

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CIVIL APPEAL NO. P411 of 2018**

**CLAIM NO. 2018 - 01886**

**BETWEEN**

**STRATEGIC SERVICES AGENCY**

**APPELLANT/DEFENDANT**

**AND**

**FAZAL ABDUL GHANY**

**RESPONDENT/CLAIMANT**

**BEFORE:**

**The Honourable Madam Justice of Appeal C. Pemberton**

**IN CHAMBERS**

**APPEARANCES:**

**For the Appellant/Defendant: Mr R Hector and Ms C Nixon, and Ms T Vidale  
instructed by Mr R Grant**

**For the Respondent/Claimant: Mr J Singh, Mr D Rambally and Mr K Tiklalsingh  
instructed by Mr S Ramkissoon**

**DATE OF DECISION: August 14, 2019.**

## DECISION

### INTRODUCTION

[1] Mr Ghany was employed by Strategic Services Agency (SSA). He faced disciplinary proceedings that saw his removal from employment. He filed proceedings against the SSA seeking judicial review of its decision to remove him. He brought these proceedings under the **JUDICIAL REVIEW ACT<sup>1</sup>**. **Part 56 of the CIVIL PROCEEDINGS RULES (CPR)** mandates the procedure for seeking such relief.

### HISTORY

[2] On May 29, 2018, the trial judge granted to Mr Ghany leave to apply for judicial review, of the SSA's decision to remove him from his employment. On September 12, 2018, the SSA applied to the trial judge to set aside the grant of that leave. By order of the November 8, 2018 that application was dismissed. The SSA was therefore unsuccessful. On January 17, 2019 the SSA filed an appeal and also applied for an order staying the execution of the trial judge's order. On the first hearing of that application Narine JA, posed whether the appeal should be have been filed as a substantive instead of a procedural appeal. The parties put in written submissions. I now determine the applications. The two main questions therefore posed in this appeal are, the first as per Narine JA, was whether the appeal should have been filed as a procedural or substantive appeal. The second is, whether the SSA will be successful in its application for a stay of execution.

---

<sup>1</sup> CHAP. 7:08

## NATURE OF APPEAL

- [3] SSA argued that appeals from an order of a trial judge such as this were in the nature of substantive appeals. Mr. Ghany argued otherwise.
- [4] Both Counsel referred to **Part 64.1(2)(b)** of the **CPR** which provides that,  
*“procedural appeal” means an appeal from a decision of a ... judge ... but **excludes** an order granting any relief made at an application for Judicial Review (including an application for leave to make the application).*
- [5] Mr. Ghany used the approach adumbrated by Mendonça JA, in the **DICK**<sup>2</sup> matter to support his case that the appeal should be treated as a procedural appeal.
- [6] SSA through its Counsel Mr Grant wrote extensively on why this appeal should be treated as a substantive appeal. Counsel relied on Jones JA, in **DOC’S ENGINEERING WORKS CASE**<sup>3</sup> to support its position.
- [7] On the clear interpretation of the provisions of the CPR, I align myself with Jones JA, in the **DOC’S ENGINEERING WORKS CASE**<sup>4</sup>. The approach used by Mendonça JA to me is limited to those cases which are **not** expressly excluded from the ambit prescribed by the CPR. This is not the case here. An application for leave and the appeal against an order so granted must fall within the exception to which procedural appeals are permissible.
- [8] Therefore this appeal was correctly commenced as a substantive appeal.

---

<sup>2</sup> CIVIL APPEAL NO. 214 OF 2010 BETWEEN ALAN DICK AND CO. LTD V FIRST FREIGHT FORWARDERS LTD

<sup>3</sup> DOC’S ENGINEERING WORKS (1992) LTD ET AL V FIRST CARIBBEAN INTERNATIONAL BANK (TRINIDAD AND TOBAGO LTD) CA NO. 34 OF 2013

<sup>4</sup> See paragraph 24 *ibid.*

## **STAY OF EXECUTION**

- [9] The second question – whether a stay of execution of the trial judge’s order should be granted will now be examined.
- [10] The SSA filed two (2) affidavits in support of its application. The affidavits made mention of the usual grounds of the application for a stay of execution, which are: good prospects of success on appeal, that SSA will face significant injustice as if a stay is not granted success on appeal will be rendered nugatory and the unusual ground of minimizing costs and judicial time. The affidavits filed in support highlighted a number of grounds of appeal which largely centered around non-disclosure, the fact that the allegations against the Respondent can amount to charges and the effect of not complying with the pre action protocols.
- [11] I shall not rehearse Counsel’s arguments and beg forgiveness for not so doing.

## **PRE ACTION PROTOCOLS**

- [12] I read the trial judge’s reasons and say at the outset that I am in agreement with the analysis and conclusion with respect to compliance with pre action protocols. Any appeal against the decision that Mr Ghany’s failure to use the Pre action Protocol procedure would sound in an award of costs and would not affect his duty of disclosure, will not meet with success.

## **NON DISCLOSURE**

- [13] With respect to non-disclosure and the duty of candour, the trial judge applied the **BRINKS MAT CASE**<sup>5</sup> to the thorough analysis of the facts in this case. Paragraph 46 of the Reasons is instructive under this head.

---

<sup>5</sup> **BRINK’S MAT LTD V ELCOMBE**

*It is important to note that the letter to the Claimant dated 28 February 2018 he was informed “that the investigation has been completed and you were found guilty of committing the disciplinary offences with which you were charged.” Nowhere in the two statements which were signed by the Claimant after the two interviews respectively, the investigator informed the Claimant that he was charged with any disciplinary offence. In my opinion, if that information was contained in any of the two statements then it would have been material since the Claimant would have been notified that there were charges against him and not allegations of offences which were being investigated.*

[14] Unless therefore there is clear evidence that Mr. Ghany was informed of the charges, and given an opportunity to defend himself against them, as opposed to his giving a statement or statements in the course of investigating the allegations, then any appeal against the trial judge’s reasoning or decision will not meet with success. I have not seen from examining the following:-

- Letter of August 7, 2017  
*“it is alleged that you have committed the following acts. Therefore we reserve the right to change or add to these allegations as appropriate in light of our investigation”.*
- Letter of February 28, 2018  
*Reference is made to the notice of suspension pending disciplinary investigation dated 7 August 2017.*

*Kindly be advise that the investigation has been completed and you were found guilty of committing the disciplinary offences with which you were charged. ...*

*As a consequence of the investigation being concluded...*

that there is any evidence that Mr Ghany was notified of the charges that he was to answer and formed the basis for the termination of his employment.

[15] This leaves for consideration, where does the risk of prejudice lie, with the SSA or Mr Ghany? The affidavit in support of the application for the stay of execution has not articulated the “*greater risk of injustice*” faced by SSA, should the stay not be granted. It is not enough for the SSA or any applicant for a stay of execution to state, without more, the principles upon which a stay can be granted. The onus is on the applicant to lead evidence for the court’s consideration so as to enable the court to properly decide whether the requirements for the grant of a stay have been met.

[16] There are no special circumstances that exist which will lean the court in favour of a stay. Weekes JA, in the **NH CASE**<sup>6</sup> opined, “*A special circumstance must be something further than prospect of success, that goes to the justice of the situation such as to be a factor that the court must consider in its balancing exercise*”. A party’s concern for judicial time and costs will not qualify under this head.

[17] In the premises, SSA’s application for a stay of execution of the trial judge’s order is dismissed. I must say though that Mr Ghany’s life has been affected by this entire episode. I base this assertion purely on

---

<sup>6</sup> **NATIONAL STADIUM (GRENADA) LTD. V. N.H. INTERNATIONAL (CARIBBEAN) LTD. AND OTHERS** Civ. Appeal 48 of 2011

humanitarian grounds. This is a good case to order an early hearing of this appeal. The parties are urged to engage in conciliatory or mediation steps. I therefore order that this matter be placed on the Cause List Hearing for the month of November so as to place it in a position for early disposal.

**ORDER**

- 1. That the application for the stay of execution filed by SSA on September 12, 2018 be and is hereby dismissed.**
- 2. Costs of this application abide by the Appeal.**

/s/CHARMAINE PEMBERTON  
JUSTICE OF APPEAL

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CIVIL APPEAL NO. P411 of 2018\_ERR1**

**CLAIM NO. 2018 - 01886**

**BETWEEN**

**STRATEGIC SERVICES AGENCY**

**APPELLANT/DEFENDANT**

**AND**

**FAZAL ABDUL GHANY**

**RESPONDENT/CLAIMANT**

**BEFORE:**

**The Honourable Madam Justice of Appeal C. Pemberton**

**IN CHAMBERS**

**APPEARANCES:**

**For the Appellant/Defendant: Mr R Hector and Ms C Nixon, and Ms T Vidale  
instructed by Mr R Grant**

**For the Respondent/Claimant: Mr J Singh, Mr D Rambally and Mr K Tiklalsingh  
instructed by Mr S Ramkissoon**

**DATE OF DECISION: August 14, 2019.**



**ORDER**

~~3. That the application for the stay of execution filed by SSA on September 12, 2018 be and is hereby dismissed.~~

1. That the application for the stay of execution filed by SSA on January 17, 2019 be and is hereby dismissed.

/s/CHARMAINE PEMBERTON  
JUSTICE OF APPEAL