

[2008] CCJ 1 (AJ)

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

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

**CCJ Appeal No CV 6 of 2007
GY Civil Appeal No 99 of 2004**

BETWEEN

EULAND HENDY

APPELLANT

AND

**COMMISSIONER OF POLICE
THE ATTORNEY GENERAL OF GUYANA**

RESPONDENTS

**Before The Rt Honourable
And the Honourables**

**Mr Justice de la Bastide, President
Mr Justice Saunders
Madame Justice Bernard**

Appearances

Mr Benjamin E Gibson and Ms Mandisa A Breedy for the Appellant

Mr Doodnauth Singh SC, Attorney General of Guyana for the Respondents

JUDGMENT OF THE COURT

Delivered by

The Rt Honourable Mr Justice M.A. de la Bastide

on the 11th March, 2008

JUDGMENT

- [1] The intended appellant Euland Hendy, a member of the Guyana Police Force, was discharged on July 6, 1983 for unsatisfactory conduct. As a result he instituted proceedings in the High Court against the respondents challenging his discharge. At the hearing the respondents conceded that he was unlawfully removed from the Police Force, and the trial judge awarded him twenty (20) months' salary as compensation. Not being satisfied with the amount of compensation awarded he appealed to the Court of Appeal which in a judgment delivered on the 29th May, 2007, upheld the judgment of the trial judge as to the quantum of damages, but ruled that he was also entitled to a pension based on his thirteen (13) years of service.
- [2] The intended appellant was granted leave to appeal to this Court against the decision of the Court of Appeal by the Court of Appeal on the 25th June, 2007. The Court of Appeal when granting leave to appeal also ordered that the intended appellant should lodge with the Registrar of the Supreme Court within 90 days the sum of \$400,000.00 as security for costs and added a rider that in default the appeal should stand dismissed. Unfortunately, the order as written up originally and transmitted to the Registrar of this Court, is defective in that it omits the grant of leave to appeal and only records the part of the order that relates to security for costs.
- [3] On the 6th July, 2007, the intended appellant filed an application to the Court of Appeal seeking leave to appeal as a poor person. Because of the intervention of the long vacation, this application was not heard until the 4th October, 2007, when it was dismissed by the Court of Appeal. Meanwhile the time prescribed for the lodging of the security for costs expired on the 23rd September, 2007.
- [4] By notice of application dated the 12th October, 2007, the intended appellant applied to us for an extension of time for the lodging of the security for costs or alternatively, for leave to appeal as a poor person and supported his application by an affidavit sworn on the 12th October, 2007.

[5] The Registrar of our Court at our request by letter to the intended appellant's counsel dated November 7, 2007, required him to show cause on or before the 22nd November, 2007, why the appeal should not be struck out or dismissed having regard to the failure of the intended appellant to provide the security for costs within 90 days in contravention of:

- (a) the order of the Court of Appeal dated the 25th June, 2007; and
- (b) section 13 (2) (a) of the Caribbean Court of Justice Act.

In obedience to that directive the intended appellant's attorney filed submissions showing cause on the 14th November, 2007.

[6] It was of course open to the intended appellant to show cause by persuading us of his entitlement to one of the two orders which he seeks in the alternative in his application to us, that is, an order for the extension of time for the provision of security or an order granting leave to appeal as a poor person. Indeed, the reference in the Registrar's letter to section 13 (2) (a) of the CCJ Act was calculated to bring to the attorney's attention the question whether this Court has power to extend the time for the provision of security for costs beyond 90 days. Moreover, unless we vary the Court of Appeal's order by either extending the time for providing security for costs or by granting leave to the intended appellant to appeal as a poor person (thereby dispensing with the need for security), the appeal would stand dismissed by virtue of the Court of Appeal's order, even without any further order by us.

[7] Having read and considered the written submissions on behalf of the intended appellant, we did not consider it necessary to request any submissions from the respondents as we are satisfied that there is no basis whatever for granting the intended appellant an extension of time for providing security for costs or leave to appeal as a poor person or for intervening in any other way to reverse the consequence of dismissal which has already befallen the substantive appeal as a result of the intended appellant's failure to comply with the order of the Court of Appeal. We will now give our reasons for having come to this conclusion.

[8] With regard to the application in the alternative for leave to appeal as a poor person, there has been placed before us no evidence whatever of the intended appellant's lack of means. In fact, it appears that he must be in a position now to raise the \$400,000.00 required to be lodged as security for costs, as otherwise, the application for an extension of time for doing so would make no sense. In fact, in the notice of application filed in this court, one of the grounds pleaded (in paragraph 2 (e)) reads as follows:

“The intended appellant will deposit the sum ordered by the Court of Appeal”.

This is supported in the affidavit in support of the application by the assertion in paragraph 10 that ‘the appellant is ready to provide the security for costs as ordered by the Court of Appeal ...’.

[9] It is true that in the affidavit sworn by the intended appellant in support of his application to the Court of Appeal for leave to appeal as a poor person, he did deal with his financial position. He swore to having assets worth not more than \$375,000.00, and claimed that he had been unemployed for a considerable period of time, that the monthly pension awarded him by the Court of Appeal amounted to \$10,000.00 and that he was unable to pay the sum of \$400,000.00 ordered by the Court of Appeal. What remains unexplained is what has happened in the interim that has made it possible for him now to raise that sum of \$400,000.00 when he could not have done so before.

[10] The fact is the Court of Appeal refused the application for leave to appeal as a poor person. We do not know what reasons underpinned that decision. But there is no provision either in the Agreement Establishing the Court or in the Caribbean Court of Justice Act (the CCJ Act), or in the Caribbean Court of Justice (Appellate Jurisdiction) Rules (the CCJ Rules) which creates a right of appeal to the CCJ from an order made by the Court of Appeal on an application for leave to appeal or leave to appeal as a poor person. That does not mean that this Court does not have the inherent power to grant an application for leave to appeal as a poor person after an application for such leave has been refused by the Court of Appeal. In fact, this Court recently established that it has that power by

exercising it when granting leave to appeal as a poor person in *Ross v. Sinclair* CV 13 of 2007. But it is a residual power which we would only exercise in exceptional circumstances which require its exercise in order to avoid the real possibility of substantial injustice. No such exceptional circumstances exist in the present case. In fact, as already pointed out, we are dealing with an intended appellant who apparently is now in a position to raise the \$400,000.00 ordered to be lodged in court.

- [11] It was open to the intended appellant in this case, having lost the benefit of the leave to appeal which he was granted by the Court of Appeal, to apply to this Court for special leave to appeal and to apply at the same time to us for leave to appeal as a poor person. He has not, however, done so but nevertheless we think it relevant to state that we have not detected any feature of this case which would have impelled us to exercise our discretion in favour of granting special leave to appeal. Apart from anything else, we do not consider that the appellant's prospects of success would have justified it. The relevance of this is that we would only resort to the inherent jurisdiction to override the decision of the Court of Appeal to refuse leave to appeal as a poor person by granting such leave ourselves, in circumstances in which we would have acceded to an application for special leave to appeal, if one had been made.
- [12] With regard to the primary application, which is for an extension of time for providing the security for costs, the intended appellant faces the difficulty referred to earlier i.e. the absence of any explanation why the sum of \$400,000.00 could not have been raised before the expiration of the 90 day time-limit for the provision of security.
- [13] There is also the matter of the intended appellant's delay in applying for an extension of time. No application for an extension was made until the 12th October, 2007, although the possibility that an extension would be needed if the application to the Court of Appeal for leave to appeal as a poor person failed, would have been obvious long before the 90-day time-limit expired on the 23rd September, 2007.

[14] In these circumstances, it is unnecessary to decide whether we are barred from extending the time for providing security for costs beyond 90 days by section 13 (2) (a) of the CCJ Act, which provides as follows:

“Leave to appeal-

(a) shall be granted to an applicant upon condition that the applicant, within a period to be fixed by the Court of Appeal or the Court, but not exceeding 90 days from the date of the hearing of the application for leave to appeal, enters into good and sufficient security, to the satisfaction of the Court of Appeal for the due prosecution of the appeal, and the payment of all such costs as may become payable to the respondent”

It would appear that if this section applies to the leave to appeal that was granted in this case, then it would not be permissible for any court in any circumstances to extend the time for providing security beyond 90 days.

[15] It could be argued, however, that section 13 (2) does not apply to leave to appeal granted by the Court of Appeal in cases where there is an appeal as of right, as there is no mention in the CCJ Act of leave to appeal being required in such cases. That is a requirement which was introduced by the CCJ Rules. In order to leave the point open for possible argument in the future, we base our decision to refuse an extension of time for providing security not on our lack of jurisdiction, but on the applicant’s lack of merits.

[16] Before concluding this judgment we would like to address a complaint made by the intended appellant that he was taken by surprise when the Court of Appeal entertained an application for security for costs at the hearing of the application for leave to appeal and made an order for the lodging of \$400,000.00 without any written notice of application by the respondents or any evidence as to the intended appellant’s financial position. In this regard, we would like to draw attention to rule 10.8 which provides:

“Where either the Court or the court below grants special leave to appeal or leave to appeal, as the case may be, it –

(a) shall subject to rule 10.6(2) determine whether the applicant should provide security for costs and if so, shall specify the amount of such security and the form in which and the time by which it shall be provided; ... ”

[17] This rule makes it mandatory for the Court of Appeal when granting leave to appeal to determine whether an order for the provision of security for costs should be made, as well as the amount of such security (if ordered) and the form in which, and the time by which, it should be provided. Any applicant for leave to appeal, therefore, should come to the hearing of his application fully prepared for these issues to be determined by the Court. There is no need for any notice of application or evidence as to the applicant's means to be filed by the respondent. If the applicant wishes to persuade the Court to moderate the amount for which security is ordered by reference to his lack of means, the onus is on him to file the appropriate evidence. If he wishes to avoid providing security altogether, he should file with his application for leave to appeal, an application for leave to appeal as a poor person supported by the necessary evidence. In the absence of affidavit evidence as to the applicant's means, the Court of Appeal is perfectly capable of fixing the amount of the security for costs by reference to the nature and number of the issues involved in the appeal and any other relevant factors that can be gleaned from the record or of which judicial notice may be taken. There is accordingly no merit in this complaint. We would point out, moreover, that this complaint is germane neither to the extension of time for providing security for costs nor to the grant of leave to appeal as a poor person. It provided the basis for what was really a challenge to the validity of the order for security for costs made by the Court of Appeal. But this challenge presupposes a right of appeal which simply does not exist. But, for the reasons already given, the challenge even if it could have been mounted, would have failed.

[18] Finally, there is an aspect of the matter to which we would advert though it has not been raised or argued. It is the question whether there is really an appeal as of right in this case. Neither the intended appellant's application for leave to appeal nor the order made by the Court of Appeal identifies the provision under which the right of appeal was claimed. The cases in which an appeal lies as of right

from the Court of Appeal to this Court are set out in sub-paragraphs (a) to (e) of section 6 of the CCJ Act. We suspect that the paragraph on which the intended appellant must have relied, is paragraph (d) which gives an appeal as of right in cases in which a party is seeking to enforce a fundamental right protected by the Constitution. In the absence of argument we go no further than to express serious doubt as to whether this case truly falls within that category.

[19] For these reasons, therefore, we dismiss the intended appellant's application for an extension of time for providing security for costs or alternatively, for leave to appeal as a poor person and confirm the order of the Court of Appeal that the appeal stands dismissed. As we have not had to trouble the respondents in connection with this appeal, we make no order as to costs.

_____/s/_____
Mr. Justice Michael A. de la Bastide (President)

_____/s/_____
Mr. Justice Adrian Saunders

_____/s/_____
Madam Justice Désirée Bernard