

[2009] CCJ 5 (AJ)

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF THE
CO-OPERATIVE REPUBLIC OF GUYANA**

**CCJ Application No AL 5 of 2008
GY Civil Appeal No 6 of 2002**

BETWEEN

RAMNARINE SOMRAH

APPLICANT

AND

**THE ATTORNEY GENERAL OF GUYANA
THE POLICE SERVICE COMMISSION**

RESPONDENTS

Before The Honourables

**Mr Justice Nelson
Mr Justice Pollard
Mr Justice Saunders
Mr Justice Hayton
Mr Justice Wit**

Appearances

Mr Roopnarine Satram for the Applicant

Ms Trishala Persaud for the Respondents

JUDGMENT

of

The Honourable Justices Nelson, Pollard, Saunders, Hayton and Wit

Delivered by

The Honourable Mr Justice Rolston Nelson

on the 27th day of May 2009

JUDGMENT

[1] Before this Court are three applications: an application for special leave to appeal against an order of the Court of Appeal dated December 17, 2007, a companion application for special leave to appeal as a poor person and an application for an extension of time to make these two special leave applications. On March 17, 2009 we heard full argument on the application for an extension of time both on the issue of delay in filing the applications for special leave and the likelihood of success of the appeals. We formed the view that the appeal was not likely to succeed except in so far as it challenged the order of the Court of Appeal that the applicant be paid pension and superannuation benefits to be assessed “on the basis of his pensionable service from August 1965 to May 1990 i.e. 14 years’ pensionable years of service”. We adjourned the hearing to enable counsel to ascertain and make written submissions on how 14 years was arrived at. Both sides accepted there was a mathematical error. When the hearing resumed on April 23, we granted the extension of time and indicated to counsel that having heard extensive argument on the merits of the appeal we would be prepared to treat the hearing of the application for special leave as the hearing of the appeal without the need to repeat the argument on the merits of the appeal. In the result by consent we allowed the appeal so as to permit the applicant’s benefits to be computed on the basis of 24 years’ pensionable service. The appeal was otherwise without merit. Since there was no agreement on costs, we made an order that the respondents pay the applicant costs in the sum of \$200,000. We now give our reasons for the orders we made.

The facts

[2] Mr. Ramnarine Somrah (hereinafter called “the applicant”), joined the Guyana Police Force as a constable on August 3, 1965 and was appointed Inspector of Police on July 2, 1986. By an Order of Dismissal dated May 21, 1990 the Police

Service Commission dismissed him from the Guyana Police Force with effect from November 30, 1989 for being absent from duty without leave or excuse.

- [3] The applicant later brought an action (“the first action”) seeking *inter alia* an order of *certiorari* directed to the Police Service Commission quashing the Order of Dismissal on the ground of excess or lack of jurisdiction. On April 18, 1991 Claudette Singh J. (as she then was) quashed the Order of Dismissal. The learned judge, however, made no order for reinstatement of the applicant in his office as Inspector of Police.
- [4] The Commission denied him reinstatement, and some six years later, on March 27, 1997 he brought an action (“the second action) for an order of *mandamus* to compel the Commission to reinstate him. Bissessar J. dismissed the action with costs. On October 15, 1997 the Court of Appeal affirmed the judgment of Bissessar J. with costs.
- [5] On January 22, 1998 the applicant wrote to the Police Service Commission requesting that he be compulsorily retired with benefits but the Commission did not respond to this letter. In the year 2000 he filed a constitutional motion (“the third action”) praying for the following relief:
- (a) An order declaring his removal from the Police Force as compulsory retirement;
 - (b) An order directing the payment to him of reasonable compensation for loss of office;
 - (c) An order for redress for constitutional wrong; and
 - (d) Costs.
- [6] On January 14, 2002 Jainarayan Singh J. (Ag.) ruled that the effect of the order of Claudette Singh J. quashing the Order of Dismissal in 1991 was that the applicant remained an Inspector of the Guyana Police Force until he attained the age of retirement. Therefore the applicant was entitled to an order for payment of salary,

pension and gratuity. The applicant was awarded the sum of \$3,149,021.00 in addition to a monthly pension of \$17,828.00 in respect of the post-retirement period, interest and costs.

[7] The State and the Commission thereafter appealed the judgment of Jainarayan Singh J. on the following grounds:

- (a) The learned trial judge erred in law in awarding pension and gratuity to the applicant; and
- (b) The learned trial judge erred in law in not taking into account the applicant's duty to mitigate his loss.

[8] On December 17, 2007 the Guyana Court of Appeal allowed the State's appeal in the third action, setting aside the decision of Jainarayan Singh J. with costs and ordering that the applicant be paid pension and other superannuation benefits to be assessed and calculated on the basis of 14 years' pensionable service.

[9] The applicant thereafter filed a motion in the Guyana Court of Appeal seeking leave to appeal to the Caribbean Court of Justice against the order of December 17, 2007. The Court of Appeal (Ramson, B. S. Roy, Cummings-Edwards JJA.) refused leave to appeal on April 18, 2008.

[10] On August 29, 2008 the applicant applied to this Court for (a) special leave to appeal pursuant to section 6(d) of the Caribbean Court of Justice Act 2004 (No. 16) and (b) special leave to appeal as a poor person.

[11] On September 12, 2008, the Registrar of the Caribbean Court of Justice wrote to the attorney-at-law for the applicant, Mr. B. E. Gibson, indicating that the application for special leave had been filed out of time. The Registrar again wrote to Mr. B. E. Gibson on October 14, 2008 and December 1, 2008 regarding the need to file an application for an extension of time. In her letter dated December 1, 2008 the Registrar informed Mr. B. E. Gibson that if his client did not file an

extension of time application on or before December 15, 2008, a notice to show cause why the applications should not be struck out would be issued.

[12] On December 12, 2008 the applicant filed an application for an extension of time to file the special leave applications.

[13] It was in this context that the special leave application and the application for extension of time came up before us.

Extension of time application

[14] Rule 5.3 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2005 as amended (“the Rules”) entitles an applicant to seek an extension of time for complying with any time limit prescribed by those Rules. In the instant case the applicant had failed to file the application for special leave within 21 days of the refusal of leave to appeal to this Court on April 18, 2008, as required by Rule 10.12 of the Rules.

[15] In order to succeed on an application for an extension of time an applicant must give a cogent explanation for not complying with the Rules and, in the case where the application is to extend the time for appealing, demonstrate that the appeal has a realistic chance of success.

[16] The applicant relied on the fact that Mr. B. E. Gibson, attorney-at-law for the applicant left Guyana shortly after the Court of Appeal’s refusal of leave to appeal. A medical certificate indicated that Mr. Gibson had undergone surgery on March 18, 2008 and again in July 2008 in New York. Indeed on April 18, 2008 Mr. Patrice Henry held Mr. Gibson’s brief in his absence. It was urged upon us that Mr. Gibson’s indisposition abroad and his return to Guyana ostensibly on July 12, 2008 were unforeseeable circumstances within Rule 5.3(2) of the Rules empowering this Court to extend the time for applying for special leave upon

proof that non-compliance with a time limit was due to unforeseeable circumstances.

- [17] Regardless of the period and duration of Mr. Gibson's illness, it must have been apparent to counsel holding his brief, Mr. Henry, that an application for special leave had to be filed within 21 days. Such an application involved no complexity. The applications for special leave were filed on August 29, 2008 in the interval between Mr. Gibson's return to Guyana on August 2 and his departure abroad on October 26, 2008.
- [18] On Mr. Gibson's return to office on November 21, 2008 he would have found at least two letters, dated September 12 and October 14, 2008, from the Registrar of the CCJ pointing out that the applications for special leave were out of time. A third letter to the same effect, dated December 1, 2008 seems to have resulted in this application for an extension of time.
- [19] There was a weak attempt to excuse the delay on the basis of the inability of the applicant to pay legal fees to two other lawyers whom he consulted. It is difficult to accept impecuniosity as an excuse for delay when the applicant is represented at the filing of the application for special leave and for an extension of time by three lawyers, Mr. Gibson, Ms. Mandisa Breedy and Mr. Patrice Henry. At the oral hearing of these applications he was also represented by more than one counsel.
- [20] The reasons advanced by the applicant for late filing of the application are therefore rejected. The only remaining question is whether the appeal has a realistic chance of success. Both counsel agreed in their written submissions for the April 23 resumed hearing that there was a mathematical error in the Court of Appeal's computation of the period of the applicant's service though the respondents had not accepted this when the application was first heard on March

17. The respondents declared that they “have no objection to the Applicant being paid pension on the basis of 24 years of service”.

[21] The respondents contended very forcefully that the computational error was not a sufficient ground for an extension of time. The respondents argued that the Rules must be strictly observed: *Hing v Hing* (1978) 25 WIR 391; *Ratnam v Cumarasamy* [1965] 1 WLR 8; *Revici v Prentice Hall Inc.* [1969] 1 WLR 157; *Evelyn v Williams* (1962) 4 WIR 265. *Hing v Hing* was principally concerned with an application to extend the time for lodging security for costs of an appeal after the appeal had been automatically dismissed for failure to do so within the prescribed time. The Court of Appeal of Guyana refused to extend the time and dismissed the application mainly on the ground that no satisfactory reason was advanced for the delay in complying with the order. Nonetheless, Chancellor Haynes envisaged (at p. 400 I) that if the applicant’s grounds of appeal or affidavits contained “sufficient undisputed matters to indicate that a miscarriage of justice might have taken place in the court below” he would have been in favour of the application. Similarly, in an application such as the present, if the applicant could persuade the Court that it would be a miscarriage of justice for special leave to be denied, the Court ought in the interests of justice to grant an extension of time: see rules 1.3 and 1.4(2) of the Rules. In the present case it would be a miscarriage of justice to prevent the applicant from making an application for leave to appeal on a ground, which, on the concession made by the respondents, must succeed on the hearing of the appeal. We therefore extended the time for filing the application for special leave to August 29, 2008, the date of filing the special leave application.

The special leave application as the hearing of the appeal

[22] Since the special leave application is made to this Court after the refusal of leave by the Court of Appeal, one needs to be reminded (a) that the present application is not by way of appeal and (b) that the grant of special leave is always a matter of

discretion and never a matter of right. Therefore it matters not whether an appeal to this Court from the Court of Appeal was “as of right” because of the value of the subject-matter of the appeal or its constitutional content. *In Brent Griffith v Guyana Revenue Authority* (2006) 69 WIR 320 this Court said at [27]:

“Thus it is a condition precedent of the exercise of that discretion in favour of the applicant that he or she should have an arguable case. Accordingly where it is clear that the appeal as presented is wholly devoid of merit and is bound to fail special leave will not be granted.”

[23] In the present case it is clear that there is merit in the ground of appeal based on the mathematical error. The parties therefore agreed to treat the special leave application as the appeal and that the appeal be allowed on that ground.

[24] We emphasise that on a special leave application the applicant must show that he or she has an arguable appeal. In the instant application we hold that, apart from the computation point, the applicant did not have an arguable case.

[25] Our primary reason for treating his case as not being arguable but for the computation point is that the applicant in the second action could have and should have brought forward for adjudication all claims concerning his wrongful and/or unlawful and/or unfair dismissal including issues of constitutional redress and compensation arising therefrom: see *Henderson v Henderson* [1843-60] All ER Rep. 378 as explained by Lord Bingham in *Johnson v Gore Wood & Co.* [2002] 2 AC 1, 30-31 and by Nelson and Hayton JJ. in *Edwards v Attorney-General* [2008] CCJ 10 (AJ) at [18]. Therefore, the attempt in the third action to relitigate issues arising out of the dismissal or to launch what is in effect a collateral attack on the judgment of Bissessar J and the Court of Appeal constituted a flagrant abuse of process: see *Chokolingo v Attorney-General of Trinidad and Tobago* [1981] 1 WLR 106, 110-112; *Attorney-General of Trinidad and Tobago v McLeod* [1984] 1 WLR 522, 580.

- [26] The applicant further contended that the Court of Appeal failed to consider that his employment had a constitutional element and that private law remedies were not applicable. The Court of Appeal rightly held that deprivation of office was not deprivation of property within article 142(1) of the Constitution. Nor can non-payment of superannuation benefits, for which one can sue, be regarded as deprivation of “property” within article 142: see [50] of *Brent Griffith v Guyana Revenue Authority* (supra).
- [27] The only public law element in the third action was the constitutional garb in which it was clothed in an attempt to attack the finality of the Court of Appeal’s decision of October 15, 1997 in the second action. The courts must be vigilant to see that actions for the recovery of a debt, especially a statute-barred debt, and matters which are *res judicata* are not dressed up in the finery of a constitutional motion: *Harrikissoon v Attorney-General of Trinidad and Tobago* [1980] AC 265; *Thakur Persad Jaroo v Attorney-General* (2002) 59 WIR 519; *Attorney-General of Trinidad and Tobago v Ramanoop* (2005) 66 WIR 334 at [25]-[29].
- [28] Even if the third action was genuinely a constitutional motion it would have been defeated by the delay of ten (10) years in commencing proceedings. It is now settled that delay may defeat a constitutional motion: see *Edwards v Attorney-General of Guyana* [2008] CCJ 10 (AJ) (20 years) and *Sealey v Attorney-General of Guyana* [2008] CCJ 11 (AJ) (16 years).
- [29] For these reasons we treated the appeal as unarguable apart from the ground based on the error of computation.
- [30] As regards the application for special leave to appeal as a poor person, we were not persuaded that the applicant, armed as he was with three counsel at the time of filing and two counsel at the hearing of the applications and the appeal, was an

indigent person within the meaning of rule 10.17 of the Rules, although one ground of his appeal has by consent succeeded.

Costs

[31] On the issue of costs the applicant urged that if he had not brought this appeal the order of the Court of Appeal as to the length of his pensionable service would have stood. Counsel for the respondents, on the other hand submitted (a) that the applicant should have pointed out the computation error to the Court of Appeal and (b) that the appeal had succeeded only on a minor point and there was no merit in the appeal otherwise.

[32] The Court resolved the issue of costs in favour of the applicant since (a) the applicant had to come to this Court to obtain the concession contained in the consent order and incurred costs in doing so (b) the respondents on March 17 had resisted the appeal as to the applicant's length of pensionable service even after it seemed that a mathematical error had been made, though on April 23 they conceded this. Further, the respondents also had a duty to draw the court's attention to such error. In the result the Court ordered that the respondents pay the applicant costs in the sum of \$200,000.

Conclusion

[33] In summary we make the following orders:

- (1) The application dated December 12, 2008 for an extension of time within which to appeal is granted.
- (2) By consent the application for special leave is treated as the hearing of the appeal.

- (3) By consent the appeal is allowed and the order of the Court of Appeal dated December 17, 2007 is varied so that the applicant is paid pension and other superannuation benefits to be assessed and calculated on the basis of 24 years of pensionable service.
- (4) The application for special leave to appeal as a poor person is refused.
- (5) The respondents shall pay the applicant's costs in the sum of \$200,000.

The Hon. Mr Justice R. Nelson

The Hon. Mr Justice D. Pollard

The Hon. Mr Justice A. Saunders

The Hon. Mr Justice J. Wit

The Hon. Mr Justice D. Hayton

