IN THE COURT OF APPEAL OF THE SUPREME COURT OF GUYANA

APPELLATE JURISDICTION

CIVIL APEAL NO 98 OF 2018

BETWEEN:

THE MINISTER OF LEGAL AFFAIRS

Applicant/Appellant

-and-

MOHABIR ANIL NANDALALL

Respondent

BEFORE KHAN S.C., J.A. (Ag) (In Chambers)

APPEARANCES: Ms. Kym Kyte Thomas Solicitor General and Ms. Debra Kumar Deputy Solicitor General for the Applicant

The Respondent in person

Hearing dates: 30th July 2018 and 2nd August 2018

DECISION

INTRODUCTION

(1) Article 65(1) of the Constitution of the Cooperative Republic of Guyana empowers Parliament, subject to the provisions of the Constitution, to make laws for the peace, order and good governance of Guyana.

(2) In the second edition of his Changing Caribbean Constitutions, Dr. Francis Alexis explains at paragraph 14.14

> *"This clause, subject to the Constitution confers on Parliament in an independent democratic state, the widest law making powers appropriate to a sovereign. Parliament has thus become the principal legislative organ, vested with what may be called the premier ordinary law making power."*

(3) This power, Dr. Alexis further explains at paragraph 14:15 enables Parliament to make or decide policy and give to policy the necessary legislative force.

(4) On the 21st October 2010, Parliament of Guyana, pursuant to Article 65(1) of the Constitution unanimously passed the Judicial Review Act Cap 3:06 (the JRA). The JRA was assented to by the then President Mr. Bharrat Jagdeo, on the 2nd November 2010.

(5) Section (1) of the JRA enacts:

> *"This Act may be cited as the Judicial Review Act 2010 and **shall** come into operation on a date appointed by order of the minister."* (emphasis mine)

(6) There is no dispute that the minister referred to in section 1 of the JRA, is the Minister of Legal Affairs, which post applicant herein at present holds.

(7) Since presidential assent was given to the JRA on the 2nd November 2010, it has not been brought into operation by ministerial order as provided for in section (1).

THE PROCEEDINGS BELOW

(8) The Respondent, an attorney at law, former Attorney General and Minister of Legal Affairs of Guyana and a current member of Parliament of Guyana, and executive member of the

Guyana Bar Association by a fixed date application dated 7th December 2017, commenced proceedings in the High Court seeking:

(a) an order or rule nisi of mandamus directed to the Applicant compelling him to bring the JRA into operation by ministerial order and that the Applicant be called upon to show cause why the order ought not to be made absolute;

(b) a writ of mandamus to be directed to the Applicant compelling him to bring the JRA into operation by ministerial order.

(9) In the grounds for his application, the Respondent set out an historical account of the journey of the JRA (then a bill) through Parliament to its eventual unanimous passage by the legislature and its assent by the then President.

(10) The Respondent explained that the JRA had not been brought into operation by the previous administration in which he held that the posts of minister of Legal Affairs and Attorney General because the new Civil Procedure Rules (CPR) which had specific provisions in Part 56 giving vehicular effect to the JRA, were not ready and had not been brought into effect.

(11) The CPR were brought into effect by a practice direction dated 23rd February 2017 after having been laid before Parliament for negative resolution (of which there was none)

(12) The Respondent further related that he had written to the applicant on the 6th February 2017 requesting that the latter bring the JRA into operation. There was no response from the Applicant.

(13) According to the Respondent, the absence of the JRA and the presence of Part 56 of the CPR, the latter having laid out the procedure and practice for proceedings under the JRA created a lacuna in the law which forced practitioners to create their own practice and

procedure outside the CPR and deprived litigants of the wide array of remedies now available under the JRA.

(14) The Respondent disclosed that he was aware of similar requests by the Chancellor (Ag), the Chief Justice (Ag) and the Guyana Bar Association to have the JRA brought into operation all of which were likewise unsuccessful.

(15) The orders nisi were granted by George CJ (Ag) on the 15th December 2017.

(16) An affidavit of defence dated 19th January 2018 was filed on behalf of the Applicant. The Applicant contended that

(a) it was the Respondent who during his tenure as Minister of Legal Affairs who was responsible for the failure to bring the JRA into operation.

(b) the non-existence of the CPR at the time the JRA was passed and assented to was no excuse for the failure to bring the JRA into operation during the tenure of the Respondent

(c) section 1 of the JRA provided for a delayed commencement of the Act and *"In this regard the legislature vests the power to determine the date of commencement of the JRA upon the Minister as a member of the executive arm of Government"* (emphasis mine)

(d) the granting of the orders prayed for by the respondent would "amount to a grave abrogation of the doctrine of separation of powers for the judiciary to compel or direct the executive to perform the function to determine the date of commencement that the legislative has by law vested in the executive arm of the government."

(e) the commencement of the operation of the JRA depended upon the legislative agenda which the president presented to Parliament at the beginning of its sessions.

(f) there was no lacuna in the law since the practice and procedure which existed prior to the CPR continued to be applied.

THE ORDER OF GEORGE CJ (Ag)

(17) After extensive submissions before her by the respective parties, on the 28th May 2018, George CJ (Ag) ordered that the orders nisi granted by her on the 15th December 2017 be made absolute and further directed and compelled the Applicant to bring into operation by a Ministerial Order, the JRA, and that the said order should be signed with all convenient speed which in the Court's estimation should not be delayed past the 31st July 2018.

THE APPEAL

(18) On 13th June 2018, the Appellant appealed to the Court of Appeal against the order of George CJ (Ag) dated the 28th May 2018. By a summons dated the 17th July 2018, the Applicant applied to this Court for a stay of execution of the order of George CJ(Ag) dated 28th May 2018 pending the appeal.

SUBMISSIONS ON BEHALF OF THE APPLICANT

(19) The Hon Solicitor General and Deputy Solicitor General contended before this court that

(a) The Appellant's appeal has a reasonable prospect of success because:

(i) the order of George CJ (Ag) violates the separation of powers doctrine in that the judiciary is thereby ordering a member of the executive to do an act and the judiciary had no jurisdiction so to do;

(ii) the provisions of section (1) of the JRA conferred upon the Applicant a discretion and did not impose upon him a duty to bring the JRA into operation as such that discretion cannot attract a mandatory prerogative order.

It should be pointed out that these two submissions are the main and substantive grounds of appeal.

(b) The appeal would be rendered nugatory if the stay was not granted because:

(i) there would be hardship on the Applicant

(ii) a decision in his favour at the substantive appeal would be frustrated

(iii) the commencement of the JRA would have to be reversed if the applicant's appeal was successful

(iv) the premature commencement of the JRA would open the floodgates to frivolous claims against the state

(v) the publication of a notice of proceedings by the Registrar of a notice of proceedings by the Registrar pursuant to section 7(1) of the JRA will prejudice the party against whom the claim/complaint is made even before the determination is made as to whether the claim has merit.

(vi) a stay of execution pending appeal will not cause any hardship to litigants because there is still a jurisdiction in the Court to consider judicial review using common law principles.

CONSIDERATIONS FOR A STAY OF EXECUTION

(20) In exercising the discretionary jurisdiction delegated to me by order 16 Rule 1 (c) of the Court of Appeal Rules to order a stay of execution of the order of George CJ (Ag) dated 28th May 2018 pending the determination of the appeal, I start out by bearing in mind the general

rule that a successful litigant is not to be deprived of the benefits of his judgment unless there are exceptional reasons for doing so. The onus of so satisfying a Court that there are exceptional reasons to deprive a successful litigant of the benefits of the judgment in his favour until the determination of an appeal lies on the applicant for the stay of execution. In other words a stay of execution is the exception rather than the rule. See **Rodrigues Architects Ltd v NBS [2018] CCJ 09 AJ** paragraph 23. In Rodrigues the CCJ noted at paragraph 19 that the judicial discretion to grant a stay of execution pending an appeal can only be exercised in favour of the stay if having regard to all the circumstances of the case and the risk of injustice, a stay ought to be imposed. Notwithstanding that Rodrigues involved a money judgment, these considerations are of general application. In resolving the issue as to whether there is a risk of injustice to the applicant, the applicant must first satisfy the Court that his appeal has a good prospect of success. Secondly, the applicant has to satisfy the Court that the appeal would be rendered nugatory if the stay of execution was not granted while the appeal is pending. See **Rodrigues** paragraphs 22 and 24.

REASONABLE PROSPECTS OF SUCCESS

SEPARATION OF POWERS ARGUMENT

(21) The first submission on behalf of the applicant is that the order granted, violated the separation of powers doctrine in that the judiciary was so to speak transgressing upon the domain exclusively reserved for the executive.

(22) In his treatise, **Caribbean Pubic Law**, Professor Albert Fiadjoe stated at p 161 that the modern view of the separation of powers principle can be stated in three senses:-

> *"First the doctrine helps us to appreciate that in the complexities of modern government there can only be shared powers among separate and quasi*

autonomous yet interdependent state organs. Secondly, the doctrine helps us to appreciate the truism that the system of government which we operate works on the assumption that there is a core function which can be classified as legislative, executive and judicial and that these core functions belong to their respective branches and functions. Thirdly, the doctrine helps us to recognize that government involves the blending of the respective powers of the principal organs of the state. Experience has shown us that we cannot have watertight compartments in government". (emphasis mine)

(23) These truisms led Sir Fred Phillips in his **Commonwealth Caribbean Constitutional Law** to conclude at p23

"The conclusion that can be drawn from the relations which exist between the executive and the legislature is that to separate them would be to impede the smooth running of the government machine. This is the reality of the situation. On the other hand, the judiciary must remain a place apart—always able and willing to stand between government (ie the legislature or the executive) and the citizen when the occasion arises."

(24) It is clear that in modern democratic governments the three arms of government do not exist in their own separate bubbles. Our evolving democracy and modern system of government requires that they not be compartmentalized, but that they be allowed to intermingle and blend with one complementing and assisting the other rather than antagonizing and obstructing the other. The judiciary as Phillips says, stands apart as an independent arbiter prepared to intervene to ensure that one arm of government does not become antagonistic to

another thereby frustrating or obstructing the functions of another arm. Otherwise the evolving democratic process enshrined in the constitution will disintegrate.

(25) It is therefore not surprising as Tracy Robinson, Arif Bulkan and Adrian Saunders recognized in their treatise, **Fundamentals of Caribbean Constitutional Law**, [see paragraph 7-029] that the judiciary can enforce positive obligations on the executive.

(26) In this regard, for example, it was found to be within the remit of the Court to make orders that place a positive duty on the executive to expend state resources to ensure full guarantee of the fundamental rights. Saunders JCCJ (as he then was) and Wit JCCJ in their joint judgment in **Frank Errol Gibson v AG [2010] CCJ 3 (Ag)** said: [paragraph 40]

> *"while it is true that certain comity must exist between various branches of the state, we do not subscribe to the notion that the separation of powers principle can preclude the court from making an order against the Executive in the exercise of the court's power to prevent breaches of constitutionally protected rights...If the appropriate way to remedy a breach is to make a mandatory order for the payment of money by the state that is what the court is empowered and obliged to do."*

(27) While Gibson's case concerned the expenditure by the executive to protect fundamental rights, the case demonstrates that the courts will not in an appropriate case be bashful in applying its coercive powers to prevent transgressions by the executive.

(28) In the normal course of legislative enactment, a bill once passed by Parliament becomes law when it receives presidential assent. The JRA became part of the laws of Guyana when the President assented to it on the 2nd November 2010.

(29) Parliament saw it fit to delay the coming into operation of the JRA by vesting in the minister the power to bring it into force by order.

(30) When parliament passed the JRA it intended that it should become operational so as to make available to the public a number of remedies for judicial review which were hitherto not available to the litigants and undoubtedly to modernize the archaic system of Crown Office procedure which existed at the time in Guyana by bringing it into harmony with the systems, practices and procedures which now benefit the citizens of our CARICOM partners and of the wider Commonwealth. Parliament did not intend to act in vain. Indeed as the Privy Council stated in **Suratt and another v Attorney General [2008] 4 LRC 502**

> *"It is not a desirable practice to leave the statute unimplemented until action is brought against government by a private complaint seeking an order against the government to implement the statute after a delay of some years."*

(31) The difficulties and anomalies presented by having CPR provisions in place for judicial review procedures without its constituent JRA became embarrassingly apparent in the case of **Medical Council of Guyana v Jose Ocampo Trueba [2018] CCJ 8 AJ**. One of the arguments advanced before the CCJ was that the provisions of part 56 of the new CPR applied only to administrative orders where relief was sought for judicial review under the JRA and since that Act was not in operation the applicant could not have brought an application under Part 56 and the common law position applied. This is one of the arguments advanced by the Applicant herein. The Council on the other hand contended that Part 56 applied to all administrative orders.

(32) What these arguments illuminate is the very lacuna in the law brought about by the non-implementation of the JRA which lacuna was denied by the Applicant.

(33) As a consequence, the CCJ held that notwithstanding the non-operation of the JRA, CPR 56 applied to and governed all administrative and constitutional law applications.

(34) In delegating to the Applicant the responsibility of bringing the JRA into operation, what Parliament did was to place an obligation on him to bring the JRA into operation by granting him the power to do so; Parliament having already passed it and the President having given his assent to it.

(35) The JRA would clearly have had executive approval by the cabinet which would have then sent it in the form of a bill to parliament to discharge its mandate under article 65 of the Constitution to make it law. It was then unanimously passed by Parliament with the most effusive support (see Hansard 10th October 2010) from the Applicant herein who was then in opposition. The JRA was then returned to the executive in the form of the President who assented to it.

(36) The only credible and sensible explanation of the failure to have the JRA immediately brought into existence was that advanced by the Respondent to wit, the CPR which supplied the procedure and practice for the operation of the JRA, was not at the time, in a state of readiness At the present time this is no longer the case.

(37) In my considered opinion and I so hold, what we have in this case is the frustration and obstruction of the legislative arm of government in carrying out its constitutional mandate of making laws for the peace, order and good governance of Guyana, by a member of the executive who reflexively seeks refuge in a rigid and anachronistic interpretation of the doctrine of separation of powers long discarded by modern constitutional law thinking and concepts of good governance and democracy. It is also apparent that the executive seems to be obstructing itself. The executive in the form of the president assented to the JRA. The

applicant, who is both a member of parliament and part of the executive, is resistant to bringing the JRA into operation. This is not a satisfactory state of affairs.

(38) The courts are duty bound in the discharge of their constitutional and inherent mandate to step in to ensure that such obstructionist and frustrating actions are put right and not permitted to erode our fragile democratic existence, system of governance and the rule of law.

(39) For these reasons I hold that the separation of powers argument advanced on behalf of the Applicant has no reasonable prospect of success in the circumstances of this case.

DUTY, POWER OR DISCRETION

(40) The next argument advanced on behalf of the Applicant in support of his application for a stay of execution is that section (1) of the JRA gave him a mere discretion to make the Act operational and the remedy of a mandatory order could not be applied to compel an exercise of discretion. Such a remedy would only apply according to the applicant if section 1 of the JRA imposed a duty on him to bring the JRA into operation.

(41) The short answer to this submission can be gleaned from the statement of Saunders JCCJ (as he then was) and Wit JCCJ in Gibson's case [paragraph 26 above]. The appropriate way to remedy this failure by the applicant to discharge his obligation to bring the JRA into operation is to subject him to a mandatory order.

(42) Nonetheless, I disagree with the submission on behalf of the Applicant that Section (1) of the JRA grants him a discretion as to when the JRA should be made operational

(43) In passing the JRA unanimously with the exuberant support of the Applicant himself, Parliament did not intend the Act to sit unimplemented, languishing indefinitely in some dusty volume of the Laws of Guyana. Parliament passed the JRA for the peace, order and good

governance of Guyana and intended it to become a vibrant tool in the development of our democracy, system of governance and to entrench the rule of law by supplying to members of the public who have complaints against administrative authorities a new array of remedies and procedures not previously available to them and to modernize the whole system of administrative remedies by bringing it into line with that which now exists not only in the Commonwealth Caribbean but in the Commonwealth as a whole.

(44) So the Applicant is duty bound by Section (1) of the JRA to make it operational and he is accountable to the people of Guyana through their representatives in Parliament for the implementation of the Act. The uniquely innovative, optimistic and all together well-meaning solution provided by the CCJ in the Ocampo case has not had its desired effect as significant confusion and uncertainty still reign due to the continued non-implementation of the JRA. The use of the imperative word "shall" in Section 1 of the JRA makes clear Parliament's intention that the Minister is obliged or duty bound to bring it into operation.

(45) The Respondent referred me to Section 39 of the Interpretation and General Clauses Act Cap 2:01 which enacts:

> *"In any written law where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises."*

(46) In my view, reading section 1 of the JRA with Section 39 of the Interpretation and General Clauses Act and the acknowledgement by the applicant in the affidavit of defence filed on his behalf that the section granted him a power, I am further reinforced in my view that section 1 of the JRA imposes a duty rather than a mere discretion on the Applicant to bring the

JRA into operation with all due haste. As such, that duty will attract a coercive mandatory order, if it has not been promptly carried out.

(47) I accordingly hold that the second ground advanced on behalf of the Applicant has no reasonable prospect of success

CAN THE APPEAL BE RENDERED NUGATORY IN THE ABSENCE OF A STAY OF EXECUTION?

(48) I must admit I found some difficulty as I attempted to rationalize the submissions on behalf of the Applicant that the appeal would be rendered nugatory were I not to grant the stay of execution.

(49) The reasons are summarized at paragraph 19 (b) (i)-(iv) above.

(50) The applicant has not explained how he will suffer irreversible hardship if the stay was not granted. It is somewhat ironic that the Applicant states that a decision in his favour in the substantive appeal would be frustrated in the absence of a stay of execution. He has not however articulated how the appeal is likely to be frustrated in the absence of a stay. I am unable to discern how having to reverse the commencement of the JRA if the Applicant's appeal is successful impacts on rendering the appeal nugatory. That would be the solution, either reverse the commencement or repeal the Act. The floodgates argument fails in the light of the Ocampo decision. The floodgates for want of a better term have already been opened by the CCJ and I cannot see how giving the public a greater range of public law remedies and a modern system by which they may be obtained is such a bad thing. Having to amend the Act after its implementation would not render an appeal nugatory. Amendments to existing pieces

of legislation are part of the normal business of the legislature. I do not see how having to amend the JRA subsequent to its implementation would render the appeal nugatory.

DISPOSAL

(51) For the foregoing reasons, I hold that the Applicant has not satisfied me that his appeal has any reasonable prospect of success, that it would be rendered nugatory and that there is any risk of injustice if I refused to grant his application for a stay of execution pending appeal.

Accordingly

(a) the summons dated 17th July 2018 is dismissed.

(b) the Applicant will pay the Respondent costs in the sum of $150,000.

Dated the 9th day of August 2018.

Rafiq T. Khan SC

Justice of Appeal (Ag)

COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE