

GUYANA SUPREME COURT

LAW LIBRARY

Georgetown

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA
CONSTITUTIONAL AND ADMINISTRATIVE DIVISION

PROCEEDING FOR JUDICIAL REVIEW

2018-HC-DEM-CIV-310

IN THE MATTER OF AN APPLICATION
BY RAMON GASKIN FOR WRITS OF
CERTIORARI AND PROHIBITION

BETWEEN:

RAMON GASKIN

APPLICANT

and

**THE MINISTER OF NATURAL
RESOURCES**

RESPONDENT

and

**ESSO EXPLORATION AND
PRODUCTION GUYANA LIMITED**

**CNOOC NEXEN PETROLEUM GUYANA
LIMITED**

**HESS GUYANA EXPLORATION
LIMITED**

**ADDED RESPONDENTS
(INTERVENERS)**

334



Sept 4, Oct, 25, 2018; Feb 11, 2019; Feb 12, 2020.

Mr. Seenath Jairam SC and Ms. Melinda Janki for the applicant.

Mr. Edward Luckhoo SC for the respondent.

Mr. Andrew Pollard SC and Mr. Nigel Hughes for the added respondents (interveners).

Coram: Justice Roxane George, Chief Justice (ag)

Judgment of the Court

Introduction

1. The applicant seeks the following orders:
 - (a) an order of certiorari directed to the Minister of Natural Resources quashing the decision of the said Minister purportedly made under Section 35(1) of the Petroleum (Exploration and Production) Act No. 3 of 1986 to grant a Petroleum Production Licence dated 15th day of June 2017 to Esso Exploration and Production Guyana Limited, Hess Guyana Exploration Ltd and CNOOC Nexen Petroleum Guyana Ltd.
 - (b) an order of prohibition directed to the Minister of Natural Resources prohibiting the said Minister from taking any step or doing any act in furtherance of section 35 of the Petroleum (Exploration and Production) Act Cap 65:04 and from granting a Petroleum Production Licence to Hess Guyana Exploration Ltd until such time as an environmental authorisation has been granted to Hess Guyana Exploration Ltd in accordance with the provisions of the Environmental Protection Act.
 - (c) An order of prohibition directed to the Minister of Natural prohibiting the said Minister from taking any step or doing any act in furtherance of section 35 of the Petroleum (Exploration and Production) Act Cap 65:04 and from granting a Petroleum Production Licence to CNOOC Nexen Petroleum Guyana Ltd until such time as an environmental authorisation

has been granted to CNOOC Nexen Petroleum Guyana Ltd in accordance with the provisions of the Environmental Protection Act.

2. It is no secret that there have been significant findings of oil offshore Guyana. This has sparked much interest as well as contention.
3. Three companies, Esso Exploration and Production Guyana Ltd (Esso), Hess Guyana Exploration Ltd (Hess) and CNOOC Nexen Petroleum Guyana Ltd (Nexen) were issued with a Petroleum Production Licence (PPL) dated June 15, 2017 by the Minister of Natural Resources (the respondent) who has responsibility for the petroleum sector. The PPL was issued pursuant to s 35(1) of the Petroleum (Exploration and Production) Act Cap 65:04 (Petroleum Act) and the Petroleum Agreement dated June 27, 2016 (PA) entered into between Esso, Hess and Nexen with the respondent as representative of the Government of Guyana. This PA came into effect on October 7, 2016.
4. The PPL authorised the production of petroleum offshore Guyana from the Liza 1 Project (Off shore Guyana) (the Project) in accordance with the terms of the said licence.
5. Prior to the issue of the PPL, Esso alone had applied for and been issued with an environmental permit Reference No. 20160705-EEDPF dated 1st June 2017 by the Environmental Protection Agency (EPA) pursuant to the Environmental Protection Act, 1986, Chapter 20.05 (EPAAct).
6. It is the contention of the applicant that in the absence of an environmental permit being issued to Hess and Nexen in accordance with Part IV of the EPAAct, the respondent is prohibited from granting the PPL to the three companies to carry out the Project. It was urged that the respondent's power to issue a PPL was restricted to Esso only and could not include Nexen and Hess.

7. It is therefore claimed that the respondent acted ultra vires, illegally, irrationally, unlawfully, arbitrarily, capriciously, erroneously, in excess of jurisdiction, unreasonably and/or contrary to s 14 of the EPAct since the PPL issued could not be referable to all three companies in the absence of an environmental authorization for each of them. It was contended that the respondent had not deferred to the authority of the EPA as required by the EPAct and therefore could not grant the PPL.
8. It was submitted that the PPL granted to Esso which purports to bind Nexen and Hess vis-à-vis the EP issued to Esso is not enough to bind these two companies and is therefore in breach of the EPAct and the Petroleum Act. It is asserted that the EP does not mention Nexen or Hess and therefore does not apply to them. As such the EPA would not have the power to enforce the permit as against these two companies. It was submitted that the references to joint and several liability in the PPL and PA have to be read disjunctively as several liability so that in these circumstances, it is possible for Nexen and Hess to commit acts that are prohibited by the EP and they would not be bound thereby.
9. The applicant also submits that article 28 of the said PA requires the 'Contractor' to obtain an environmental authorisation from the EPA and to comply with the provisions of the EPAct. Article 1 of the PA defines the Contractor as Esso, Hess and Nexen. The "Contractor" does not mean Esso alone; it means all three (3) of them, viz, Esso, Hess and Nexen (individually). Therefore, Esso, Hess or Nexen is each a developer and in the absence of an environmental permit to Hess and Nexen, the 'Contractor' being Esso, Hess and Nexen, is in breach of article 28 of the PA.
10. The respondent and the interveners on the other hand contend that the EP was granted in relation to a project and not a specific company pursuant to ss 12 and 13

of the EPAct. It was submitted that a developer and a licensee as defined in the Petroleum Act are different. It was contended that the applicant has confused joint and several liability with several liability. It was further contended that the applicant is guilty of delay in bringing this application for judicial review.

Preliminary issues

11. The application for the orders sought was initially refused by Holder J. His decision was appealed to the Court of Appeal which allowed the appeal and, without any pronouncement on Holder J's decision, remitted the application for hearing de novo. It was considered by the Court, applying **The Medical Council of Guyana v Jose Ocampo Truebo** [2018] 08 AJ that the application of the Civil Procedure Rules required a fuller hearing of the issues to be determined. Let me say at the outset that the contentions about the proceedings in the Court of Appeal are not relevant to a determination of the issues in this case. The matter was remitted for hearing de novo and it is on that basis that this court proceeded both as to the application by the interveners to be heard and as to the substantive application.

12. The applicant's affidavit in reply to the respondent's affidavit in defence raises a number of irrelevant issues as regards oil spills which are too numerous to itemize. There are also a number of paragraphs which should be struck out as being vituperative. The entire application is very prolix. Also the application does appear to be contradictory in parts as regards whether the applicant is contending that Esso, Hess and Nexen should have separate permits. It is however noted that as an alternative the applicant contends that all three companies should collectively have applied for or could apply for an EP.

13. In addition, although it is submitted that Esso properly has a permit which allowed for the issuance of a PPL to this company, yet it is claimed that the entire PPL should be nullified. On the other hand, it seems that the application contemplates severance of the PPL as it only refers to prohibition as regards Nexen and Hess and not Esso.
14. There were also lengthy submissions on the issue of delay. While the Judicial Review Act, Chapter 3:06 does not provide a timeframe by which applications under the Act should be made, s 21 does provide guidance to the court in this issue.
15. I am not satisfied that there is sufficient evidence of delay on the part of the applicant in filing this application. Even if there were some delay, the nature of the application is such that I would not non-suit the applicant on this ground.

Substantive issues

16. The issue to be determined is whether the PPL was properly issued by the respondent to Esso, Hess and Nexen in the absence of an EP to Hess and Nexen.
17. In this regard, a sub-issue is whether s 14 of the EP Act requires that Hess and Nexen each apply for and obtain an EP in addition to that obtained by Esso.
18. In my view the PPL was properly issued. I agree with the submissions on behalf of the respondents that the EP was issued in relation to a project and that it was not necessary for it to be issued to each company which is a party to the PA for the execution of the project. The statutory provisions and terms of the PA and PPL outlined below lend to my conclusion.

19. It is clear from the submissions of all parties that the respondent is the person or statutory authority who, before issuing the PPL, must have ensured that an EP had been granted by the EPA. Section 5 of the EPA Act which is the relevant provision provides that:

“Without prejudice to the provisions of section 14, any person or authority under any other written law, vested with power in relation to the environment shall defer to the authority of the Agency and shall request an environmental authorisation from the Agency before approving or determining any matter in respect of which an environmental authorisation is required under this Act.”

20. This is reinforced by the definition of the environment in s 2 which would apply to the extraction or production of petroleum. The “environment”, “environmental authorization” and “natural resources” are defined as follows in this section:

“environment” or “natural environment” means all land, area beneath the land surface, atmosphere, climate, all water, surface water, ground water, sea, seabed, marine and coastal areas, and natural resources or any combination or part thereof;

“environmental authorization” means an environmental permit, a prescribed process licence, a construction permit or an operation permit;”

...

“natural resources” means “the living plants, animals and organisms, ecosystems, forests, waterways, soils, and other biological factors within the natural environment, and the geologic formations, mineral deposits, renewable and non-renewable assets and the habitats of the living plants, animals and organisms.”

21. Section 11 of the EPAct requires a developer to apply to the EPA for an environmental permit. “Developer” is defined in s 10 of the EPAct. Sections 10 and 11 state:

“10 For the purposes of this Part –

‘developer’ means the applicant for environmental authorisation for a project or the State initiating a project;

...

‘project’ means the execution of construction works or other installations or schemes, any prescribed process or alternation thereof, any interference with any ecosystem or any other activity in the natural surroundings or landscape including those involving the extraction of natural resources, or any project listed in the Fourth Schedule and shall include public and private projects.

11 (1) A developer of any project listed in the Fourth Schedule, or any other project which may significantly affect the environment, shall apply to the Agency for an environmental permit and shall submit with such application the fee prescribed and a summary of the project including information ...”

22. I agree with the applicant that given s 2 of the Mining Act, Chapter 65:01 (Mining Act) and s 2 of the Petroleum Act, petroleum does not fall to be considered under the Fourth Schedule of the EPAct.

23. Section 2 of the Mining Act which states that:

“Mineral” includes ore or compound of any mineral, any metal and precious stone and includes any radio-active mineral, but does not include water or petroleum;

and that “Petroleum” has the same meaning as in section 2 of the Petroleum Act.

Section 2 of the Petroleum Act states:

“petroleum” means—

- a. any naturally occurring hydrocarbons, whether in a gaseous, liquid or solid state;*
- b. any naturally occurring mixture of hydrocarbons, whether in a gaseous, liquid or solid state; or*
- c. any naturally occurring mixture of one or more hydrocarbons, (whether in a gaseous, liquid or solid state) and any other substance...”*

24. Given that petroleum is not included in the definition of mineral resources, then the extraction or production of petroleum would fall under the definition of natural resources as referred to above at [20].

25. The respondents also contend that the decision to grant an environmental permit is in respect of the project under section 12 and section 13(1) of the EPA Act.

Section 12(1) of the EPAct provides as follows –

“The Agency shall approve or reject the project...”

And section 13(1) of the EPAct further provides as follows –

“A decision by the Agency to issue an environmental permit for a project shall be subject to conditions which are reasonably necessary to protect human health and the environment...”

26. Then the Environmental Protection (Authorisation) Regulations (the "EPA Regulations") further support the submission that the authorization is granted in respect of a project.

Regulation 17(2)(b) of the EPA Regulations states:

"An application for an environmental authorisation - shall be in respect of one project or facility".

27. I agree that from the foregoing, it is clear that the environmental authorisation as evidenced in the EP relates to the project.

28. I now turn to s 14 (1) of the EPAct which the applicant relies on. It states:

"14 (1) A public authority shall not give development consent in any matter where an environmental authorisation is required unless such authorisation has been issued and any development consent given by any public authority shall be subject to the terms of the environmental authorisation issued by the Agency."

29. On the facts of this case, Esso can be classified as the developer within the meaning of s 10. It is this company that had applied for and obtained the EP. Thus, there was an EP in existence when the PPL was issued. The EP was in relation to a project involving the extraction of natural resources, to wit petroleum.

30. The Petroleum Act provides for the issuance of the PPL. Section 8 of the Petroleum Act states that, *"No person shall search for in, or get from, any land in*

Guyana petroleum except— (a) under and in accordance with a licence granted by the Minister under this Act”

31. Sections 34 to 41 of the Petroleum Act which are under the heading “Petroleum Production Licence” detail the circumstances under which a PPL can be applied for. Section 35 provides for the “Grant of petroleum production licence” and permits the PPL to include such conditions as are necessary or as the Minister determines. Section 35 states:

“35(1) Subject to section 36 –

(a) where an application is duly made under section 34(1), the Minister shall grant the petroleum production licence applied for on such conditions as are necessary to give effect to the application and the requirements of this Act; and

(b) where an application is duly made under section 34(2), the Minister may grant, on such conditions as the Minister determines, or refuse to grant the petroleum production licence applied for.

(2) Conditions necessary to give effect to a petroleum agreement, entered into by the applicant for a licence shall be included in any licence granted to the applicant under subsection (1).”

32. Part IV of the Petroleum Act details the provisions for licences and has to be read in conjunction with s 35 by virtue of which the Minister grants a PPL. Sections 9 and 10 in Part IV state as follows:

“9(1) No licence shall be granted –

(a) to an individual, unless he is a citizen of Guyana; or

(b) to a body of persons, unless it is –

- (i) a company; or
- (ii) a corporation.

(2) A licence may be granted to two or more persons associated together in any form of joint arrangement, if each one of them is qualified to hold the licence under subsection (1).

(3) Where at any time a licensee is constituted of two or more persons, the obligations to be observed and performed by the licensee under this Act shall be joint and several obligations, but without prejudice to any right of contribution which may exist between all or any of them.

10. The Minister may enter into an agreement (not inconsistent with the Act) with any person with respect to all or any of the following matters, namely –

(a) the grant to that person or to any other person (including any body corporate to be formed), identified in the agreement, of a licence;

(b) the conditions to be included in the licence as granted or renewed;

(c) the procedure to be followed by the Minister while exercising any discretion conferred upon him by or under this Act and the manner in which the discretion shall be exercised;

(d) any matter incidental to or connected with the foregoing.”

(Emphasis mine.)

Section 11 outlines the form of application for a licence.

33. Hess and Nexen, as companies, would satisfy the requirements to be granted a licence under s 9(1). Section 9(2) states that a licence may be granted to two or more persons associated together in any form of joint arrangement. The PA speaks to Esso, Hess and Nexen being associated in a joint arrangement. Subsection 9(3) clearly permits a PPL to be in the names of two or more persons and importantly

for them to be collectively called a licensee. As a collective or joint licensee, their obligations under the PPL are statutorily joint and several, meaning that each of them or all of them would be liable under the terms of the PPL, though their agreement may provide for their contributions as regards any such liability.

34. Utilising the provisions of the definition section as outlined, I consider that s 10, as highlighted above, is wide enough to permit the issuance of a licence to a company or any other company identified in the agreement. This is to say, it permits the issuance of a licence to Esso and to Hess and Nexen which were identified in the agreement. It is noted that the section allows for the issuance of a licence even to a body corporate that is to be formed. Thus, it could not be that these additional companies as named in the agreement would have had to have obtained an EP once such had been granted as regards the project to which their joint arrangement was referable.

35. Article 2(f) of the PPL states that any obligations which are to be observed and performed by the licensee are joint and several. This merely reiterates that which is statutorily enshrined.

36. The PPL is granted to Esso, Nexen & Hess as Joint Venture Licensees, but they are referred to as the Licensee, based on Esso's application representing the three companies. The Licensee shall give effect to the PA. Pursuant to para (f) of the PPL, "Any obligations which are to be observed and performed by the Licensee shall be joint and several obligations." And para (h) states that the Minister hereby approves the Operator [Esso], which Operator may only be changed by the Licensee to another party not comprising the Licensee with the written consent of the Minister."

37. Paragraph (o) (i) of the PPL provides that “The Licensee shall abide by the Environmental Protection Act 1996, Regulations made thereunder and the terms and conditions of the Environmental Permit issued by the Environmental Protection Agency Reference No. 20160705 – EEDPF and dated 1st June 2017.”

38. Article 2 of the PA provides that it is made pursuant to s 10 of the Petroleum Act. By para 2.2 under the heading “The Operator” “Esso shall be the operator charged with conducting the day to day activities of the Contractor under this Agreement. Paragraph 2.3 states that “The duties, obligations and liabilities of the Parties comprising the contract under this Agreement and under any License issued pursuant hereto shall be joint and several.”

39. The PA under which the PPL was issued also states at Article 2 (3) that the duties, obligations and liabilities of the parties, that is, the three companies comprising the Contractor are joint and several and under any licence issued pursuant to the PA.

40. Article 28.1 of the PA states that:

“In accordance with the Environmental Protection Act, 1996, the Contractor shall obtain an environmental authorization as required from the Environmental Protection Agency and comply with the provisions of that Environmental Protection Act in relation to any activity of this Agreement that is governed by that Environmental Protection Act.”

41. I agree with the submissions on behalf of the respondents that where liability is joint and several the parties have jointly and individually promised to carry out the same promise or obligation; that there is only one obligation by which they are all bound.

42. The various instruments therefore clearly set out the obligations of the licensee which ensure that the EP is binding on all of them.

43. The applicant construes s 17 of the Petroleum Act too narrowly. Section 17 states that:

“Nothing in this Act shall be construed

(b) where the doing of any act is regulated by any other written law, as authorising a licensee to do that act –

(i) otherwise than in accordance with that written law and any authority referred to in paragraph (ii); and

(ii) without first obtaining any authority (however described) required under that written law for the doing of an act.”

44. Licensee in this section has to be read in conjunction with the other provisions outlined above which recognise that “licensee” can apply to more than one company or corporation jointly.

45. I therefore do not agree that the effect of the joint and several obligations on Esso, Hess and Nexen means that each has a separate obligation to comply with the Environmental Protection Act by each obtaining an EP. They are bound to comply with the EP that was issued to Esso by virtue of the PPL and the PA as well as by s 9 (3) of the Petroleum Act. I also do not agree with the submission on behalf of the applicant that the addition of Hess and Nexen violates the provisions regarding transferring or assigning the EP to another person or entity. There is no evidence of such in this case.

46. As such, the orders sought are refused and the applicant’s FDA is dismissed with costs to the first respondent in the sum of \$100,000, the said sum to reflect the

court's disapproval at the prolixity of the application. There will be no costs to the added respondents as ordered when they were joined as parties.



Roxane George
Chief Justice (ag)
February 12, 2020

