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IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

(REGULAR JURISDICTION)

2023-HC-DEM-CIV-FDA-1183

BETWEEN: -

1. **MARK GORDON**
2. **SHENIKA SIMPSON**
3. **LUCRECIA GEORGE**

Applicants

-and-

1. **THE ATTORNEY GENERAL**
2. **CENTRAL HOUSING AND PLANNING AUTHORITY**
3. **GUYANA SUGAR CORPORATION**

Respondents
Jointly and severally

SUBMISSIONS ON BEHALF OF THE FIRST NAMED RESPONDENT

FACTUAL BACKGROUND:

1. In or around 2011, the Government of Guyana proposed the construction of a four-lane highway passing through lands owned by a State entity, the Guyana Sugar Corporation ("GUYSUCO"). Those lands are known as Block 'X' Plantation Herstelling, East Bank Demerara ("the said lands") and were declared a zero-tolerance area on 24 June 2021 by the Central Housing and Planning Authority ("CHPA").

2. A group of persons numbering around 150 (which included the Applicants) squatted on the said lands (collectively referred to as "the squatters"). It is the Respondents' case that these squatters have no legal and/ or proprietary right and/or interest in the said lands.

3. Notwithstanding, in or around 2011 and then from 2021, the Government, through the Ministry of Housing and Water ("the Ministry") and the CHPA, informed the squatters of the Government's intention and plan to utilise the said lands for a public purpose, that is, for the construction of a four-lane highway.

4. This four-lane highway is intended to create another access for traffic to and from the East Bank of Demerara, in order to ease the tremendous traffic congestion which currently plagues that East Bank corridor. This proposed highway would positively impact the lives of tens of thousands of Guyanese as it would address a chronic traffic congestion issue.

5. This vital road link is also intended to create connectivity to a new and vast road network currently under construction that connects traffic from the East Bank, from the West Coast and West Bank via the New Demerara Harbour Bridge, Georgetown and the East Coast of Demerara via the Eccles to Ogle road link.

6. The Government of Guyana, through its agent (CHPA), met with the squatters, including the Applicants, on several occasions, with the aim of providing financial aid

to the squatters for the structures erected on the said lands, and to provide them with alternative free titled lands [which they would own] for their relocation.

7. Despite the numerous attempts by the Government to incentivise the relocation of the Applicants, they refused to engage with the Government and its agents.

8. Notably, there were 150 squatters on the said lands. With the exception of only 7 persons, including the Applicants, they have all engaged the Government and have been relocated.

9. The remaining squatters, including the Applicants, were issued several public notices offering them, as the Government did for the other squatters, free residential house lots, and a grace period to relocate.

10. A final notice was issued, and the squatters were informed that should they reject this final offer, the Government through its agents, will have no choice but to proceed with the demolition exercise to commence the construction process. This national infrastructural project could not be indefinitely stalled.

11. The Applicants never heeded the notices issued by CHPA, nor did they accept any of the offers made to them. Instead, they remained on the said lands.

12. The Government proceeded with the demolition exercise.

13. The Applicants are now before this Honourable Court claiming several constitutional breaches.

14. Insofar as is relevant to the First Named Respondent, the Attorney General, we will address the Applicants' claim that their rights under Articles 141, 142 and 143 of the Constitution of Guyana were contravened.

ISSUES:

I. Whether any Prescriptive Rights accrued to the Applicants?

15. It is submitted that at all material times, the said Lands were owned by GUYSUCO, a state company, then vested to NICIL, a state company, and are now under the control of CHPA.

16. Details of ownership of the lands at Mocha/Herstelling, which includes the said lands, are set out hereunder:

    a. by virtue of Transport 448 of 1882, the lands were owned by the Third-Named Respondent ("GUYSUCO");
    b. in 2011, GUYSUCO gave approval for the transfer of certain lands including lands at Cane View, Herstelling, including the said lands, to the CHPA;
    c. by virtue of Order No. 45 of 2017 made under the **Public Corporations Act, Chap. 19:05** and published in the Official Gazette on 30 December 2017, ownership was transferred from (GUYSUCO) to National Industrial and Commercial Investments Limited (NICIL);
    d. the said approval granted to CHPA continues to be honoured by NICIL;
    e. to date, CHPA continues its use and occupation of lands, including the said lands.

17. It therefore cannot be disputed that the said lands fall into the definition of state land in the **Title to Land (Prescription and Limitation) Act, Chap. 60:02.**

18. Prior to 2011, title by prescription could have been acquired for State lands once sole and undisturbed user or enjoyment for thirty (30) years was established - [see **section 3 of the Title to Land (Prescription and Limitation) Act, Chap. 60:02.].**

19. This position however changed in 2011 by virtue of **section 3(2)** of the **Title to Land (Prescription and Limitation) (Amendment) Act 2011** ("the 2011 Amendment Act") which provides:

*"State land, Government land, **land wholly owned by State entities including companies and corporations or in which the controlling interest is vested in the State** .... is expressly excluded and shall **not** be acquired by prescription through adverse possession."*

20. The said lands, being lands owned by a State entity (GUYSUCO), and transferred to NICIL, another State entity, are, no doubt, State lands. The 2011 amendment **expressly** bars the acquisition of State lands by prescription through adverse possession.

21. The Applicants contend that the 2011 Amendment does not operate retrospectively. With this contention, we do not disagree. However, the Applicants' sole and exclusive occupation must have been for a period of 30 years prior to 2011 for it to have crystallized. On the Applicants' own case, they began occupying the said lands in 1997. Therefore, by 2011 their occupation would have only been for 14 years - clearly falling short by more than half of the period required for possessory title to have been acquired.

22. In addition, the evidence of the CHPA bears out that the Applicants could not have been in sole undisturbed or uninterrupted/ exclusive possession and control of the said lands.

23. Following these assertions by the Respondents in their Affidavits in Defence, the Applicants sought to disingenuously change their narrative in their Reply filed on 9 February 2024. The Applicants then, and for the first time, alleged that the said lands are private lands - clearly, in an attempt to satisfy the requirement in **section 3(a) of the Title to Land (Prescription and Limitation) Act** of 12 years' sole and undisturbed occupation to accrue prescriptive rights.

24. The Applicants' 'new' claim for adverse possession to what they now purport to be 'private lands', must fail for the below reasons:

    i. the Applicants have attempted to substantiate their allegation of private ownership of the said lands by way of Transport 402 of 1892 in the name of one Manoel DeAguiar. This Transport is completely irrelevant to these

proceedings, and is misleading, as the Transport relates to the ownership of lands at Plantation Rome and Houston, not to the said lands which are located at Herstelling;

ii. in any event, the evidence bears out that the Applicants were not in sole and undisturbed possession of the said lands, even for 12 years before 2011 *(see the Affidavit in Defence of the Gladwin Charles filed on 19 January 2024 and the Affidavit of Rawle Aaron filed on 22 January 2024);*

iii. even if the Applicants can establish such possession, they filed no claim before 2011 and are therefore caught by the provisions of **section 4 of the Title to Land (Prescription & Limitation) (Amendment) Act, No. 6 of 2011];**

iv. further, no relief is claimed in the Applicants' Fixed Date Application for this private adverse possession claim (and indeed, this could not have been prayed for, given that the premise of the Applicants' case is prescriptive rights to State lands by adverse possession) - see paragraph 1 (h) of the FDA, which seeks *"a declaration that section 3(2) of the Title to Land Act as amended in 2011 does not extinguish, retroactively or retrospectively, any prescriptive right that accrued in favour of the First Landed Applicant before the amendment took effect."*

II. Whether the Applicants are entitled to protection from deprivation of property pursuant to Article 142 of the Constitution?

25. The Applicants allege breach, by the Respondents, of their constitutional right to property in the said lands.

26. It is respectfully submitted that both in fact, and in law, the Applicants' claim to adverse possession over the said lands has been defeated. These matters are addressed *in extenso* at Issue 1 above.

27. Indeed, the Applicants must have first acquired the property, that is, the said lands, or an interest in or right over the same, to have suffered a deprivation therein, such as to benefit from the constitutional protection that **Article 142 of the Constitution** affords.

28. As the Applicants have not made out a case on the first limb, that is to say, they have not established that they have acquired the said lands or an interest in or right over the same, **Article 142** has no place in these proceedings.

29. Once it is established that the said lands are owned by the State and that the Applicants can neither acquire legal nor proprietary title/interest in State lands, *a fortiori,* this claim for constitutional breach must fail.

III. Whether the Applicants are entitled to relief under Article 143 of the Constitution?

30. Article 143 guarantees protection against arbitrary search or entry of, *inter alia*, a person's property.

31. From the above, we have established that the said lands were never the "property" of the Applicants. They therefore cannot seek constitutional protection under Article 143.

32. Indeed, from the time the Applicants entered the said lands in 1997, they were in law regarded as trespassers. Trespass refers to the unlawful presence of a person on land that is in the possession of another: **Halsbury's Laws of England Tort (Volume 97A (2021) at para. 161.**

33. The Applicants entered State lands and constructed wooden structures and unfinished concrete structures; temporary bridges across the drainage trench from Mocha Arcadia; utilized illegal electrical connections; and participated in rainwater harvesting. The said lands were clearly not a regularised housing area. In fact, as aforementioned, from 2021, the area was declared zero-tolerance. *[See Affidavit of Rawle Aaron and Gladwin Charles filed on behalf of the Third Named Respondent].*

34. The Applicants were therefore trespassers in the eyes of the law and squatted on State lands. As Lord Denning MR recognised in **McPhail v Persons, names unknown [1973] Ch 447 at 456, [1973] 3 All ER 393 at 396, CA [Tab A],** a squatter is a trespasser.

35. By their own admission, the Applicants were not the title holders of the said lands, and could not have been, since the said lands are owned by the State. Accordingly, trespassers can be removed at any time.

36. Notwithstanding, CHPA at all material times, chose to ensure that the Applicants' structures and belongings were not destroyed - [*see paragraphs 53 to 57 of the affidavit of Rawle Aaron filed on behalf of CHPA].*

37. CHPA also issued several notices regarding meetings to be held with residents of the squatting area on 2 September 2021, 28 September 2021, 27 June 2022, 9 November 2022, 25 November 2022, 26 November 2022, 27 November 2022, 28 November 2022 and December 2022; issued Certificates of Title to squatters who complied with said notices; assisted squatters with labour and other materials and with temporary accommodation where requested; compensated the squatters for the value of their cash crops through NAREI; and allowed a grace period to the squatters to facilitate the construction of their new homes.

38. It must be underscored that the Applicants refused to engage in this process even after the issuing of several notices and meetings by CHPA. As a result, they were warned that failure to accept CHPA's offer would thereby force CHPA to take the necessary steps to retrieve State Lands in accordance with its mandate.

39. As such, the entry to the said lands and subsequent demolition after the many steps undertaken by the CHPA cannot be deemed as arbitrary such as to offend **Article 143**. CHPA followed the requisite due process and natural justice principles – it issued notices; provided opportunities for the Applicants to be heard and make representations; and offered financial and other compensation for their relocation.

40. No doubt, CHPA and the Respondents appreciated that while a property owner does not owe a duty of care to trespassers, it does owe a duty of '*common humanity*', or a duty to act '*in accordance with common standards of civilized behavior*': **British Rlys Board v Herrington [1972] 1 All ER 749 [Tab B].** This CHPA did, above and beyond, as the evidence bears out.

41. However, as the House of Lords recognised in that case, where the owner of the property acts to retrieve his land or to deter the trespasser, it is the trespasser who is himself responsible for any injuries resulting from the trespass, thus:

> *"... If the trespasser, in spite of the occupier's reasonable endeavours to deter him, insists on trespassing or continuing his trespass, he must take the condition of the land and the operations on the land as he finds them, and cannot normally hold the occupier of the land or anyone but himself responsible for injuries resulting from the trespass, which is his own wrongdoing."* [pages 23-24]

42. It is respectfully submitted that the Respondents, at all times, acted reasonably and within the confines of the law in entering upon the said lands for purposes of demolition.

IV. Article 141(1) – Protection from Inhuman Treatment

43. The Applicants seek the refuge of **Article 141**. They allege that CHPA violated their right to protection from inhuman or degrading punishment when it entered upon the said lands on the demolition dates and bulldozed their personal property and belongings.

44. CHPA's evidence establishes that prior to the demolition exercise on 5 January 2023, CHPA spared no effort in facilitating the relocation process for the squatters of the said lands to ensure a smooth and temperate transition.

45. Those efforts were outlined by Mr. Rawle Aaron and Mr. Gladwin Charles, on behalf of CHPA. In addition to the matters outlined in the affidavits of Mr. Aaron and Mr.

Charles, and traversed above in these submissions, the following specific efforts on behalf of the Respondents, and in particular, CHPA, must be registered:

(i) In relation to alternative land offered, the squatters including the Applicants, were given the following options regarding relocating to residential communities:

a. Those with concrete structures can build on the land allocated;
b. Those with wooden structures, the structures would be removed free of charge to the land allocated;
c. An opportunity to select a house and land in Plantation Prospect; and,
d. Relocation to another lot in any other housing scheme.

(ii) Following this, an appraisal report was done in which the current market value of the Applicants' property was valued at $2,800,000 and the cost replacement value reflected a sum of $6,000,000. In spite the offer of compensation in this sum, the Applicants refused to engage with CPHA;

(iii) The First Named Applicant was also offered compensation for the value of his crops in the sum of $132,861 - (see NAREI valuation). He refused;

(iv) All of these options and considerations were offered to the Applicants. Yet still, they refused to engage in the relocation process;

(v) As a consequence, CHPA caused a final notice to be issued to the Applicants;

(vi) A subsequent public final notice was then published in the Guyana Chronicle. It displayed a copy of each letter and identified 5 squatters, including the Applicants, who refused compensation, a free residential house lot and a grace period to facilitate the construction of their new homes;

(vii) In the said notices, the Ministry of Housing and Water, indicated that there were available, move-in-ready, single flat two-bedroom housing units in Little Diamond Housing Scheme for each of the 5 families, inclusive of the Applicants;

(viii) Then in December 2022, a subsequent meeting was held with the remaining non-compliant squatters where an offer of 5 acres of agricultural lands at Long Creek was made available by the Guyana Lands and Survey Commission. The Applicants were invited to visit CHPA to negotiate on an individual basis for their compensation. Again, the Applicants did not attempt to engage the Ministry of Housing and Water and CHPA;

(ix) On 5 January 2023, CHPA entered onto the said lands and commenced demolition.

46. No doubt, CHPA and the Respondents exercised and exhausted all reasonable and practicable efforts to secure the Applicants' cooperation before demolition. Yet, the Applicants cry victim.

47. In **Ianthe Harding v The Superintendent of Prisons and the Attorney General of St. Lucia Civil Appeal No. 13 of 2000 [Tab C]**, the Court of Appeal determined that the words *'inhumane and degrading'* treatment should be given their natural and ordinary meaning. Justice Satrohan Singh espoused at para. 32:

> *"Inhuman punishment or other treatment means or requires punishment or treatment which causes a minimum level of intense physical or mental suffering, whether or not inflicted deliberately or intentionally or results in the complete or substantial deprivation of the elementary necessities of life over an extended period of time."*

48. We respectfully submit that no such punishment, treatment or suffering, or deprivation of the elementary necessities of life over any period of time was ever meted out to the Applicants. On the contrary, even as squatters/ trespassers, they were afforded every opportunity to assuage any inconvenience which relocation may have caused. They declined.

49. In relation to **Article 3 of the European Convention on Human Rights**, cases have made it clear that the determination of inhumane and degrading treatment must be made

with regard to the peculiar circumstances of the case: **Desmond Grant and Roger Gleaves v The Minister of Justice [2011] EWHC 3379 (QB) [Tab D].**

50. In the circumstances of the case at bar, the Honourable Court is respectfully invited to place heavy reliance on the Affidavits of Mr. Rawle Aaron and Mr. Gladwin Charles. Specifically, this Honourable Court should have regard to the fact that although the Applicants had no legal right to the said lands, CHPA complied with the principles of due process and natural justice in carrying out its mandate at all material times.

51. The Applicants' conduct prior to the demolition, i.e., their failure to engage with CHPA, which frustrated the relocation process, should also be considered by this Honourable Court. All but 7 persons attempted, over the course of an extended period, to stall a national development and infrastructure project.

52. We respectfully submit that there was no violation of Article 143 as the Applicants contend and/or at all.

(V) Whether the Applicants are entitled to exemplary damages?

53. In the case at bar, there exist no aggravating circumstances to warrant either an award of exemplary or vindicatory damages.

54. Exemplary damages serve to provide an applicant with recovery above and beyond compensatory damages in order to punish the wrongdoer for egregious conduct and to deter the wrongdoer and others from similar conduct in the future: **Rookes v Barnard [1964] AC 1129 [Tab E].**

55. It is trite law that a Claimant should not be awarded both damages for the breach of a constitutional right and exemplary damages. In **Maharaj v The Attorney General of Trinidad and Tobago (2015) 18 WIR 537 [Tab F],** Chief Justice Ivor Archie observed:

"In summary, therefore, the expression 'vindicatory damages' in the sense of a separate award has a rather tenuous lineage. A careful reading of the authorities convinces me that it has never really been expressly approved by the Privy Council (at least as a requirement), and its use may be misleading in that it may tempt trial courts to artificially and doubly compensate claimants in respect of breaches that are properly compensable by a single and undifferentiated award of 'damages'...

56. In **Takitota v AG and Others [2009] 4 LRC 807 [Tab G]** (at para 14), the Privy Council pronounced that the common law award of exemplary damages has *"much the same object"* as an award of damages for breach of a constitutional right, that is, to punish the defendant for outrageous behavior and deter him and others from repeating it. The Board observed in very uncompromising terms that:

"... it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights. When the ***vindicatory function of the latter head of damages has been discharged,*** *with the element of deterrence that a substantial award carries with it, the purpose of exemplary damages has largely been achieved.* ***To make a further award of exemplary damages would be to introduce duplication."***

57. It should be noted that the Caribbean Court of Justice cases on which the Applicants rely do not concern constitutional violations.

58. In any event, there is nothing on the evidence to suggest any '*outrageous behaviour*' of the Respondents in the process. The converse is true. Every effort was made and employed to ensure the Respondents' proper conduct in the relocation and demolition processes.

59. It is therefore respectfully submitted that no case for exemplary damages has been established. Further, even if this Honourable Court were to determine that there was a violation of the Applicant's constitutional rights (and we say there was none), an award

of exemplary damages ought not to be made, as to so do would be to introduce duplication.

CONCLUSION:

60. The First Named Respondent respectfully submits that the Applicants have failed, in law and in fact, to establish any prescriptive right over the said lands of the State.

61. Once that fundamental pillar falls, the remainder of the Applicants' case must fall away. Indeed, the Applicants cannot seek the shelter of Articles 142 and 143 in respect of that which is not their property.

62. In fact, it is the case that notwithstanding the Applicants' status as squatters and trespassers on the said lands, the Respondents acted in compliance with the law and principles of due process and natural justice in, and leading up to, the demolition process. The demolition was the result of no less than the Applicants' unreasonable and uncompromising conduct. It is respectfully submitted that there was, too, no breach of Article 141 of the Constitution.

63. In the circumstances, it is respectfully submitted that the Fixed Date Application herein be dismissed with costs.

All of the above are respectfully submitted.

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Dated this 10th day of April 2024