REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

Civ. App. No. P320 of 2018
Complaint No. GSD-IRO 35 of 2018
Application No. 7 of 2018

IN THE MATTER OF THE INDUSTRIAL RELATIONS ACT CHAPTER 88:01

AND

IN THE MATTER OF A COMPLAINT BY OILFIELD WORKERS' TRADE UNION PURSUANT TO SECTION 84(1) OF THE INDUSTRIAL RELATIONS ACT, OF THE COMMISSION OF AN INDUSTRIAL RELATIONS OFFENCE IN BREACH OF SECTION 40(1) OF THE INDUSTRIAL RELATIONS ACT

AND

IN THE MATTER OF AN APPLICATION BY OILFIELD WORKERS' TRADE UNION FOR AN INTERIM ORDER UNDER THE PROVISIONS OF THE INDUSTRIAL RELATIONS ACT CHAP. 88:01 AND IN PARTICULAR UNDER SECTIONS 7(1) AND/OR 10(1)(b) THEREOF AND/OR UNDER THE INHERENT JURISDICTION OF THE COURT

BETWEEN

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO

Appellant/Applicant

AND

OILFIELD WORKERS' TRADE UNION

Respondent

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO
(Joined as an interested party to Application No. 7 of 2018 by Order of the Industrial Court on October 4, 2018)

Interested Party

BEFORE:

PEMBERTON, J.A.

APPEARANCES:

For the Appellant:	**Mr. R. Armour S.C., Ms. V. Gopaul, Mr. D. Ali instructed by Ms. M. Ferdinand and Ms. K. Petersen**
For the Respondent:	**Mr. A. Bullock and Ms. L. Abdulla**
For the Interested Party:	**Mr. S. Jairam S.C., Mr. R. Dass and Mr. D. Allahar**

DATE OF DELIVERY: 10th October 2018

DECISION

[1] On the 9 October 2018 the Applicant/Appellant applied to the Court for certain orders and relief namely:

1. That the Injunction Orders of the Industrial Court, dated 8 October 2018, be stayed until the determination of the Appeal filed against that order;
2. That the Appeal filed against those Injunction Orders dated 9 October 2018, be deemed urgent and that the hearing of the Appeal be expedited;
3. That costs are reserved pending the hearing and determination of the Appeal.

[2] The application came up for hearing on 10 October 2018. I granted the relief that the Appeal be deemed urgent and gave directions for an expedited hearing.

[3] I then proceeded to hear the application for the stay of execution of the Industrial Court's orders granting injunctive relief. After considering Counsel's arguments, I granted the stay of execution as prayed. These my reasons.

[4] The entire matter arose out of the discussions surrounding the continuance of/non-continuance of the day-to-day operations of the major asset of this country, the appellant, the Petroleum Company of Trinidad and Tobago (PETROTRIN). The respondent, the Oilfield Workers Trade Union (OWTU) is the recognized bargaining union for certain classes of workers employed in PETROTRIN.

[5] For some time now, there has been concern about the continued operations of the largest state owned company, PETROTRIN in the most important sector, petroleum, the operations of which fuel the economy and daily life of this nation. As expected, PETROTRIN and the OWTU have been engaged in a talks on this issue.

[6] On 3 April 2018, the parties signed a Memorandum of Agreement which, *inter alia* provided that the parties meet to discuss plans on[1] the way forward. On 20 July 2018, this Memorandum of Agreement was entered as an order or award of the Industrial Court.

[7] During this time PETROTRIN's dire financial position and the possibility of a reduction of its work force became the subject of hot debate nationwide, given the importance of PETROTRIN's operations to this economy. The uncontroverted evidence reveals that PETROTRIN and the OWTU held a meeting on 28 August 2018, at which time PETROTRIN informed the OWTU that closure of the Company was the only viable economic and financial option. PETROTRIN commenced informing workers that they will be terminated and that termination letters were available for collection.

[8] On 1 October 2018, the OWTU filed a complaint in the Industrial Court alleging that PETROTRIN was in breach of section 40(1) of the **INDUSTRIAL RELATIONS ACT**[2] which provides *inter alia* that "*the recognized majority union and employer shall, subject to this Act, in good faith, treat and enter into the negotiations with each other for the purposes of collective bargaining"*. Section 40(2) of the Act provides that if the allegation is proved, the offending party is guilty of an industrial relations offence and a fine of $4000.00 TT can be visited upon them.

---

[1] See affidavit in support of the application sworn by WILFRED ESPINET at para. 3 making reference to attachment "W.E. 1". In "W.E.1" sworn on 4th October, 2018, para. 17 states: *The Company accordingly then met with the Union on 28th August, 2018 to explain the changed situation in light of the grave circumstances (that is to say the restructuring was no longer a viable option and that closure of the Company was the only viable option) which had become apparent. At that meeting at which I was present , Nigel Edwards (a director of the Company) presented three scenarios:*

(a) The Company could continue as is with no changes to its organizational structure or design;
(b) The Company could continue with a change in its organizational design and function as our peers (regionally) or,
(c) The Company could be closed down and its employees terminated and a stand alone company focused on E&P (in accordance with international benchmarks) would assume responsibility for the servicing of the Company's debts. ….

[2] Chap. 88:01 **LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO**

[9] The OWTU has alleged that PETROTRIN has failed to comply with this section. On 2 October 2018 the OWTU filed an application in the Industrial Court seeking two interim orders to restrain PETROTRIN from "*terminating or otherwise determining"* any employment of members of the union, and from making "*any offer of voluntary separation"* to its members pending the hearing and determination of the section 40(1) complaint. After hearing the application the Industrial Court, a superior court of record as declared in section 4(1) of the **INDUSTRIAL RELATIONS ACT**[3] granted the relief.

[10] At the hearing of that application, the parties agreed and the court granted leave to the Attorney General to join in the matter as an interested party only on the injunction hearing. After receiving and considering submissions, on 8 October 2018, the court granted to the OWTU, the interim relief as prayed. The following afternoon, PETROTRIN filed an appeal against the grant of the relief, and second application seeking a stay of the injunctive orders and that the hearing of the appeal be deemed urgent and therefore expedited. As I said, I dealt with the application for an expedited appeal. The application for the stay of the Orders is now before this Court.

[11] **APPLICATION FOR THE STAY OF EXECUTION**

PETROTRIN's application was based on two main grounds; that the appeal has good prospects of success and there exist exceptional and additional circumstances to support the grant of a stay of the injunctive orders to the Company. The application was supported by affidavits filed on behalf of PETROTRIN and the Attorney General. OWTU also filed an affidavit. I shall not rehearse counsel's arguments but shall refer to them in my analysis.

[12] **LAW, ANALYSIS AND CONCLUSIONS**

I pointed out to the parties that this hearing is not one in which I have to deliberate on whether to discharge the injunctive orders granted, nor is it a mini trial nor can I substitute my view for that of the Industrial Court. My function on this application is to see if the applicant makes a case for a stay, that is, I must consider *inter alia,* whether the appeal has good prospects of success given the parts of the judgment which are condemned. Mr. Armour opened by stating that in order for his application to succeed, the Court had to be satisfied that the criteria laid down in the seminal **NATIONAL**

[3] Id.

STADIUM (GRENADA) LIMITED case**.** Weeks J.A. (as she then was), stated at paragraph 78 of that judgment that:

> *The test in this jurisdiction for whether a stay of execution should be granted is* ***whether the appeal has good prospects of success*** *and additionally* ***whether there are any special circumstances*** *which would justify exceptionally the grant of the state… Whether the court should exercise its discretion to grant a stay of execution of the judgment pending the hearing of an appeal against that judgment depends upon all the circumstances of the case, but* ***the essential factor is the risk of injustice****.* (Emphasis mine.)

[13] **GOOD PROSPECTS OF SUCCESS**

In order to assess this, this court is required to examine the notice of appeal and the judgment being appealed against. The main points of discussion revolve around the general sentiment that the court did not observe the usual steps to be followed in granting interim injunctions. These are that the court had jurisdiction to grant interim relief and notwithstanding that whether the court examined the circumstances to determine whether there were serious issues to be tried. Further, the court had to engage in a balancing act to determine where the risk of injustice lied if an interim injunction was granted. The court therefore had to look to the evidence before it and show what it took into consideration in determining where the balance of justice lay.[4]

[14] I have examined the judgment and I have found that the court simply said that they examined the evidence without detailing or at best indicating the evidence that it considered to aid it in arriving at its conclusion. Notwithstanding that, even if that were done there were other requirements which needed to be considered before an interim injunction could have been granted.[5]

[15] At paragraph 33 of the judgment the court recognized that it has to ask itself the question "*whether the risk of injustice will the greater if the injunction is granted or if it is refused."* In order to answer that question, it would have been necessary to at least present the evidence of both parties.

---

[4] **NATIONAL COMMERCIAL BANK (JAMAICA) LIMITED v OLINT CORPORATION LIMITED [2009] UKPC para. 16**

[5] See **JETPAK SERVICES v BWIA INTERNATIONAL AIRWAYS (1998) 55 WIR 362, per de la Bastide CJ at p 370 Letter b -d**

However, in answering that question the court simply stated that, *"it is our view that there would be a greater injustice if the issues affecting the loss of employment of 5500 workers are not properly ventilated before the closure of the Company".*

[16] One of the other requirements that is necessary in this case is an examination of evidence speaking to the public interest. This fact was recognized by the court when it stated, "*Indeed the public interest is one of the considerations which we are mandated to take into account under section 10 of the act in determining any matter before us."* Further, the court added and concluded that *"…When we consider the balance of convenience, the justice of the case and the public interest it is our view that the injunction should be granted."* I put to Mr. Bullock whether he could have presented any argument against the position that apart from the court saying that it carried out the balancing act, that there was no evidence of same in the judgment. He admitted that he could not do that. He insisted that OWTU's right to engage in good faith negotiations will be obliterated and it will suffer if this court were to grant the stay as requested. He further submitted that the bargaining position of the OWTU will be undermined. Mr. Bullock addressed the public interest and the balance of convenience arguments presented by offering that the substantive hearing of the industrial relations offence would be done expeditiously. Like the Court, Mr. Bullock did not address the evidence of the other party or the Interested Party.

[17] There is no gainsaying that the Court gave a very lucid discourse on these issues. One has to ask the question though, where is the evidence which the court considered, other than the threatened loss of employment of 5500 workers? There is no explanation as to why the court did not take into account or even mention the evidence placed before it by PETROTRIN, whose evidence would have spoken to balance of convenience and that of the Attorney General, whose evidence will have spoken to the public interest. In other words, it is not apparent on the face of this judgment neither can we infer that the court engaged in the balancing act of the sort necessary to support its conclusions. All of the evidence or at least the key factors of the evidence presented to the court must be taken into around for it to arrive at a sustainable conclusion. That was not done. To my mind the ground of appeal on this basis will succeed.

[18] Counsel dealt with the particular grounds which form the basis of PETROTRIN's appeal to illustrate that he had good prospects of success on the specific bases. I shall deal with each of them. They are as follows:

(1) the court had no jurisdiction to grant an injunction in an application inviting the court to find that PETROTRIN was guilty of an industrial relations offence under section 40(1) of the Act.

The President of the Industrial Court in a ruling handed down in 2014 stated, "*The IRO (Industrial Relations Offence) does not in our respectful view qualify as a cause of action that can support an interim injunction."* It is not clear why the Court moved away from this clear and convincing stance. To my mind the analysis of the issue in this case was flawless. I re-commended it. I therefore think that an appeal on this basis of jurisdiction has a good prospect of success.

[19] I must note that at the hearing, Mr. Armour brought to my attention the fact that he had filed an amended notice of appeal which augmented ground 3. I indicated that I would not be taking the amendments into account since I thought that the changes should be the subject of an application before the full court of appeal.

[20] Another ground presented for consideration by this Court to determine whether there is a good prospect on appeal was,

(2) the failure of the court to consider the true legal effect of changed circumstances on the Memorandum of Agreement of 3 April 2018;

Mr. Armour submitted that had the court examined PETROTRIN's evidence in the form of the affidavit of Wilfred Espinet, there would have been facts laid out for their consideration speaking to the effect of the change in circumstances under which the Memorandum of Agreement had been signed.[6] Mr. Bullock stated that even if the judgment did not reflect any consideration of that, we must treat that as the court exercising its discretion to properly grant the injunction. He thought that paragraphs 11, 22, 23 and 31, showed that the court was alive to the change in circumstances.

[21] As I said above, this hearing cannot be regarded as a mini trial or even as an appeal against the grant of the injunctive relief. Having said that and having examined the paragraphs of the judgment

[6] See Memorandum of Agreement dated 3rd April, 2018 and Affidavit of Wilfred Espinet sworn on 9th October 2018 at para. 3 speaking to Exhibit W.E. 1 at paras. 12-17.

stated above and paragraph 25, I find that the Court was not bound to accept the evidence proffered by PETROTRIN and it and was at liberty to treat it as it thought fit. It is definitely arguable that the Court placed the wrong emphasis on the evidence and had it examined the evidence in light of change of circumstances causing the substratum of the Memorandum of Agreement to disappear it may have arrived at a different conclusion. I would therefore conclude that there is a prospect of success on this point.

[22] Mr. Armour set out what he regarded as the errors of law on the face of the judgment.

(3) the errors of law which occurred when the Industrial Court,

a) conflated the closure of an employer's business/operations with a restructuring thereby imposing on PETROTRIN a duty and responsibility which they did not have in these circumstances.

Mr. Bullock did not really address this issue. At paragraph 30 the court outlined the rule of the industrial Court and at paragraph 31 stated,

> … *But the Company has a duty and an obligation* ***to meet and consult*** *with the Union in good faith in accordance with good industrial relations principles and practice… That it is the law of the land as laid down by the Parliament of this Republic in the Industrial Relations Act and not the invention of individual members of this Court…".* (Emphasis mine).

And therein lies the rub. This is not a case of retrenchment, which in accordance with the Act that governs that regime[7], *employers may enter into consultation with the recognized majority Union with a view to exploring the possibility of averting, reducing or mitigating the effects of the proposed retrenchment*. It is implied that these meeting will be done in good faith. That is not the case here.

[23] To the extent that the Court has imposed the obligation on PETROTRIN to meet and consult in these circumstances, and has provided that as a basis for the grant of injunctive relief, there is a good prospect of success on appeal.

[24] The other two heads, that the Court,

[7] Section 5 of the **RETRENCHMENT AND SEVERENCE BENEFITS ACT Chap. 88:13**

b) failed to consider sufficiently or at all, relevant factors to determine where the risk of injustice lay; and

c) found that the balance of convenience, the justice of the case and the public interest favored the grant of the injunction grant of the injunction to protect sum of 5500 workers as compared to the 1.3 million population of Trinidad and Tobago;

have been discussed above and I do not propose to repeat my analysis and conclusion. Suffice it to say, that on these heads, there are good prospects of success on appeal.

[25] The other ground expressed below, that the Court

d) failed to consider sufficiently or at all the adequacy of damages and/or the lack of evidence from OWTU of its capability to provide an undertaking in damages

is evident from the judgment. There is no need to go further but to say that this ground has a good prospect of success.

[26] These aspects also formed part of PETROTRIN's application for the stay of injunctive relief. They are that the Court,

e) failed to pay sufficient regarded or any regard at all to the evidence including the uncontested evidence from PETROTRIN and the Attorney General which was before them;

f) arrived at a decision and/or order which no court acting judicially and properly instructed as to the relevant nor would or would have arrived at on the application before it.

To my mind, an examination of the judgment reveals this. When granting injunctions, the court must take into account all relevant information which is presented to it. Failure to do so may result in an injustice to the injuncted the party. Any appeal mounted on this basis will have a good prospect of success.

[27] **SPECIAL CIRCUMSTANCES**

This is a very live issue in this application. Both PETROTRIN and the Attorney General provided evidence which amount to special circumstances in this case for me to consider the granting of a stay. Mr Wilfred Espinet at paragraph 6 of his affidavit detailed his apprehension that the injunctive orders,

will have a significant and detrimental impact on the efforts of the company to address its financial situation". He detailed, *inter alia,* the fact that "*the company has outstanding short-term commitments to train the suppliers and bonds which fall due between today and 26 October 2018 totaling US$ 197.4 million and which cannot be financed. The Company is not generating cash flow that is capable of servicing the requirements of those short-term commitments and as a result has approached the government to provide a guarantee to its financiers. To date, the Government has not provided the requested guarantee.*

This is but one of the serious statements which illustrate the dire straits that PETROTRIN had advanced to the court. On the grant of an injunction as well as an application for a stay, parties are required to make full and frank disclosure. In the absence of evidence to the contrary I accept this and oral evidence contained in Mr. Esplanade's affidavit.

[28] As part of assessing whether there are special circumstances to grant a stay, I turned to the affidavit filed on the behalf of the Attorney General by the Permanent Secretary of the Ministry of Finance, Mr. Vishnu Dhanpaul. I will not set out the affidavit in full the trial the retentive to do that but suffice it to say that Mr. Dhanpaul stated that there have been several calls for government guarantees,

as a direct consequence of the international scrutiny of PETROTRIN's various creditors and bondholders, who are naturally becoming concerned as to the viability of extending credit for full during their investments… As a consequence of its well publicized financial difficulties. The risk of extending credit… is exponentially increased where there are legitimate concerns arising from its insolvency and any investment, if not independently guaranteed by the State, could become compromised in the winding up. This has only been exacerbated by the intercession of injunctive relief at the behest of the Union, as it merely highlights yet further instability in PETROTRIN's operations. The expectation is that because PETROTRIN is wholly old by the state the government will not allow PETROTRIN to flounder and will step in to provide guarantees. The unfortunate result of this is that as uncertainty increases, more and more creditors will require a guarantee going forward, with the result that the State will have to shoulder and even greater debts burden which it can ill afford to do.

[29] At paragraph 10, Mr. Dhanpaul continues, *"the danger of these increasing calls for guarantees is that it will adversely affect the national debt racial, which is already more than optimum".* The affidavit then advises of our eminent downgrading by international credit agencies. Paragraph 14 stated that a further downgrade by the International credit agencies is not only likely but is not consequently eminent with the injunction orders in place. He continues,

> *Against this background the Government would not be able to finance a deficit budget and it would become impossible to finance the social programs, drugs for hospitals, developmental works and a whole host of other setbacks in the provision of goods and services for the population, including paying public servants and other Government employees.*

Mr. Dhanpaul then continued in similar vein to outline the various financial and economic rules attendant on any delay in dealing effectively with PETROTRIN. He opined that,

> *The effect of any delay in the restructuring of the assets and debts of the appellant is likely to be occasioned by the grant of injunctive orders and this will only increase investor in uncertainty and anxiety. It is inevitable that they are going to be further because of the state for government guarantees in order for the Government and other State enterprises to access credit facilities generally…. In order circumstances, if the said injunctive orders of the Industrial Court were to remain in effect, the prejudice that would be suffered by the State and by extension the national community would outweigh any of their benefits.*

[30] Mr. Oswald Warrick filed an affidavit in this application on behalf of OWTU. It stated that approximately 521 workers collected letters of notice of termination. Mr. Warrick also stated at paragraph 9 that despite the injunction, *"the Union remains willing and committed to meeting with the company in good faith to discuss solutions to the company's financial difficulties".* He then exhibited a copy of a letter sent to PETROTRIN under the hand of OWTU President General. What is telling is that OWTU, while inviting fertile discussions on the issues at hand, these discussions are foreshadowed when the President General stated that, "*this will necessarily require PETROTRIN to rescind its decision to terminate PETROTRIN's entire work force with effect from November 30, 2018."*

[31] I do not think I need to say anything more than to say that when the evidence some of which is outlined above, is put in the mix, that there are indeed special circumstances, the impact on the national economy, the nation's international credit standing and the burden on tax payers, which must be considered and which fortify my decision to grant a stay of the injunctive relief granted by the Industrial Court.

[32] For the reasons outlined above I hereby grant the prayer contained in this Application.

IT IS NOW ORDERED

1. **That the orders of the Industrial Court dated 8 October 2018 in Application No. 7 of 2018 are hereby stayed until the determination of the appeal filed against the said orders.**
2. **That costs are reserved pending the hearing and determination of the appeal.**

I place on record my deepest appreciation for Counsel, Instructing Attorneys, my Judicial Research Assistant, my Team and Registry Staff for their diligence and assistance in this matter.

/s/ Charmaine Pemberton
Justice of Appeal