**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA**
**CONSTITUTIONAL AND ADMINISTRATIVE DIVISION**
**PROCEEDING FOR ADMINISTRATIVE ORDER**

**2019-HC-DEM-CIV-FDA- 1148**

BETWEEN:

**DIPCON ENGINEERING SERVICES LIMITED**
Applicant

-and-

1. **THE ATTORNEY GENERAL OF GUYANA**
2. **PRESIDENT OF THE CO-OPERATIVE REPUBLIC OF GUYANA**

Respondents

**BEFORE THE HON. MR. JUSTICE *NARESHWAR HARNANAN***

*MR. TIMOTHY MUNRO JONAS FOR THE APPLICANT*

*MR. BASIL WILLIAMS SC AND MR. NIGEL OVID HAWKE FOR THE RESPONDENTS*

**DECISION:**

*Brief facts***:**

1. The Applicant seeks an order of *certiorari* quashing the decision of the 2nd Respondent, the President of Guyana made on 8th July, 2019 pursuant to ***Article 188(1)(b)*** of the Constitution of Guyana, granting a ***respite*** of the execution of punishment imposed on Mr. Winston Jordan, the Minister of Finance, by *Hon. Madam Justice Priya Sewnarine-Beharry*. The respite was for an indefinite period terminating upon the expiry of all appeals.
2. The Applicant argues that the Respondents have failed to give reasons for the exercise of the power under the said Article and further, that the interference of the President by the said decision violates the separation of powers doctrine. The Applicant therefore argues that the decision amounts to a nullity, was arbitrary, unreasonable, irrational and ultra vires.

3. The genesis of these proceedings, is an Order of Court dated October 21, 2015, made by the *Honourable Justice Rishi Persaud*, in which the Applicant was awarded the sum of USD$2,228,400.67, or its equivalent in Guyana Dollars and costs in the sum of GYD$1,200,000.00 against the State.
4. The Applicant argues that the Minister was lawfully obliged to direct the payment of the judgement debt on behalf of the State pursuant to ***section 14*** of the ***State Liability and Proceedings Act, Chapter 6:05*** of the ***Laws of Guyana***.
5. After a period of non-compliance with *Justice Rishi Persaud's* order, the Applicant instituted proceedings in Court for an order of *Mandamus,* to compel the State, more specifically, the Minister of Finance, to direct payment of the judgement debt. The Court agreed and issued the order of *Mandamus* on March 1, 2018.
6. Again, after non-compliance with the orders of Court, the Applicant applied to the Court for an order directing Winston Jordan to obey the *Mandamus* order. This was granted on November 12, 2018. Both Orders were at the instance of the *Hon. Chief Justice Roxane George SC*.
7. After non-compliance with the orders of Court yet again, the Applicant sought an order committing Winston Jordan to prison for his failure to comply with the Court orders. An order of criminal contempt was then granted on June 24, 2019. By that ruling, it was ordered that Winston Jordan was in criminal contempt unless the judgement was paid on or before July 8, 2019, failing which he would be imprisoned for 21 days.
8. The Applicant contends that the said Minister of Finance, in or around May 2019 presented a supplementary budget for approval which included the sum of $800,000,000.00 to satisfy the payment of the judgement debt, which was approved by Parliament.
9. Further, the Applicant contends that the President's decision to grant Winston Jordan a respite, has the following effect:
    a. amounts to an interference by the Executive with the functioning of Parliament which has approved the payment of the debt in violation of the separation of powers doctrine and an interference

with the functioning of the judiciary which had refused a stay of execution of the committal order;

b. perpetuates the default of the State by its obligations under law to pay its debt to the applicant in accordance with the intendment of Parliament and the Court; and

c. deprives the Applicant of its property being the debt owed by the State and therefore amounts to a violation of the Applicant's constitutional right.

10. On the other hand, the Respondents contend that as a consequence of the failure to obtain a stay of execution of the committal order against Winston Jordan, the President, acting on the advice of the *Prerogative of Mercy Committee* pursuant to ***Articles 188*** and ***189*** of the Constitution, issued a respite to the Minister, in both in his official and private capacities, only terminating upon the expiration of all appeals.

11. Also, the Respondents argue that Minister could not withdraw from the Consolidated Fund, monies that have been appropriated by Parliament, and that he followed the protocols required by him in securing funds for the payment of debts by the State by seeking the requisite approval of Parliament by way of a Supplementary Appropriations Bill.

*Preliminary Notice of Application by the Respondents*:

12. Taking issue with the President being named as a Respondent in these proceedings, the Attorney General has now applied to this Court for an order to remove him as a party, pursuant to ***Rule 19.02(3) (a) (i)*** of the ***Civil Proceedings Rules*** of Guyana, on the ground that it is contrary to **section 10** of the ***State Liability and Proceedings Act, Cap 6:05.***

13. The Attorney General relies on ***Kent Garment Factory v AG and Others*** [1991] 41 WIR 177, where *Chancellor Kenneth George* agreed that since the enactment of the ***State Liability Act****,* any proceedings against the State are required to be brought against the Attorney General as the Defendant as is provided in the Act.

14. The Respondent also relied on the case of ***Zulfikar Mustapha v AG*** as an example where the Court refused to name the President as a party in

the proceedings on the basis that the Attorney General was already named a party and was deemed the proper representative on behalf of the State.

15. The Attorney General also argues in the alternative that the President should be removed pursuant to ***Article 182(1)*** of the ***Constitution of Guyana.***

16. They contend that the clear language of the said Article connotes that the President ought not be answerable to the court as a party to the proceedings in a civil matter for actions done in his official capacity. Reliance was placed on the *dicta* in ***Motswaledi v Botswana Democratic Party and Others*** [1999] 3 LRC 394 and the decision of then *Chief Justice (ag.) Ian Chang* in ***Baird v PSC*** [2001] 63 WIR 134.

17. Therefore, Attorney General contends that the President should not be a party to the proceedings because:

    a. the President's absolute immunity is a functionally mandated incident of his unique office rooted in the Constitutional tradition of the separation of powers;
    b. diversion the President's energies by concern with private law suits would raise unique risks to the effective functioning of government;
    c. the President cannot make important and discretionary decisions if he is in constant fear of civil liability;
    d. the State would be liable for the President's actions if found unconstitutional, but the President himself would be immune from the curial processes;
    e. the Attorney General is the proper party in proceedings against the State.

18. On the other hand, Counsel for the Applicant submits that the ***Constitution*** provides that sovereignty belongs to the people and where a citizen, however exalted his position in the Executive may be, acts in excess of his power, he is subject to the scrutiny of the Court.

19. Counsel further argues that the Office of President is statutorily created and therefore the President is a creature of statute, subject in the exercise of his office, to the Court's jurisdiction.

20. Counsel on the Applicant's behalf also submits that ***Article 182*** draws a distinction between personal and official capacity of the office holder, and where a civil proceeding is brought against the President in his official capacity, for an act done in his official capacity, and no relief is sought from him in his personal capacity, that proceeding is not prohibited by ***Article 182*** and therefore the action is properly instituted and maintained against the President.

21. Counsel submits that ***Article 182*** precludes the President being added in civil proceedings for acts done in his private capacity only, and impliedly affirms that the Head of State remains amenable to Court proceedings in relation to acts done in his official capacity, for example, judicial review of his decision to grant a respite.

22. Counsel also pointed out that ***Motswaledi,*** *supra,* as relied on by the Attorney General, does not support their contentions because the circumstances could be distinguished in that case.

23. Counsel argues that the facts here relate to the President being named in his official capacity in civil proceedings in respect of an act done in his official capacity, a situation which is specifically excluded from the ambit of ***Article 182***. Counsel further relies on the dicta, *inter alia,* in ***Hochoy v Nuge et al*** [1964] 7 WIR 174, ***AG v Dumas*** [2017] UKPC 12, and ***Yassin and Thomas v Attorney General,*** CA 40/1996, in support of their contentions.

***<u>ISSUES</u>*:**

A. Whether the President of Guyana can be made a party to these civil proceedings

B. Whether the President exercised his discretion under ***Article 188(1)*** of the Constitution of Guyana fairly, properly, lawfully and reasonably.

***<u>ISSUE A</u>*:**

*Whether the President of Guyana can be made a party to these civil proceedings.*

*Law and Analysis**:***

24. ***Article 182*** of the ***Constitution*** of the ***Republic of Guyana*** provides:

> (1) Subject to the provisions of article 180, the holder of the office of President shall not be personally answerable to any court for the performance of the functions of his or her office or for any act done in the performance of those functions and no proceedings, whether criminal or civil, shall be instituted against him or her in his or her personal capacity in respect thereof either during his or her term of office or thereafter.
>
> (2) Whilst any person holds or performs the functions of the office of President no criminal proceedings shall be instituted or continued against him or her in respect of anything done or omitted to be done by him or her in his or her private capacity and no civil proceedings shall be instituted or continued in respect of which relief is claimed against him or her or anything done or omitted to be done in his or her private capacity.
>
> (3) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period during which any person holds or performs the functions of the office of President shall not be taken into account in calculating any period of time prescribed by that law for bringing any such proceedings.

25. In the Ugandan case of ***Tumukunde v AG and another*** (Constitutional Petition No. 6 of 2005), UGCC 1 [25 August 2005], one of the issues before the Court was whether the actions of the Commander in Chief/President can be challenged in a Court of law. The Constitutional Court of Uganda examined and analysed the purport of ***Article 98*** of the *Constitution of Uganda,* more specifically sub-articles (1), (4) and (5), which sets out the President's immunities. ***Article 98*** provides that:

> (1) There shall be a President of Uganda who shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour.

(4) While holding office, the President shall not be liable to proceedings in any court.

(5) *Civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person*; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President. [emphasis supplied]

26. ***Kitumba JA*** and ***Mukasa-Kikonyogo DCJ*** opined the following in their combined judgement, after relying on the *dicta* in the US cases ***Baker vs Cart*** 369 US 1962 and ***William Clinton vs Paula Jones*** 520 US 68 [1997]:

> However, challenging the act or acts of the President is one thing and prosecuting him and bringing him before a Court of law is another. We agree that ***clause 4*** of ***Article 98*** the President cannot be prosecuted for a criminal offence or be sued in a civil action in any court***...***
>
> …With regard to the parties to the action for complaints against an act or acts of the President, *the proper respondent or person to sue is the Attorney General.*
>
> …However, while holding office, the President shall not be liable to proceedings in any court. [emphasis supplied]

27. Similarly, ***Twinomujuni JA*** construed the meaning of ***Article 98(4)*** of the ***Uganda Constitution*** and stated:

> … that the article only protects the person of the President from being dragged in Courts of law either as a party or a witness for actions performed when holding the office of the President. ***Article 98(4)*** means that and no more.

28. In a Sri Lankan case ***Kumaranatunga v Jayakody and Another*** [1984] 2 Sri LR 45 (15 March 1984), the Court of Appeal of Sri Lanka held:

> The language of article 35(1) of the Constitution is so clear and unambiguous that the need for interpretation of this article does

not arise. *This article clearly confers absolute immunity on the President, during the tenure of his office, from being proceeded against in respect of anything done or omitted to be done by him either in his official or private capacity in any tribunal.*

… There are two aspects to article 35(1): the President is immune from all proceedings and the Court is barred from entertaining and continuing any proceedings against him**.**

… Hence no petition can be *instituted impleading the President as a respondent***.** [emphasis supplied].

29. In that case, the preliminary objection was raised that the 2nd respondent holding the office of President of the Republic of Sri Lanka, could not have been made a party-respondent in the proceedings as his joinder contravened ***Article 35(1)*** of the Constitution.

30. **Article 35 of the Sri Lanka Constitution** reads as follows:

(1) *While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.*

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.

(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130(a) relating to the election of the President :

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General. [emphasis supplied]

31. See also ***Victor Ivan And Others v Hon. Sarath N Silva and Others*** [2001] 1 Sri LR 309 (20 June 2001) where the Supreme Court of Sri Lanka also held that proceedings could not be instituted against the President in light of ***Article 35(1)***. See also ***Mallikarachchi v Shiva Pasupathy and Attorney-General*** [1985] 1 Sri LR 74 and ***Karunathilaka v Commissioner of Elections*** [1999] 4 LRC 380**.**

32. It must be noted also that in ***Baird v PSC***, cited above, *Chang CJ(ag*) relied on the *dicta* in ***Karunathilaka***, cited above, and noted that ***Article 35(1)*** of the Sri Lankan Constitution is very similar in nature to ***Article 182*** of the Guyana Constitution.

33. In the Indian case ***Rameshwar Prasad and Others v Union of India and Another*** [2006] INSC 35 (24 January 2006), one of the issues before the Court was whether the Governor was answerable to any Court in view of the immunity granted by ***Article 361(1)*** of the Constitution**.**

34. ***Article 361*** of the Indian Constitution provided that**:**

(1) The President, or the Governor or Rajpramukh of a State, *shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:*

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61: Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor of a Slate, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor of such Stale, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims. [emphasis supplied]

34. In ***Rameshwar Prasad,*** cited above, the Supreme Court of India interpreted the ***Article 361*** at paragraph 173 of the judgment, as follows:

A plain reading of the aforesaid Article shows that there is a complete bar to the impleading and issue of notice to the President or the Governor inasmuch as *they are not answerable to any Court for the exercise and performance of their powers and duties*. Most of the actions are taken on aid and advice of Council of Ministers. The personal immunity from answerability provided in Article 361 does not bar the challenge that may be made to their actions. *Under law, such actions including those actions where the challenge may be based on the allegations of mala fides are* ***required to be defended by Union of India or the State****, as the case may be*. Even in cases where the personal mala fides are alleged and established, it would not be open to the

Governments to urge that the same cannot be satisfactorily answered because of the immunity granted. [emphasis supplied]

35. Therefore, the Supreme Court of India held that the personal immunity under ***Article 361*** is complete and therefore there was no question of the President or the Governor being made answerable to the Court. The Court also relied on dicta in the United States case of ***Richard Nixon*** [1982] USSC 140 which set out the theoretical basis for the need for such immunity, when they said that**:**

> The position in law, therefore, is that the Governor enjoys complete immunity. Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The immunity granted by Article 361(1) does not, however, take away the power of the Court ***to examine the validity of the action*** including on the ground of *mala fides***.** [emphasis supplied]

36. In ***Motswaledi****,* cited earlier, the Court of Appeal of Botswana was similarly confronted with the interpretation of the immunity provision of the Constitution, ***Article 41(1),*** to determine whether it applied in the circumstances.

37. The facts are that the President of Botswana, who was also the President of the ruling party Botswana Democratic Party, suspended a member of the said party. That member filed proceedings in Court to set aside the decision.

38. The Court at first instance found that the President was protected under ***Article 41(1)*** and that proceedings should not be instituted against him. The decision was appealed, and the Court of Appeal also found that the President was protected by the section. The Court said that:

> The obvious purpose of the provision was to ensure that the President while carrying out his important functions was not impeded or embarrassed by having to deal with lawsuits or civil claims…

39. The Court also stated that:

> … many democratic countries had similar immunity clauses, justified on the basis that it was in the public interest that the democratic good (equality before the law) should accommodate another good (that the head of state be not impeded in the execution of his duties in the service of that democracy).

40. However, it must be noted that this case is distinguished from the matter before the Court, in that ***Article 41*** of the Botswana Constitution allows the President to be sued in his official capacity with respect to civil suits, but protects him in his private capacity from prosecution in civil proceedings.

41. ***Article 182*** of the Constitution of Guyana is differently worded. Further, the facts in ***Motswaledi,*** involved an act of the President in his private capacity, unlike in the present circumstances involving an act in the President's official capacity. ***Article 41(1)*** of the Botswana Constitution provides that:

> (1) *Whilst any person holds or performs the functions of the office of President* no criminal proceedings shall be instituted or continued against him or her in respect of anything done or omitted to be done by him or her either in his or her official capacity or in his or her private capacity and no civil proceedings shall be instituted or continued in respect of which relief is claimed against him or her in respect of anything done or omitted to be done in his or her private capacity. [emphasis supplied]

42. It is clear from the authorities above that the rationale of the immunity provision under the Constitution is to preserve the dignity of the office of the President and to ensuring the effective performance of the functions of such high office.

43. ***Article 182(1)*** of the Constitution provides that the President cannot be made personally answerable, and/or is immune from prosecution while in office, and after he ceases to be in office for acts done in the performance of duties as President.

44. Moreover, the immunity as enshrined in the Constitution appears to be absolute and applies to both his official and personal capacity while in office as President, as in the Sri Lankan Constitution, *per* ***Article 35***.

45. This Court therefore does not agree with the contentions of the Applicant in their interpretation of ***Article 182***. Further, the authorities relied on by the Applicant, relate to the validity and reviewability of the acts of the President. This Court does not find that the issue is whether these acts are reviewable, as clearly, they are.

46. This Court maintains the position that the President is personally immune from the curial process in both civil and criminal proceedings. As highlighted in the ***Tumukunde*** case, cited earlier, challenging the decision of the President, and bringing him before the Court, is separate and distinct. Further, ***Article 182*** read in conjunction with ***section 10*** of the ***State Liability Act, Cap. 6:05*** supports this conclusion.

***CONCLUSION ON ISSUE A:***

47. This Court therefore is of the view that the President cannot be named as a party to these civil proceedings. However, his actions in the circumstances, may be challenged through the Attorney General. It is therefore ordered that the President be removed as a party to these proceedings.

***<u>ISSUE B</u>***:

*Whether the President exercised his discretion under* ***Article 188(1)*** *of the Constitution of Guyana fairly, properly, lawfully and reasonably.*

*Law and Analysis*:

48. **Article 188** of the **Constitution of Guyana** provides:

(1) The President ***<u>may</u>***-

(a) grant to any person concerned in or convicted of any offence under the law of Guyana, a pardon, either free or subject to lawful conditions;

(b) ***grant to any person a respite, either indefinite,***

***or for a specified period, of the execution of any punishment imposed on that person for such an offence; or***

(c) substitute a less severe form of punishment for any punishment imposed on any person for such an offence; or

(d) remit the whole or any part of any punishment imposed on any person for such an offence or of any penalty or forfeiture otherwise due to the State on account of such an offence.

(2) Subject to the provisions of the next following paragraph, the powers of the President under the preceding paragraph shall be exercised by him after consultation with such Minister as may from time to time be designated by him.

(3) In addition to the Minister designated generally under the preceding paragraph, a second Minister may, in the manner prescribed in that paragraph, be specially designated in relation to persons convicted by courts-martial under the law of Guyana; and at any time when there is a second Minister so designated, the powers of the President under paragraph (1) shall, in relation to such persons, be exercised after consultation with that other Minister. [emphasis supplied]

49. Therefore, the President has a **<u>discretion</u>** to grant to any person a respite of the execution of any punishment for an indefinite or specified period pursuant to ***Article 188 (1)(b).*** This discretion of the President must be exercised in accordance with ***Article188(2)*** which requires that the President consult with the Minister designated by him before he exercises his powers under ***Article188(1)***.

50. Further, ***Articles 189*** and ***190*** provides for an *Advisory Council on the Prerogative of Mercy* which may be consulted by the designated Minister

before advising the President but is not obliged to do same or act in accordance with that Council's advice. [see **Article 190(2)**]

51. Historically, the exercise of prerogative powers was absolute and could not be subject to judicial review. However, the case of ***Council of Civil Service Unions and Others v Minister for the Civil Service*** [1985] AC 374 made the exercise of prerogative powers such as the prerogative of mercy amenable to Judicial Review. The Court stated that:

> "What determines whether the exercise of such a power is subject to the power of review is ***not its source but its subject-matter***". [Emphasis supplied]

See also ***R v Home Secretary, ex p Bentley*** [1994] QB 349 and ***Henry et al v Ag of Trinidad and Tobago et al*** TT 2009 HC 298, at paragraphs 36 to 53**.**

52. Their Lordships comments in the case ***AG et al v Joseph and Boyce*** [2006] CCJ 3 AJ are also worthy of note. At paragraph 26 of the ruling, they said:

> The decision of the House of Lords in ***Re Council of Civil Service Unions*** ("the ***CCSU*** case") marked a defining point in the approach of the courts to the judicial reviewability of prerogative powers. In the distant past, courts and text-book writers regarded the acts of the sovereign as '*irresistible and absolute*'. On this basis courts confined themselves merely to an inquiry into the existence and extent of prerogative powers. Their Lordships' speeches in the ***CCSU*** case ***emphatically endorsed the break with this approach. The modern view is that courts today will review a prerogative power once the nature of its subject-matter renders it justiciable. What is now pivotal to a determination of the reviewability of a prerogative power is not so much the source of the power but rather its subject-matter***. In the ***CCSU*** case, Lord Fraser stated at page 399E:
>
> > …whatever their source, powers which are defined, either by reference to their object or by reference to procedures for their exercise, or in some other way, and whether the

> definition is expressed or implied, are in my opinion ***normally subject to judicial control to ensure that they are not exceeded***. By "normally" I mean *provided that considerations of national security do not require otherwise*. [emphasis supplied]

53. In ***Yassin and Thomas v Attorney-General of Guyana*** [1996] 62 WIR 98, with respect to the prerogative of mercy, *Fitzpatrick JA* (as he then was) said at page 117A that:

> In this case justiciability concerning the exercise of the prerogative of mercy applies not to the decision itself but to the manner in which it is reached. ***It does not involve telling the Head of State whether or not to commute***. *And where the principles of natural justice are not observed in the course of the processes leading to its exercise, which processes are laid down by the Constitution,* ***surely the court has a duty to intervene****, as the manner in which it is exercised may pollute the decision itself*. [emphasis supplied]

54. Further reliance was placed on the *dicta* in the ***CCSU*** case, cited above, *per Lord Roskill,* who stated that:

> It is not for the courts to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair *they are only concerned with the manner in which those decisions have been taken.* [emphasis supplied]

55. Further, *Singh J* in ***Yassin and Thomas,*** cited above, described the constitutional provisions relating to consideration for the exercise of the prerogative of mercy as contained in ***Articles 188*** to ***190*** as '***constitutional safeguards***.'

56. The Jamaican case of ***Lewis et al v AG and Another*** [2000] 57 WIR 275, also held that the merits of the decision to exercise a prerogative of mercy is not open to review by the Court, but the procedure followed may be susceptible to judicial review.

57. In that case it was pointed out that the Governor-General of Bahamas was required to act in accordance with the advice of the designated

Minister in the exercise of the prerogative of mercy pursuant to ***Article 90(2)*** of Bahamas Constitution. Also, in accordance with ***Article 90(2)*** of the Jamaica Constitution, the Governor-General similarly must act on the advice of the Jamaican Privy Council.

58. The authorities therefore indicate that procedural inadequacies may be a ground for judicial review in respect of the exercise of prerogative powers. As has been seen, the exercise of ***any discretion*** must be done fairly and reasonably, with due regard to the principles of justice and with scrupulous transparency.

59. In an address intituled, ***Judicial Review of the Exercise of Discretionary Public Power,*** April 2017, given to the *Queensland Chapter of the Australian Institute of Administrative Law*, Federal Court of Australia Judge *Andrew Greenwood*, noted:

> *Brennan CJ* in **Kruger v The Commonwealth**[1] observed that when a discretionary power is statutorily conferred on a repository, the power must be exercised *reasonably* because the legislature is taken to intend that the discretion be so exercised. Thus, the power must, as a matter of construction of the statute conferring the power, be exercised *reasonably* (unless the plain words of the statute clearly and necessarily convey a different intention). [emphasis supplied]

60. *Justice Greenwood* went further in his analysis of the assessment of the repository's decision, and relying on the *dicta* in ***Minister for Immigration and Border Protection v Singh*** [2014] 308 ALR 280 at page 45 of the report, that:

> where no reasons are given for the exercise of a discretionary power, all a supervisory court can do is focus on the outcome of the exercise of the power, in the factual context presented, and assess for itself, ***whether there is an evident and intelligible justification for the exercise of the power***, keeping in mind, of course, that it is for the repository of the power, and the

[1] [1997] 190 CLR 1 at page 36 of the Report

> repository alone, to exercise the power. ***The repository of the power must do so, however, according to law***. [emphasis supplied]

61. *C.K. Thakker's*, ***Administrative Law***, 2nd Edn, at page 718 of the text, cited the dicta of *Bhagwati J.* (as he then was) in ***Khudiram Das v State of West Bengal*** [1975] 2 SCC 81, that:

> There is nothing like unfettered discretion immune from judicial reviewability. The truth is that in ***a government under law, there can be no such thing as unreviewable discretion***... [emphasis supplied]

62. *Thakker*, cited above, continued at page 718 and 719 that:

> The law has always frowned on uncanalised and unfettered discretion conferred on any instrumentality of the State and it is the glory of administrative law that such discretion has been through judicial decisions structured and regulated. It is true that abuse of power is not to be assumed lightly but experience has belied the ***expectation that discretionary powers are always exercised fairly and objectively***. [emphasis supplied]

63. In another Indian Supreme Court case of ***DTC v Mazdoor Congress***, AIR [1991] SC 101, *Sawant J* expressed the need to ensure there is a check on discretionary powers of high-ranking officials. He said:

> ***There is need to minimize the scope of the arbitrary use of power in all walks of life***. It is inadvisable to depend on the good sense of individuals, however high-placed they may be. It is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection and fairness does not go with the posts, however high they may be. ***There is only a complacent presumption that those who occupy high posts have a high sense of responsibility***. The presumption is neither legal nor rational. History does not support it and reality

> does not warrant it. ***In particular, in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave (have) any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law***. [emphasis supplied]

64. Therefore, the authorities are clear that it is not for the Court to decide whether the grant of ***respite*** ought to be granted, but whether the manner in which the President exercised his discretion to grant the respite was proper in accordance with the Constitutional provisions, and not arbitrary.

65. The factual context of the grant of respite here as contained in the record before this Court, is against a backdrop of a history of non-compliance by the State, with an order of Court, that there is no hope of being vacated by a higher Court. Applications for extensions of time to file appeals had been exhausted all the way to the Caribbean Court of Justice (*CCJ*), without any success.

66. In fact, the *CCJ* made it quite clear in its assessment of the State's prospects of success, that the Attorney General failed to demonstrate how there would be a miscarriage of justice, if an appeal is not permitted. [See ***AG v DIPCON Engineering*** [2017] CCJ 17(AJ)1.]

67. In its November 2017 ruling, Guyana's apex Court made it a point to note at paragraph 21 of its ruling that:

> The judgment, delivered more than two years ago, ***may now be enforced***. In ***Selby v Smith***[2] this Court observed that judgments must be carried into effect unless a court orders a stay and the court must act expeditiously in deciding whether to grant or refuse a stay. ***It can be ruinous for the holder of a money judgment, especially of a significant amount, to be kept out of his money and, worse, by default***. [emphasis supplied].

68. Since then, and as recounted on the record, there have been 3 applications filed in an effort towards enforcement of the initial order of *Justice Rishi Persaud*. It is undisputed that each attempt failed to realise

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[2] [2017] CCJ 13 (AJ) at [35]

compliance by the State, through its Finance Minister, Winston Jordan, pursuant to the provisions of the ***State Liability and Proceedings Act***.

69. Amongst those, as recounted earlier, is an order of mandamus by the *Hon. Chief Justice Roxane George SC*, directing him to comply with his statutory obligation and direct the payment of the judgment to the Applicant. The record reflects absolute non-compliance with every order of the Court during this time. This was followed up with another order by the *Chief Justice* directing him to obey the order of mandamus. Again, this order was not complied with.

70. This culminated with the committal order by *Justice Priya Sewnarine-Beharry* in June 2019. Up to this point, the Applicant has been making strenuous efforts to enforce it judgment for just about 4 years, without success. Even after the committal order, a higher Court has refused the Attorney General's application to stay the committal order, citing the very reasons by the *CCJ* above.

71. At this juncture, it is important to appreciate for legal and evidential context, the fundamental concepts of the rule of law and the separation of powers doctrine. This is so because of the interplay between the role and function of the Judiciary in circumstances within its province (enforcement Orders), and the reactionary decisions of the Executive branch, as demonstrated in its continued non-compliance with orders of Court, culminating with the grant of respite, which leads ineluctably to the conclusion that the State is acting in bad faith.

*RULE OF LAW & SEPARATION OF POWERS*:

70. Past Secretary-General of the United Nations, *Kofi Annan*, has described the *rule of law* as:

> a principle of governance in which all persons, institutions and entities, public and private, ***<u>including the State itself</u>***, are ***<u>accountable</u>*** to laws that are ***publicly promulgated***, ***equally enforced and independently adjudicated***, and which are consistent with international human rights norms and

standards. It requires, as well, measures to ensure adherence to the principles of ***supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency***.[3] [emphasis supplied]

71. The noted author *Michael Fordham* in his text the ***Judicial Review Handbook***, 4th edition, wrote at paragraph 7.2 - 7.3, thus:

> **Rule of law/separation of powers**. The rule of law is a first principle of constitutional theory. Together with the separation of powers, it explains why the ***Courts' supervisory role is one of crucial constitutional importance, and how the Government and the Crown are accountable to the Courts***. The rule of law is a theme which pervades the law of judicial review. It is not found in any statute, nor any constitutional document such as a written constitution. Rather, it has evolved through time as a self-recognition by Courts of ***a central sovereign role***.
>
> **Principles of legality**. As if by way of a spin-off from the rule of law, the Courts have come to recognise 'the principle of legality', representing a further counterbalance to legislative supremacy. The idea is that limitations are recognized within enabling statutory powers, to defend a constitutional imperative. The focus has tended to be on protecting basic rights, at least absent plain words (or necessary implication). But there is an unmistakable wider potential of constitutional principles of legality capable of reaching beyond fundamental rights as impervious even to plain words. [emphasis supplied]

72. *Mark Elliot* writes in his book, ***The Constitutional Foundations of Judicial Review***, 2001, at page 11, that:

[3] (Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).

…it can be seen that, in relation to judicial review, the notion of constitutional legitimacy possesses two facets. It requires a broad, contextual investigation of the constitutional principles which may justify *curial supervision of a particular form of power, as well as a narrower, more technical examination of the legal basis of review in order to ensure that judicial control can be rationalized in a legally coherent and constitutionally acceptable manner…* [emphasis supplied]

73. *Elliot*, continues at page 98, citing *Christopher Forsyth's* article intituled, ***Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review***, [1996] 55 CLJ 122, where he wrote:

…Parliament must therefore be taken tacitly to have approve the fashioning of broad grounds of review. Hence legislative intention is relevant not because it can be divined and turned into specific principles of review, but because '*the legislature is taken to have granted an imprimatur to the judges to develop the law' themselves.*

This analysis is to be welcomed to the extent that it provides an alternative to the unconvincing dogma of the traditional ultra vires doctrine, which postulates a more simplistic framework within which the courts merely identify and enforce those unwritten limits on discretionary power which Parliament is taken to have intended. [emphasis supplied]

74. *Charles-Louis de Secondat, Baron de La Brède et de Montesquieu*, the French political philosopher, in his treatise, ***De l'esprit des loix*** (The Spirit of the Laws), 1748, translated from French to English by Thomas Nugent in 1750, is famous for propounding the ***separation of powers*** doctrine. He wrote:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a

> tyrannical manner. Again ***there is no liberty if the judicial power be not separated from the legislative and executive powers***. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> Miserable indeed would be the case, where the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

75. In commenting on the importance of the doctrine of separation of powers, ***Thakker*** (cited above) noted that its value lies in the '*checks and balances*' which are necessary to prevent ***<u>an abuse of enormous powers of the executive</u>***. At page 45 of the text, he writes:

> The object of the doctrine is to have '***a government of law rather than of official will or whim***'. Montesquieu's great point was that if the total power of government is divided among autonomous organs, one will act a check upon the other…Again, almost all the jurists accept one feature of this doctrine that the *judiciary must be independent of and separate from the remaining organs of the government, viz.* legislature and executive.
>
> The Report of International Congress of Jurists held at New Delhi in 1959 states:
>
>> An independent Judiciary is an indispensable requisite of a free society under the *Rule of Law*. Such independence implies freedom from interference by the Executive or the Legislature ***<u>with the exercise of the judicial function</u>***.
>>
>> If there is one bulwark that guards the freedom of the average citizen, it is the law court. Courts of justice are more important than even the military to guard the freedom of the country and of the individual or for ***<u>enforcing an adherence to the rule of law</u>***. [emphasis supplied]

76. In *V.G. Ramachandran's* ***Administrative Law***, 1984, at page 27 of the text, the author opined:

> Even the supreme law-making Parliament of the land exalts itself when it respects by convention the judicial pronouncements of the Supreme Court of the land in its interpretive jurisdiction.

77. It is therefore important for the maintenance of civility and respect for the rule of law, that the functions or actions of the three institutions of the State are independent of each other, whilst at the same time fostering partnerships for good governance and due administration of the rule of law.

78. Having said that, there were no reasons proffered by the President for the grant of respite to explain at the time, why the respite was issued. His Excellency may have had sound grounds upon which he based his decision. The gazetted instrument of respite merely stated that it was granted '*until all appeals and remedies available to him and the State have been exhausted'*.

79. Indeed, there is no statutory duty imposed on the President to give reasons for his decision to grant the respite. Therefore, the absence of reasons, does not automatically vitiate the exercise of the discretion he has, where no duty to give reasons is spelt out in the legislation.

80. However, the Court is cognisant of the decision in ***R v SOS ex parte Lonrho*** [1989] 1 WLR 525, and more particularly at page 539 of the report where Lord Keith opined that:

> The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. *The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons cannot complain if the court draws the inference that he an no rational reason for his decision.* [emphasis supplied]

81. Also, in the case ***Re Carl Hanoman* GY 1999 HC 1,** the duty to give reasons for exercise of discretion was explored by the High Court of

Guyana. It was noted that there was no definitive position on the question of need for reasons but that such a duty to give reasons was enhanced by the particular circumstances such as the adverse effects of the decision and whether it is obvious that reasons ought to be given. [See also ***Linton C. Allen v His Excellency the Right Hon. Sir Patrick Allen*** [2017] JMSC Civ 24].

82. Undoubtedly, His Excellency, the President, is imbued with a discretion by ***Article 188*** of the ***Constitution*** to consider the grant of pardon of the conviction of any offence, to any person. By that Article, he may also consider the grant of a ***respite*** of the execution of any punishment imposed on a person who commits an offence. This discretion is wide, as the President can grant that respite either for an indefinite or a specified period.

83. Further, this Court is of the view that there is no greater illustration of the high degree of responsibility which the President has in the exercise of his discretion when considering the application of ***Article 188***.

84. Suffice it to say, no discretion exercised pursuant to any statutory power, as in the grant of respite, is absolute. The Privy Council in ***Mohit v The Director of Public Prosecutions of Mauritius*** [2006] UKPC 20, concluded at paragraph 20 of its judgment that:

> In ***R v Panel on Take-overs and Mergers, Ex p Datafin PLC*** [1987] QB 815, 847, *Lloyd LJ* observed that "*If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review*".

85. Even the Constitution itself preserves the supervisory jurisdiction of the Courts in relation to acts done pursuant to the authority derived from its provisions, and otherwise. ***Article 233(8)*** states*:*

> Subject to article 227(6) and article 216(12), ***no provision of this Constitution*** that any person or authority ***shall not*** be subject to the direction or control of any other person or authority in the exercise of any functions ***shall be construed as precluding a court from exercising jurisdiction in relation to any***

***<u>question whether that person or authority has exercised those functions in accordance with this Constitution or any other law</u>***. [emphasis supplied]

86. In spite of there being no duty to give reasons for the exercise of this discretion, there can be no doubt that this high power of a pardon, or the grant of respite, of a term of punishment on conviction of an offence at law, imposed by a Constitutionally created, protected and independent tribunal, cannot be activated on a whim, or arbitrarily, and without procedural and legal transparency.

87. Whilst no reason was attached to the decision, ***Ms Roxanne Barratt***, who is the Principal Assistant Secretary (General) of the Ministry of the Presidency, being duly authorised by the State in these proceedings, deposed on the record on the State's behalf that '*as a consequence of the failure to obtain a Stay of Execution of the Order for contempt against the Minister of Finance personally, the President of Guyana acted on the advice of the Prerogative of Mercy Committee pursuant to article 188 of the Constitution of Guyana to issue a respite on behalf of the Minister of Finance Mr. Winston Jordan both in his official capacity and private capacity*.'

88. This Court is of the view that there can be no other conclusion, but that the President exercised his discretion under ***Article 188***, to grant the respite, after the Judiciary pronounced its decision to refuse the stay of execution of its committal order.

89. To recall the context, this committal order was made after a period of about 4 years of the initial order of judgment in favour of the Applicant, and after 2 separate enforcement orders obtained by the Applicant, which were not complied with by the State. Further, there were also applications filed in the Court of Appeal and the Caribbean Court of Justice, all of which were determined in favour of the Applicant.

90. Further, Ms. Barratt, in making reference to the President acting on the advice of the Prerogative of Mercy Committee, did not substantiate same on the record, so as to assist the Court in its clear supervisory jurisdiction to determine whether the basis for the decision was done in a fair, proper,

reasonable, just and rational manner, in the particular circumstances of this case.

91. What is left before this Court is the explanation by the Principal Assistant Secretary (General) of the Ministry of the Presidency. This Court can only reasonably conclude that the President would have acted to overturn the decision by the Judiciary, when it refused a stay of execution of the committal order. This is apparent as gleaned from the instrument published in the Official Gazette stating that the respite was granted ***until all appeals and remedies available to him and the State have been exhausted***.

92. It goes without saying that the President has the discretion to grant the respite of the execution of the punishment imposed on Winston Jordan. However, this decision must be exercised fairly and lawfully, respecting the rule of law and the separation of powers doctrine.

93. His Excellency's decision to grant the respite in the manner conferred, and after a Court would have considered and refused the application for a stay of execution of the committal order, has the effect of undermining the administration of justice and the rule of law, whilst infringing on the Constitutional remit of the Judiciary.

94. Further, there is no suggestion on the record before the Court that the departure from adherence to the rule of law is justified in the circumstances. This Court therefore agrees with the contentions by the Applicant that the effect of the President's decision is:

   i. An interference by the Executive with the functioning of Parliament which has laid before it a Supplementary Appropriations Bill for authorization to issue from the Consolidated Fund, appropriations in accordance with a schedule of supplementary provision. This schedule details the sum of $800,000,000.00 to '*meet payment of judgment awarded to Dipcon and increased activities such as Ministerial Outreaches*'.

ii. An overreach by the Executive into the province of the Judiciary which had refused a stay of execution of the committal order, pending appeal.

iii. Enables and perpetuates continued defiance by the State through its Minister of Finance, of Orders of Court and of the provisions of the State Liability and Proceedings Act, by insulating the Minister against the lawful consequences of default and contempt.

iv. Perpetuates the default of the State of its obligations under Orders by the High Court, Court of Appeal and the Caribbean Court of Justice.

v. Facilitates the continued deprivation of the fruits of judgment, whilst leaving the successful litigant without any remedy or means to collect its lawful debt.

95. It is worth repeating that the particular circumstances on the record before the Court does not set out an evident and intelligible justification for the exercise of the power of ***Article 188(1)(b)***, except that it insulates Winston Jordan, the Minister of Finance, from the consequences of repeated non-compliance with extant Orders of Court, and continues the default by the State, which has no extant appeals of the substantive judgment of the Court.

96. This insulation is arbitrary, improper, irrational, unreasonable, ultra vires, in bad faith and in excess of jurisdiction. There is no other lawful process by way of appeals which can ultimately impugn the existence and validity of the debt of the State, which must be paid, pursuant to the judgment by *Justice Rishi Persaud,* made since October 21, 2015.

***DISPOSITION***:

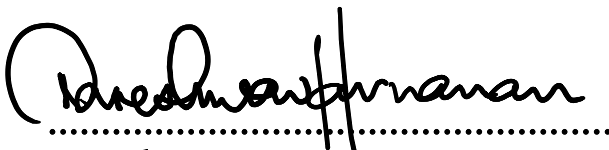
97. In the circumstances, it is therefore ordered that an Order of ***Certiorari*** be issued directed to the Attorney General of the Co-operative Republic of Guyana, pursuant to the ***State Liability and Proceedings Act*** of the Laws of Guyana, quashing the decision by His Excellency, the President of

Guyana, as contained in the publication in the Official Gazette dated 8th July, 2019, to grant to Winston Jordan, a respite for the indefinite period terminating upon the expiry of all appeals from the execution of the punishment of imprisonment for a period of 21 days imposed on him by Order of Justice Priya Sewnarine-Beharry dated the 24th June, 2019, for his criminal contempt of the Orders of the High Court of Guyana on the grounds that:

i. The said decision was improper, unreasonable and/or irrational, arbitrary and ultra vires, in bad faith and in excess of jurisdiction; and

ii. No reasonable argument has been advanced in support of the said decision

98. Costs to the Applicant are to be assessed by filing the relevant application on or before the 14th April 2020, failing which, the parties are ordered to bear their own costs. The assessment of costs application, if filed, will be heard on 4th May 2020 at 10:00am.



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**Nareshwar Harnanan**
**Puisne Judge**
**March 10, 2020**