IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

NOTICE OF MOTIONS NOS. 97B & 98B.

Notice of Motion for extension of time to appeal.

BETWEEN:

STANLEY SINGH
(Applicant)

- and -

ESTHER PERREIRA
(Respondent)

- and -

BETWEEN:

JANET JAGAN
(Applicant)

- and -

ESTHER PERREIRA
(Respondent)

BEFORE:

THE HONOURABLE MR. JUSTICE C.C. KENNARD – CHANCELLOR

THE HONOURABLE MR. JUSTICE M.A. CHURAMAN – JUSTICE OF APPEAL

THE HONOURABLE MR. JUSTICE L.L. PERRY – JUSTICE OF APPEAL

1998

October 8,20,21,22,23,26,27,28
November 3,4,11

H. Ramkarran S.C. and R Gajraj for Stanley Singh
S.D.S. Hardyal S.C., R Gajraj and K. Ramjattan for Janet Jagan
P.S. Britton S.C., D. Britton and R. Trotman for Esther Perreira.
C.M.L. John for Good and Green for Guyana and National Democratic Party.
W. Sampson for the United Force
R. Mc Kay S.C. and K.S. Massiah S.C. for H.D. Hoyte
S. Hussain for National Independent Party and the Guyana Democratic Party

J U D G M E N T

KENNARD, C.

What we are now concerned with is whether the applicants JANET JAGAN and STANLEY SINGH should be granted extension of time to appeal the decision of the learned Chief Justice whereby she had granted leave to Esther Perreira on the 24th February,

1998 to present an election petition. There seems to be some misunderstanding by the press concerning the issue with which we are concerned. We are not dealing at this stage with appeals by Janet Jagan and Stanley Singh from the decision of Madam Justice Claudette Singh delivered on the 8th September, 1998. That will be dealt with at a later stage. The sole issue we are dealing with at this stage is the applications by Janet Jagan and Stanley Singh for an extension of time in which to appeal the decision of the learned Chief Justice of the 24th February, 1998. In view of my conclusion in this matter I do not intend to go further than is really necessary for present purposes. Order 2 Rule 3 (3) of the Court of Appeal Rules Cap 3:01 reads thus:

> **"A judge of the Court (Court of Appeal) may by order extend the time prescribed by para (1) of this rule within which an appeal may be brought, provided the application for this purpose is made with one month of the expiration of the time so prescribed".**

That provision is not relevant to the present applications. Order 2 Rule 3(4) provides:

> **"In exceptional circumstances, the Court having power to hear and determine an appeal may on application extend the time within which an appeal may be brought beyond the period delimited for an application to a judge of the Court under this rule".**

Order 2 Rule 3(5) states:

> **"Every application for enlargement of time when made to a judge of the Court shall be made by summons, and when made to the Court shall be by motion. Every summons or notice of motion filed shall be supported by an Affidavit setting forth good and substantial reasons for the application and by grounds of appeal which prima facie show good cause therefor". [See Persaud v. Ramson (1979) 26 WIR 229, Hardial v. Sookia(1980) 28 WIR 170 and G.T.M. v. Chandroute (No.1) Civil Appeal No. 42/89].**

I must state here and now that we are not dealing with appeals by Janet Jagan and Stanley Singh from the order of the Chief Justice as there is at the present time no appeal from the order made by her on the 24th February, 1998.

What we are dealing with is an application for extension of time in which to appeal that decision. Whether the appeal will in fact succeed, if leave is granted to appeal out of time, is not my concern at this stage. I will deal with that at the appropriate time, if this becomes necessary. Apart from the issue

for the delay in filing the appeals within the prescribed time, with which I will deal with later, I must ask myself whether there are good and arguable grounds of appeal [See G.T.M. v. Chandroutie (supra).

Order 2 Rule 3(5) of the Court of Appeal Rules to which reference was made earlier states inter alia:

> **"Every summons or notice of motion filed shall be supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which prima facie show good cause therefor".**

I interpret the above to mean whether prima facie the appeal sought to be brought has any merit.

The two issues with which I have to concern myself with at this stage are (1) Whether prima facie there is an obligation on a petitioner to obtain leave of the High Court before he or she presents an election petition.

(2) If leave is necessary, how is the Court to be approached for such leave?

It, therefore, becomes necessary for me to set out article 163 of our Constitution so far as it is relevant for present purposes. Article 163 provides as follows:-

(1) Subject to the provisions of this article, the High Court shall have exclusive Jurisdiction to determine any question—

(a) regarding the qualification of any person to be elected as a member of the National Assembly;

(b) Whether –

(i) either generally or in any particular place, an election has been unlawfully conducted or the result thereof has been or may have been, affected by any unlawful act or omission;

(ii) the seats in the Assembly have been lawfully allocated;

(iii) a seat in the Assembly has become vacant; or

(iv) any member of the Assembly is required under the provisions of article 156(2) to cease to exercise any of his functions as a member thereof;

(c) regarding the filling of a vacant vacant seat in the Assembly; or

(d) Whether any person has been validly elected as Speaker of the Assembly from among persons who are not members thereof or, having been so

elected, has vacated the office of Speaker.

(2) Proceedings for the determination of any question referred to in the proceeding paragraph may be instituted by any person (including the Attorney General) and, where such proceedings are instituted by a person other than the Attorney General, the Attorney Genera; if he is not a party thereto may intervene and (if he intervenes) may appear or be represented therein.

(3) An appeal shall lie to the Court of Appeal –

(a) from the decision of a Judge of the High Court granting or refusing leave to institute proceedings for the determination of any question referred to in paragraph (1);

(b) from the determination by the High Court of any such question, or against any order of the High Court made in consequence of such determination.

(4) Parliament may make provision with respect to –

(a) the circumstances and manner in which and the conditions upon which proceedings for the determination of any question under this article may be instituted in the High Court and an appeal may be brought to the Court of Appeal in respect thereof;

(b) the consequence of the determination of any question under this article and the powers of the High Court in relation to the determination of any such question including (without prejudice to the generality of foregoing power) provision empowering the High Court to order the holding of a fresh election throughout Guyana or a fresh ballot in any part thereof or the re-allocation of seats in whole or in part; and

(c) the practice and procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article and of that Court and Court of Appeal in relations to appeals to the Court of Appeal under this article; and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court.

(5) In this article reference to any person being elected shall be read and construed as a reference to any person being elected under paragraph (2) or (3) or (4) of article 60 or under article 160 (2), as the case may be.

If one construes article 163(3) (a) by itself does it not suggest that leave is necessary before an election petition is presented? That sub article gives the right to a citizen who had applied to a judge of the High Court for leave to present an election petition to appeal to this Court from a refusal to grant such leave. In addition, it gives to a citizen a right to appeal the order of a High Court Judge who had granted to another citizen leave to institute proceedings by way of election petition.

I ask the question how can a person appeal the grant of leave to present an election petition if that person is not aware that leave has been granted.

Can it not be reasonably argued that leave of the Court is necessary before an election petition is presented. And is this not the point I must at this stage address my mind to and not whether the proposed appeal will in fact succeed. As I had stated earlier, it is not my concern at this stage to determine whether or not the proposed appeals will in the end succeed. My concern is whether prima facie the appeals sought be brought have merit. In my view article 163(2) should be read in conjunction with article 163 (3) (a).

In **Attorney General of Trinidad and Tobago v. Whiteman** (1990) 2 WLR Lord Keith said at p. 1202:

> **"The language of a constitution falls to be construed, not in a narrow and legalistic way but broadly and purposively as to give effect to its spirit [See also Barnwell v. Attorney General (1993) 49 WIR 10, Societe Union Docks v. Government of Maurituis (1985) LRC (Constitution) 801, Attorney General of Gambia v. Jobe (1984) 3 WLR at 183 and Maharaj v. Attorney General of Trinidad & Tobago (No.2) 1978 30 WIR 311]".**

At this stage I must deviate slightly to deal with the chronology of the events.

1. Ex-parte application by way of summons was made by Esther Perreira on 20th February, 1998 for leave to present an election petition. This application was not served on Janet Jagan and Stanley Singh.

2. On the 24th February, 1998 the learned Chief Justice granted leave to Esther Perreira to present an election petition. As far as I am aware this order was not served on Janet Jagan or Stanley Singh prior to 7th September, 1998 nor brought to their attention prior to that date.

3. On 26th February, 1998 Mr. Justice Small granted leave to Esther Perreira to amend the petition.

4. On 27th February, 1998 the following documents were served on Janet Jagan and Stanley Singh:-

   (1) A sealed and certified copy of the petition with affidavit in support.

   (2) A sealed copy of the Notice of the Presentation of the Election petition.

   (3) A sealed copy of the notice for security for costs.

5. On the 2nd March, 1998 the Honourable Chief Justice made an order granting leave to Esther Perreira to further amend her petition.

6. The parties through their lawyers appeared before Madam Justice C.M.C. Singh on 5th June, 1998. On that occasion Mr. Ramkarran S.C. appeared for Donald Ramotar in a Petition filed by him (Ramotar) and also held the brief of Mr. Ramjattan who is one of the lawyers appearing for Janet Jagan. On that occasion Mr. Ramkarran had indicated to the learned judge that he desired a two (2) weeks adjournment to consider whether he would wish to file a summons raising any objection to the hearing of the petitions. On the return date, that is to say, 19th June, 1998, Mr. Ramkarran informed the Judge that he did not wish to do so. I do not consider this as a step taken in the proceedings so as to justify the conclusion that Mr. Ramkarran was waiving anything.

I must point out that up to that stage their was nothing to indicate that the order made by the Honourable Chief Justice on 24th February, 1998 was brought to the attention of Mr. Ramkarran or the other lawyers appearing for Janet Jagan and Stanley Singh. It is true that there is no requirement in the Election Laws for copies of the ex-parte order to be served on the Respondents to the petition but I make the point that there is nothing to indicate that order was brought to the attention of Janet Jagan or Stanley Singh or their lawyers prior to 7th September, 1998.

Mr. Britton S.C. did make the point that had the applicants or their lawyers exercised due diligence they would have discovered that the application for leave had been granted on an ex-parte application on 24th February, 1998. Unfortunately, I do not share this view as it was Esther Perreira, who had initiated the proceedings and I would have thought that it was desirable to have copies of the order served on the parties named in the petition, even though

as I had said, there is no legal requirement for her to do so. Common sense would dictate that that should have been done. How else could they have been made aware of the order? (See **Muir v. Jenkins** (1913) 2QB 412.

It was not until the 7th September, 1998 when the matter came up before Madam Justice Claudette Singh again and when Mr. Hardyal S.C. had submitted to the learned judge that no leave had been obtained by Esther Perreira to present her petition that Mr. Britton S.C., who is one of the lawyers appearing for Esther Perreira, laid over with the Court the order which had been made by the Honourable Chief Justice on 24th February, 1998 and the trial judge had cause copies of it to be made and handed over to the lawyers appearing for Janet Jagan and Stanley Singh, among others.

Another point raised by Mr. Hardyal S.C. is that proceedings initiated by way of an ex-parte summons were nullities and, therefore, if the court finds this to be so then everything that flows from it is flawed as it goes to the jurisdiction of the Court (High Court) to hear the Election petition filed by Esther Perreira. He submitted that you cannot add nothing to nothing and get something and he referred to a number of the cases on the point including **Bernstein v. Jackson** (1982) 2 AER 806 Re: Pritchard (1963) 2 WLR 685, **Mc Foy v. South African Railway** (1961) 3 AER 106 and **Etienne v. Layne** Civil Appeal No. 59 of 1974.

In other words, he had submitted what was done was a nullity in that the proceedings never started at all owing to some fundamental defect in issuing them. He had submitted before us that a summons cannot be used to initiate legal proceedings. In **Etienne v. Layne** George JA as he then was, said that to use a general summons in order to initiate proceedings would amount to a nullity.

Mr. Hardyal S.C. had submitted that substantial issues of law are involved, namely the proper interpretation of article 163 of the Constitution, and in particular article 163 (2) and 3 (a), and that the applicants ought to be granted leave to appeal out of time despite the lapse of about six (6) months between the time the Honourable Chief Justice had made her order and the time of the filing of the present applications on 14th September, 1998.

Both Mr. Mc. Kay and Mr. Britton had submitted that the applicants Janet Jagan and Stanley Singh had not offered any good reason or excuse for their delay in filing their appeals in time. However, it must always be borne in mind that the order of Honourable Chief Justice was not brought to the attention of the applicants until 7th September, 1998 and within a matter of 7 days later they had filed their present application.

I quite agree that election petitions ought to be dealt with expeditiously. As was said by George CJ in Payene v. Hammond Civil Action No. 206 of 1986 at p. 36:

> **"This tardiness on their part is the very antithesis of the urgency and dispatch with which election disputes should be resolved".**

In that case even though the petitioner was aware of certain non-compliances with the Election Laws he took over three months to file his application.

In Thiberge v. Laundry (1876) AC 102 Lord Cairns stressed the need for a speedy resolution of controverted elections when he said at p. 106:

> **"One of the obvious incidents and consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a manner that should, as soon as possible become conclusive and enable the constitution of the Legislative Assembly to be distinctly and speedily known".**

I agree with those statements but they must be considered in relation to the particular facts of the case and in this case, it is not disputed that the order made by the Honourable Chief Justice was only brought to the attention of Counsel for the applicants on 7th September, 1998 and this is a most important consideration.

It is my view that the facts and circumstances of the instant cases falls squarely within Order 2 Rule 3 (4) and (5) of the Court of Appeal Rules and that applicants should be given an extension of time of 7 (seven) days from today to file their appeals.

However even if I am wrong in that respect then Order 1 Rule 8 of the Court of Appeal rules which provides as follows comes into play:

> **"Subject to the provisions of Section 19(2) of the Act [relating to the time within which an appeal may be brought in a capital case to the Court] and to Order 2 Rule 3 (3) of these Rules the Court may enlarge the time prescribed by these rules for the doing of anything to which these rules apply or may permit a departure from these rules in any other way where this is required in the interests of justice".**

This rule was considered by this Court in Mustapha Ally v. Hand-in-Hand Insurance Company (1967) 11 WIR 202, Hing v. Hing (1978) 25 WIR 391 and more recently in G.T.M. v. Chandroutie (supra):

In the latter case the application for extension of time was filed some 2 ½ years after

judgment had been delivered in the High Court and yet leave was granted to appeal out of time. At p. 19 of the cyclostyle decision George Ch said:

> **" . . . . . it seems to me therefore that in Moses v. Kumar (See (1969) 14 WIR 328, (1969) GLR 111) had attention between drawn to Order 1 Rule 8 this Court may well have concluded that its provisions were wide enough to empower it in the exercise of its mature judgment to grant an extension of time despite the failure to comply with the stringent requirements of Order 2 Rule 3 (4) . . . . . "**
> **Needless to say, having regard to the stringent requirement of the sub-rule a Court would no doubt approach any such application with the utmost caution, less by too liberal an attitude it defeats its very intent and purpose. But this can be no reason for denying that in a particular case Order 1 Rule 8 can be applied".**

I, therefore, go on to consider whether the applicants have profferred good and sufficient reasons why this residual and exceptional discretion should be exercised in their favour. In this regard certain important factors should be taken into account namely:

(1) The order of the learned Chief Justice was not brought to the attention of the applicants until 7th September, 1998 and bearing in mind that neither themselves nor their lawyers had appeared before the Honourable Chief Justice on the 24th February, 1998. Had there been an appearance on their behalf at that stage I would have been the first person to say that they cannot benefit from their default.

(2) A matter of considerable Constitutional importance of which there is no decision of this Court as far as I am aware is involved, that is to say, whether it is a condition precedent to the presentation of an election petition in the High Court that the intended petitioner must obtain leave of the High Court, and if leave is required how is the court to be approached for such leave, bearing in mind that there are at present no provisions, statutory or otherwise, setting out the procedure to be adopted.

In my humble opinion the combined effect of the matters referred to above constitute sufficient justification for this Court's intervention in favour of allowing an extension of time.

As I have stated more than once before my concern is not whether the appeals sought to be brought will in the end succeed, if leave is in fact granted, but whether prima facie the appeals, sought to be brought have merit, that is to say, whether there are good and arguable grounds of appeal

and to this I had earlier answered in the affirmative.

In the circumstances I would granted an extension of 7 days within which to file the necessary appeals.

C.C. KENNARD
Chancellor of the Judiciary.

Dated this 11th day of November, 1998.

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W. Sampson for the United Force.

R. Mc Kay, S.C. and K.S, Massiah S.C. for H.D. Hoyte.

S. Hussain for National Independent Party and the Guyana Democratic Party.

JUDGMENT

PERRY JA

There exists before this Court a Notice of Motion filed by ***Stanley Singh*** and ***Janet Jagan*** seeking leave to file a notice of Appeal out of time. Both applicants have deposed directly that they are respondents in an election petition touching and concerning the General Elections held on the 15th December, 1997. Election Petition No. 38 of 1998. Their main contention seems to be that they were never served with an order of Court made by the Honourable Chief Justice Madam Desiree Bernard which gave the petitioner in the election Esther Perreira leave to file the said election petition. That order is dated the 24th day of February, 1998. The applicants allege that they only became aware of the existence of such an order on the 7th day of September, 1998 when it was mentioned to them in Court by Senior Counsel Peter Britton. The said order was obtained ex-parte and the applicants are contending that they should have been served with a copy of the documents filed in support of such an order so that they could have been heard if they so desired. It is also contended by the applicants that the method by which the order was obtained was irregular null and void since it was brought by way of ex-parte summons and not by way of Notice of Motion or originating summons. This brings into question whether or not it was necessary to have leave to present an election petition. In this regard reference was made to article 163 of the 1980 Constitution of the Republic of Guyana. That section reads thus that is article 163 (3) and (b):

> **"An appeal shall lie to the Court of Appeal from (a) the decision of a Judge of the High Court granting or refusing leave to institute proceedings for the determination of any question referred to in paragraph 1.**
>
> **(b) From the determination by the High Court of any such question or against any order of the High Court made in consequence of such determination.**
>
> **(c) And it goes on to say that Parliament may make provisions with respect to the circumstances and manner in which and the conditions upon which any question under this article may be brought to the Court of Appeal in respect thereof and there are further provisions set out in article 163 (4) (b) and (c).**

The question which has to be decided by this Court is whether there is a requirement laid down either by the Constitution or by the National Assembly (Validity of Elections) Act Chapter 104 for leave to be sought before an election petition is filed. When one looks carefully at article 163 3 (a) of the 1980 Constitution there seems to be no expressed provision for leave to be granted as a condition precedent to the filing of an election and I do not think it is the duty of the Court to infer such a requirement. In Halsbury's Law of England 4th Edition Volume 44 under the heading "**Interpretation**". It is stated that it is the province of the legislature to enact statutes and of the Courts to construe the statutes which the legislature has enacted. Since interpretation of the law is a matter for the Court, the Courts are not bound by an expression of Parliament's opinion expressed in or to be inferred from a statute as to what the law is as distinct from a positive enactment itself creating or declaring law although where a statute is ambigous such statements of opinion may be considered. The making of law is a matter for the legislature and not for the Courts and the Courts are not entitled to canvass the power of parliament to make any statute or the property or wisdom of making it and may not base the construction of a statute on their view of what Parliament ought to have done. If blunders are found in the legislation they must be corrected by the legislature and it is not the functions of the Court to repair them. It is trite law that any Act or provision which is not in the in the statute can otherwise be implied to remedy an omission even if it is evidently unintentional. It seems to me that as an extension of that article; 163(a) is obscure and has doubtful meaning and it is not for this Court to say by inference or otherwise that leave is required to file an election petition. It seems to me that as an extension of that article the legislation is required to either amend the constitution to state that leave is necessary before the filing of an election petition or that the Act dealing with election petitions be amended to include such a requirement. If the result of the interpretation of a statute according to its primary meaning is not what the legislature intended, it is for the legislature to amend the statute construed rather that for the Courts to attempt the necessary amendment by investing plain language with some other than its natural meaning to produce a result which it is thought the legislature must have intended. When one looks at the Constitution of Trinidad and Tobago it is clearly set out that proceedings for the determination of any question referred to in subsection 52 (1) of their Constitution shall not be instituted

except with the leave of the Court, that is a Judge of the High Court. It is clearly set out therein that leave is a condition precedent. The other sections which follow are identical to that set out in Section 3 subsection (a) and (b) of article 163 of our 1980 Constitution. Again under section 78 (1) of the Representation of the People Act of the Bahamas it is clearly set out that no election petition shall be presented unless leave therefor has been granted on an application made ex-parte to a judge of the Supreme Court and it goes on to set out what statements should be set out in the application. It is worthy of note that no such requirement is clearly or specifically set out either in the 1980 Constitution or the National Assembly (Validity of Election) Act Chapter 104 governing the filing of an election petition. Upon examination of the P.U.C. Act of 1990 Guyana it is specifically set out in section 78 (1) that an appeal shall lie to the Court of Appeal from ~~any final~~ decision or order of the P.U.C.

In the case of **Moore and another v. Gamgee (1890) 25 QBD** the defendant did not dwell or carry on business within the district of the Court. He had carried on business in the district within six months before the commencement of the action but the plaintiffs had not obtained leave to commence the action within the district as required by the County Courts Act 1888. Section 74 which clearly stated that:-

> **"Except where by this Act it is otherwise provided, every action or matter may be commenced in the Court within the district of which the defendant or one of the defendants shall dwell or carry on business at the time of the commencement of the action or matter by leave of ~~the Court or Registrar~~ in the Court within the district of which the defendant(s) dwelt or carried on business etc."**

It is clear, therefore, that to file such an action one had to have leave. However, in that case the Court held that by appearing to the action and defending it the defendant had waived the requirement for leave. The main point here is that leave was necessary.

The National Assembly (Validity of Elections) Act Chapter 104 sets out the various steps to be taken in relation to the filing of an election petition. It sets out the method of questioning the validity of elections, presentation and service of election petitions time for presentation of an election petition, amendment of an election petition. No where in this act is it stated either specifically or by inference that leave to file such a petition is necessary. In my view if that were

a requirement it would no doubt have been clearly stated in the act. A strict confirmity of the procedure set out in the Act is no doubt of vital importance.

Having regard to what I have stated earlier and now I am of the view that no leave is required for the presentation an election petition in Guyana. If it is the intention of Parliament that such leave is required then Parliament should so legislate with reference to article 163 of the Constitution or amend the Act.

In the circumstances, I would dismiss the motion for leave to appeal out of time and refuse any stay as requested. Having come to the conclusion that no leave is necessary it is not relevant for me to deal with the other issues raised by the applicants relating to the form by which leave was obtained on whether there was a waiver or delay on the part of applicants.

The motion is therefore dismissed with cost to the respondents represented in this Court.

L.L. PERRY
Justice of Appeal

Dated this 18th day of November, 1998.