.e. 14 September 2012, counsel for the plaintiff stated that he would answer the three questions of the demand of further and better particulars under paragraph 28(A)(iii) and the matter was fixed for mention on 16 October 2012 before the Master and Registrar for these answers to be filed. When the case was called on 16 October 2012 the answer filed was as follows:

"1. The plaintiff relies on the answer dated the 25th of June 2012."

The defendants thereafter filed their plea on 29 November 2012 in which they have raised the aforementioned plea *in limine.* The issues raised in the said plea being that there is

no live issue left in the case and the plaintiff's insistence upon the question, is an abuse of the process of the court the more so given that the documents sought, if they exist in fact, are not Cabinet papers and are not within the defendant No. 1's possession.

In relation to these documents, on 10 May 2012 the Attorney for the co-defendant made the following observations:

> *"As regards paragraph 28(a)(iii), we understand that plaintiff <u>may be</u> referring to documents secured in the course of the enquiry.*
> *These documents are not subject to disclosure under the Official Secrets Act. If these documents are relevant to the charge, they will, as per normal practice, be shown to the plaintiff at the level of the investigations for the purpose of recording any explanation he wishes to give."* (Emphasis added)

On 16 October 2012 the attorney for the co-defendant reiterated his stand that it <u>may be</u> that the co-defendant has secured the documents.

After considering all the arguments, I am of the view that the plea *in limine* is well taken. The request made under paragraph 28(A)(iii) is sweeping in nature and is worded in general terms. The defendants made repeated requests for particulars so as to ascertain and identify the documents that were being referred to. They asked the plaintiff to specify the dates, title and subject matter of such documents. The plaintiff did not supply any of the details sought.

I accordingly find that the documents and discussion papers, which the plaintiff wishes to refer to and publish to the co-defendant, have not been clearly identified and are not identifiable. Neither the nature of these documents, their date, subject matter or title, have been supplied by the plaintiff despite requests for particulars and requests for further and better particulars on the part of the defendants. Given that the documents and discussion papers have not been clearly specified or identified, it is difficult for the defendants to know exactly what the plaintiff is

seeking. As such it is not possible for the court to issue an order in the general and vague terms averred in the plaint and order the defendants to give authority to the plaintiff to refer to and publish to the co-defendant i.e. *"All documents and discussion papers relating to the construction of hospitals covering the period June 2010 to December 2010".*

Further I take note of the defendant No. 1's stand which is to the effect that he has in fact communicated the information which is in his possession relating to item 1 and 2 under paragraph 28. In so far as item 3 is concerned, the defendant No. 1 has consistently maintained that such documents, if they exist, are not Cabinet papers and are not in his possession. The defendant No.1's stand on this issue is not contradicted either by any averment of the plaint or any particulars furnished. As such the court cannot order the defendant No. 1 to give his authority for the plaintiff to refer to and publish to the co-defendant, documents of which he has no knowledge and which he has claimed are not in his possession. Furthermore in the absence of any reliable indication that these documents are in fact Cabinet matters in respect of which the provisions of the Official Secrets Act would apply, the need to make the order prayed for by the plaintiff in respect of these documents, has not been made out *ex facie* the plaint and the pleadings.

It must also be noted that at the sitting of the 16 October 2012 before the Deputy Master and Registrar when the Senior State Attorney reiterated that the documents in question were not in the defendant No. 1's possession, she made a statement on behalf of the defendants as follows:

> *"… that documents and discussion papers, <u>if they exist, are not Cabinet papers and defendant No. 1 is not in possession of same</u>. However defendants have no objection that plaintiff refers to any document in his possession for the purposes of his defence in the inquiry initiated by the co-defendant. There is therefore no live issue left in this case. …"* (Emphasis added)

Incidentally I note that at paragraph 11 of the answer to the demand of further and better particulars dated 25 June 2012, after having taken cognisance of the statement made on 14 May 2012 by the attorney for the co-defendant, the plaintiff has stated:

> *"The plaintiff takes good note that the documents and discussion papers under reference are now in possession of the co-defendant."* (Emphasis added)

The co-defendant's stand is that if the documents referred to by the plaintiff concern documents that it has secured in the course of the enquiry, these will be shown to the plaintiff at the level of the investigation for the purpose of recording any explanation that he wishes to give.

It must also be pointed out that whilst the plaint does not make any averment to the effect that the plaintiff is in possession of the documents *in lite* and that the plaintiff has ignored a question in the demand of particulars on this issue, the tenor of the prayers would tend to indicate that he is in fact in possession of the documents. Indeed it is to be noted that he has not asked for communication of the documents but has rather under paragraph 28A, B, C(iii) prayed for authority to refer and publish to the co-defendant, the said documents.

The defendant No. 1 has maintained that the documents in question are not in his possession, and the common stand adopted by all the defendants before the Deputy Master & Registrar on 16 October 2012 is that, they have no objection that the plaintiff refers to any document in his possession for the purposes of his defence in the enquiry initiated by the co-defendant. This stand in my view meets the prayers at paragraph 28(B)(iii) which is to the effect that the court makes a declaration that the plaintiff is entitled by lawful authority to refer to and publish the documents under reference as well as prayer 28(C)(iii) under which, the plaintiff has

prayed that the court gives directions to the defendants or any one of them allowing the plaintiff to refer to and to publish to the co-defendant the said documents.

I accordingly find that there is no outstanding issue which remains to be determined *ex facie* the plaint. I find it apt to quote the dictum of Lord Justice Clerk Thomson in the case of **McNaughton v. McNaughton's Trs. (1953) SC 387,392** and cited in **Planche v. The PSC & Anor [1993 SCJ 128]**:-

> *"Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory +-bureau."*

I find that the plaint does not disclose any answerable breach of any chapter II rights such as to warrant a constitutional redress under Section 17 of the Constitution and that at any rate, there is no live issue *ex facie* the plaint which remains to be determined.

For all the above reasons I set aside the plaint. With costs.

R. Mungly-Gulbul
Judge

19 March 2013

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Mr. Attorney G. Nunkoo

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Mr. N. Meethoo, State Counsel instructed by:
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