2005 No. 70 – APL DEMERARA

IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISICTION

ON APPEAL FROM THE JUDGE IN CHAMBERS OF THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

BETWEEN:

SOCIAL IMPACT AMELIORATION PROCRAMME BOARD a body incorporated by Order Number 53 of 1990 made under the Public Corporations Act 1988

(Appellant/Respondent)

-and-

VERNON BENJAMIN trading under the name and style of BENJAMIN'S Contracting Associates of Lot 127 Fourth Street, Alberttown, Georgetown, Guyana.

(Respondent/Applicant)

BEFORE:

THE HON. MR. JUSTICE IAN CHANG – CHIEF JUSTICE (ag.)

THE HON. MR. JUSTICE RISHI PERSAUD – PUISNE JUDGE

Mr. Kamal Ramkarran for the Appellant.
Mr. Frank O. Fraser for the Respondent.

Heard on:
2009
April 3
May 9, 29
June 19

JUDGMENT

CHANG (Chief Justice (ag.)) delivered the judgment of the Court.

On the 5th September 1997, the respondent Vernon Benjamin trading under the name and style of Benjamin's Contracting Associates brought an action No. 4124 of 1997 against the appellant Social Impact Amelioration Programme (Simap), a body incorporated by Order 53 of 1990 under the Public Corporations Act 1988, claiming money due and owing to the respondent for work done on the Critchlow Labour College at the request of the appellant. But, on the 31st October 1997, with leave of the court, the respondent discontinued that action.

The dispute between the appellant and the respondent as to whether or what money was due and owing to the respondent by the appellant was referred to arbitration. The arbitrators were Mr. Ian Mc Donald, Mr. Donald Robinson and Mr. David Patterson. On the 14th October 1999, the arbitrators awarded the sum of $5,453,809 to the respondent with interest at the rate of 2% per month from the 1st April 1997 until payment.

On the 16th May 2000, having received no payment of the award, the respondent filed action No. 8455 of 2000 against the appellant seeking an order for the enforcement of the said award. But, by Notice of Withdrawal and Discontinuance dated the 24th July 2000, that action was discontinued by the respondent.

On the same day that the respondent withdrew and discontinued action No. 8455 of 2000 i.e. on the 24th July 2000, the respondent filed a new action No. 12135 of 2000 against the appellant seeking an order of

enforcement of the said arbitration award. That action was dismissed by the High Court on the strength of preliminary submissions made by counsel for the appellant. Costs in the sum of $15,000 to the appellant were ordered. Of that sum, the respondent paid only $2,000.

On the 13th March 2003, the respondent filed in the Magistrate's Court a plaint No. 259 of 2003 against the appellant in another effort to enforce the award. But, before that plaint could have been heard by the Magistrate, the plaint was withdrawn by counsel for the respondent.

On the 17th April 2003, the respondent instituted proceedings in the High Court by way of Summons for the following Orders:

(a) That the Plaintiff may have leave of the Court or a Judge to enforce the award on a submission dated the 14th day of October 1999 of Mr. Ian Mc Donald, Mr. Donald Robinson and Mr. David Patterson, the arbitrators appointed to the abovementioned arbitration against Social Impact Amelioration Programme (Simap) Board, a body by order 53 of 1990 under the Public Corporation Act 1988 of lot 237 Camp Street, South Cummingsburg, Georgetown, Guyana, in the same manner as a judgment

(b) That pursuant to Section 13 of the Arbitration Act, Chapter 7:03, the Plaintiff be at liberty to enforce the award on a submission dated the 14th day of October 1999 of Mr. Ian Mc Donald, Mr. Donald Robinson and Mr. David Patterson, the arbitrators duly appointed in the matter under the Arbitration Act, Chapter 7:03, in the same

manner as a judgment or order to the effect and to enter judgment in terms of the said Award

(c) That within 7 days after the service of this Order on the defendants, the defendants may apply to set aside the award and the award shall not be enforced until after the expiration of that period or if the Defendants apply within that period to set aside this Order, until after the application is finally disposed of.

(d) That the costs of this application and of any judgment which may be entered in the matter to be taxed if not agreed and paid by the Defendants to the Plaintiff.

(e) Any further or other order as is to this Honourable Court deemed just and expedient."

The **Summons** read:

"**Let all parties** attend the Judge in Chambers on Tuesday the 6th May 2003 at 9:00 o'clock ..."

The Summons came up for hearing in the Chamber Court and an Attorney-at-Law who had previously appeared for the appellant entered the judge's Chambers without having been instructed. The judge ordered service of the Summons. Service of the Summons was effected on the law firm of Cameron and Shepherd which caused it to be delivered to the appellant. The appellant instructed the said law firm of Cameron and Shepherd to appear on the appellant's behalf and to defend against the application. The appellant,

through its Secretary, Lennox Steward, filed an Affidavit in Answer dated the 18th July 2003.

In that Affidavit in Answer, the appellant stated that the application could not have been made by ***inter partes*** Summons and further constituted an abuse of the Court's processes in the light of the previous proceedings which the respondent had instituted to enforce the arbitration award and which were discontinued or dismissed. That Affidavit further mentioned that in Action 12135 of 2000, costs in the sum of $15,000 were awarded in favour of the appellant of which the respondent paid only $2,000.

The respondent filed an Affidavit in Reply in which it was claimed the application was made by way of an ***ex parte*** Summons and not by an ***inter partes*** Summons and drew the Court's attention to paragraph (c) of the Indorsement of the Summons filed. The Court was reminded that it was the court itself by ordering service which had made the summons ***inter partes***. It was drawn to the court's attention that none of the applications which were withdrawn or dismissed was decided on merits and therefore such previous proceedings could not adversely affect the respondent's right to institute the proceedings to enforce the award.

On the 2nd September 2005, Justice Cummings-Edwards ordered that:

> "leave be and is hereby granted to the plaintiff pursuant to section 13 of the Arbitration Act, Chapter 7:03, that the plaintiff be at liberty to enforce the award dated the 14th day of October

1999 of Mr. Ian Mc David, Mr. Donald Robinson and Mr. David Patterson duly appointed in this matter to the above-mentioned Arbitration on a submission against Social Impact Amelioration Programme (Simap) Board, a body incorporated by Order 53 of 1990 under the Public Corporations Act 1988 of Lot 237 Camp Street, South Cummingsburg, Georgetown, Guyana, in the same manner as Judgment or Order to the same effect."

On the 15th September 2005, the appellant appealed to this Court against the decision made by Justice Cummings-Edwards.

In his written submissions, counsel for the appellant urged this court to find that the Summons filed by the respondent in the High Court to initiate the process was an ***inter partes*** summons and, since there were no pending proceedings, the respondent could not have used an ***inter partes*** summons to initiate the proceedings. Counsel for the appellant referred this court to the dicta of George J.A. in the case of **Sarah Etienne V Frederick Layne and Anor** (1979) Civil Appeal No. 39 of 1974 (unreported). Those dicta read:

> **"As a means of initiating proceedings an originating summons in available whenever permitted by any rule of court or other statutory provisions. On the other hand, the use of a general summons whether inter partes or ex parte, is, generally speaking, permissible only for the purpose interlocutory proceedings in a pending cause or matter.** Accordingly, in the absence of any enabling provision in that regard to use the latter

process in order to initiate proceedings would appear to be an error of such gravity as to amount to much more that a mere irregularity. But this major divergence from the required procedure did not seem to have caused the court any concern."

The remarks of George J.A in the above case were endorsed by Bernard C.J (as she then was) in the decision of **Balram Sookram V Amarnauth Sukram** (1997) Full Court Appeal No. 46 of 1997. What the cases clearly bear out is that a **general** summons, whether ***inter partes*** or ***ex parte***, is permissible generally only in **interlocutory** proceedings in a pending cause or matter and that, whenever permitted by any rule of court or other statutory provision, an **originating** summons and not a general summons should be used for **initiating** proceedings. Thus, the distinction between a general summons and an originating summons is crucial. A **general** summons cannot be used for initiating proceedings.

In the instant case, an examination of the summons by which the respondent had applied for leave to enforce the arbitration award reveals that it is in the form of Form 1 of Appendix N to the Rules of the High Court. Form 1 of Appendix N reads:

"Let all parties concerned attend the Judge in Chambers on .....day, of ....., 19..., at .....o'clock in the noon, on the hearing of an application on the part of .....for an order that ....."

The Summons filed by the respondent reads:

"Let all parties concerned attend the Judge in Chambers on Tuesday the 6th day of May 2003 at 9:00 o'clock in the forenoon on the hearing of an application on the part of the Plaintiff for the following orders."

The similarity between the respondent's summons and the summons in Form 1 is undeniable. Therefore, it is clear that the respondent initiated his proceedings by way of a general summons ***ex parte***.

Order 41 Rule 2 of the Rules of the High Court makes it pellucidly clear that the Form 1 summons is not an originating summons. Order 41 Rule 2 prescribes:

"A Summons **other than an originating summons** shall be in Form No. 1 in Appendix N to these Rules with such variations as circumstances may require and shall be addressed to all persons on whom it is to be served."

Thus, it is clear that the respondent applied by way of a **general** summons in the format of Form 1 of Appendix N and not by way of an Originating Summons.

It should be noted further that, in the rubric of the application, the respondent was stated as the **Plaintiff** while the appellant was stated as the **Defendant**. Therefore, the proceedings should have been initiated as ***inter partes*** proceedings. However, the Summons used was an ***ex parte*** summons

which commenced with the words "Let all parties attend the Judge in Chambers...." The trial judge must have recognized from the rubric that the proceedings ought to be ***inter partes*** proceedings and therefore could not have been heard ***ex parte***. Accordingly, she ordered service of the Summons to be effected on the **named defendant**, the appellant.

Despite the order of the trial judge for service to be effected on the appellant thereby rendering the proceedings ***inter partes***, such an order could not cure the fundamental procedural ***faux pas*** of commencing or initiating proceedings by way of a general summons. Such an error was so grave as to constitute much more than a mere procedural irregularity and was therefore incapable of being cured by an order for service (which merely rendered the proceedings ***inter partes***). In the view of this court, the proceedings were not validly initiated from a procedural standpoint in that the procedural defect went to the essential validity of the proceedings. As Bernard C.J. stated in **Balram Sookram V Amarnauth Sukram** (*Supra*):

> "The summons was clearly an ***inter partes*** summons naming himself as plaintiff and the appellants as defendants **such a summons cannot initiate proceedings."**

Thus, whether the summons was ***inter partes*** or ***ex parte***, such a summons being a general summons and not an originating summons, the proceedings could not be instituted or initiated by such a process.

This court sees the necessity of pointing out that, just as a general summons may be either ***inter partes*** or ***ex parte***, an originating summons may also be either ***inter partes*** or ***ex parte***. Order 41 Rule 5 of the Rules of Court states:

> "An originating summons shall be in one of the Forms Nos. 2 to 4 (inclusive) in Appendix N to these Rules and shall be applicable with such variations as circumstances may require."

An examination of Forms 2 to 4 of Appendix N reveals Forms applicable to Originating Summons both ***inter partes*** or ***ex parte***.

This court wishes to draw attention to pages 272 and 399 of **Russel on Arbitration** (16th Edition) (1957) where the learned authors dealt with "Application for leave to enforce award." It is clear that in 1957 in the United Kingdom, the process was initiated by way of originating summons. In **the Supreme Court Practice 1970** (vol. 2) it remained unchanged. It reads:

> "An application for leave to enforce under this section is made in Q.B.D. **by originating summons**.

In the light of Order 1 Rule 3 of the Rules of the High Court which states:

> "Where touching any matter of practice or procedure these rules are silent, the Rules of the Supreme Court in force immediately before the 23rd February 1970 made in England under or by virtue of the Supreme Court of Judicature (consolidation) Act

1925 of the United Kingdom or any law amending the same shall apply ***mutatis mutandis,***"

there appears no reason to conclude otherwise than that the position is the same in Guyana i.e. that an application for leave to enforce an arbitration award is by way of originating summons which under Order 41 Rule 4 means" every summons **other than** a summons in a pending cause or matter.

For the above reasons, this appeal must be allowed and the order of the trial judge granting leave to the respondent pursuant to section 13 of the Arbitration to enforce the arbitration award dated the 14th October 1999 against the appellant must be set aside and vacated. This Court so orders. There will be costs to the appellant in the sum of $25,000.

Counsel for the appellant submitted that the trial judge ought to have stayed or dismissed the proceedings on the ground of abuse of the court's processes since the application was one of a number of unsuccessful attempts to have the arbitration order enforced against the appellant. While this court finds it unnecessary to fully consider and determine this ground of appeal, this court has noted that all such previous attempts to enforce the said award fell not on merits but on the respondent's own decision to discontinue his own proceedings or on preliminary submissions. While it may be true that up to now the respondent has only paid $2,000 of the $15,000 costs ordered against him in Action No. 12135 of 2000 which relates to the same subject matter as the application in this matter against the same appellant, the court has noted that the trial judge did not see it fit to stay or dismiss the

proceedings for that reason on the ground of abuse of process. This court would not lightly interfere with a trial judge's discretion on that issue even though this court is of the view that there was basis for ordering a temporary stay of the proceedings until all costs ordered against the respondents in the previous proceedings were fully paid.

Ian N. Chang
Chief Justice (ag.)

Dated this 7th day of August 2009.