

**IN THE CARIBBEAN COURT OF JUSTICE  
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE  
REPUBLIC OF GUYANA**

**CCJ Application No AL 7 of 2006  
GY Civil Appeal No 49 of 2003**

**In the matter of an Application by DWARKA NAUTH for  
Special Leave to Appeal in terms of Articles 142 and 144 of the  
Constitution of Guyana**

**BETWEEN                      DWARKA NAUTH                                      APPLICANT**

**AND**

**THE ATTORNEY GENERAL OF GUYANA  
THE PUBLIC SERVICE COMMISSION  
THE REGIONAL EXECUTIVE OFFICER  
THE MINISTER OF FINANCE                      RESPONDENTS**

**Before The Rt Honourable  
And the Honourables**

**Mr Justice de la Bastide, President  
Mr Justice Nelson  
Madame Justice Bernard**

**Appearances**

**Mr Benjamin E Gibson, Ms Mandisa A Breedy and Mr Rudyard W Ceres for the  
Applicant**

**Mr Vashist Maharaj and Ms Damone Younge for the Respondents**

**27th June 2007**

**JUDGMENT  
of  
The Hon. Mme Justice Bernard**

## **JUDGMENT**

- [1] On 7<sup>th</sup> May, 2007 after hearing arguments we refused an application by Dwarka Nauth for special leave to appeal against a decision of the Court of Appeal of Guyana. We promised to give the reasons for our refusal, and we now do so.

### **History of the litigation**

- [2] On 25<sup>th</sup> November, 1992 the applicant was appointed by the Regional Executive Officer of Region 2, as a temporary Social Security Officer. This is not a position in the permanent pensionable establishment of the Public Service, and does not fall under the control of the Public Service Commission.
- [3] On 6<sup>th</sup> July, 1995 by Government Order No. 52/9/73 the applicant was appointed by the Public Service Commission to act as Assistant Hospital Administrator at the Suddie Hospital. This was a position in the permanent pensionable establishment of the Public Service. The acting appointment was terminated with effect from 1<sup>st</sup> January, 1996 due to the applicant's interdiction from duty by his employer in his substantive post. He thereafter ceased to be under the control of the Public Service Commission.
- [4] By letter dated 31<sup>st</sup> August, 2000 the applicant's services with the Regional Administration were terminated with effect from 1<sup>st</sup> September, 2000 as his position had been abolished. As a result of this he appealed to the Public Service Appellate Tribunal (hereinafter referred to as "the Tribunal") which is a statutory body established to hear appeals against decisions of the Public Service Commission. The Tribunal after a hearing concluded on 21<sup>st</sup> March, 2003 that the applicant had been wrongfully removed from office, and recommended that he be compensated.
- [5] Consequent upon this decision the applicant filed proceedings in the High Court claiming the sum of \$5,096,353.00 being salary from 1<sup>st</sup> January, 1996. After

hearing evidence the action was dismissed by Jainarayan Singh, J., and an appeal was filed to the Court of Appeal which was also dismissed on 13<sup>th</sup> July, 2005. On 25<sup>th</sup> August 2006 an application for leave to appeal to this Court was made to the Court of Appeal which refused such leave on 22<sup>nd</sup> November, 2006. On 7<sup>th</sup> December, 2006 the present application for special leave to appeal out of time was filed in this Court as well as an application for leave to appeal as a poor person.

### **Reasons for applications**

- [6] The applicant asked that his failure to apply for special leave to appeal within the prescribed time be excused on the ground that on 13<sup>th</sup> July, 2005 when the decision of the Court of Appeal was given, it was not known in Guyana that the Caribbean Court of Justice was fully operational and ready to accept appeals from the Guyana Court of Appeal. As a result he had written the Court of Appeal requesting that it reconsider its decision in exercise of residual powers granted to it by virtue of Article 123 of the Constitution and Section 3 of the Court of Appeal Act, Cap. 3:01. No reply was received to the first letter dated 22<sup>nd</sup> August, 2005, nor to a second letter dated 24<sup>th</sup> October, 2005 written to the Hon. Chancellor (ag.). The applicant alleged that the Court of Appeal was never reconvened to address the issues raised in his letters, and that he was advised that while the issue of jurisdiction was pending before the Court of Appeal he should not move to the Caribbean Court of Justice as it might prejudice the adjudication by the Court of Appeal.
- [7] The reasons advanced in support of his application for leave to appeal as a poor person were that he possessed no more than G\$375,000.00 worth of property, and after having been unemployed for a considerable period of time, he was now employed as a school teacher earning G\$48,000.00 per month, with a wife and four minor children to maintain.

[8] At the hearing of the applications Counsel for the applicant informed the Court that a written judgment was not available from the Court of Appeal at the time when it gave its decision on 13<sup>th</sup> July, 2005, and only became available later. He conceded that he was aware that under Rule 10.3(1) of the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2005 (hereinafter referred to as “the CCJ Rules”) the time for seeking leave to appeal to this Court from the court below was thirty (30) days from the date of judgment and so the time for applying expired on 12<sup>th</sup> August, 2005. However, because of the unavailability of the written judgment there was delay in applying.

**Submissions in support of application for special leave**

[9] The applicant’s reliance on Section 3 of the Court of Appeal Act, Cap. 3:01 was based on the fact that the Court of Appeal in the exercise of its jurisdiction has all the powers and authorities vested in or exercised by the Supreme Court of Judicature in England on 1<sup>st</sup> January, 1958, and the Court of Appeal of England and Wales possessed a residual jurisdiction to reopen an appeal which had already been determined. He further submitted that in the instant case the applicant who was a member of the Public Service was deprived of his office without compensation by a procedure which was clearly unconstitutional, and there was no other convenient remedy; had the Court of Appeal addressed his application to exercise its residual jurisdiction the time for appealing to this Court would only have begun to run from the date when the matter was determined.

[10] The applicant’s application was opposed by the respondents who relied on this Court’s judgment in *Brent Griffith v Guyana Revenue Authority*<sup>1</sup> and submitted that the special leave application was in fact an application for an extension of time in relation to which the Court ought to take into account the length of the delay, the reasons for the delay, and the strength of the applicant’s case; further the applicant had failed to establish any grounds upon which this Court ought to exercise its discretion in granting special leave.

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<sup>1</sup> [2006] CCJ 2 (AJ)

[11] **Issues for determination**

The issues to be determined by this Court are:

- (1) has the applicant advanced satisfactory reasons for the delay in applying for special leave to appeal, and
- (2) does the intended appeal have sufficient merit to warrant an exercise of the Court's discretion in favour of granting special leave?

[12] With regard to the first issue, the applicant claimed that a written copy of the Court of Appeal's decision was not available when it was given orally on 13<sup>th</sup> July, 2005. This Court held in *Brent Griffith (supra)* that it is trite law that a judgment takes effect from the date upon which it is pronounced. Hence 13<sup>th</sup> July, 2005 is therefore held to be the date when the judgment in the instant case was delivered.

[13] The application for leave to appeal to this Court was made to the Court of Appeal on 25<sup>th</sup> August, 2006, thirteen (13) months and twelve (12) days after the date of the judgment on 13<sup>th</sup> July, 2005, well outside the stipulated time of thirty (30) days from the date of judgment provided for in Rule 10.3(1) of the CCJ Rules. Counsel's contention that on the date of judgment the procedures for appealing to this Court were not generally known among the legal fraternity in Guyana, strains one's credulity in light of his admission that he knew of the enactment by Guyana of the Caribbean Court of Justice Act in 2004, and also by July 2005 of the issue of the CCJ Rules. It follows therefore that on the date of the judgment (13<sup>th</sup> July, 2005), he knew that this Court was the final court of appeal for Guyana, and how to go about launching an appeal to this Court. The CCJ Rules were made and issued by the President of the Court on 17<sup>th</sup> June, 2005, and were available for perusal shortly after this date.

- [14] Even if we accept that in August 2005 the applicant was uncertain about the procedure to gain access to this Court, certainly by January 2006 Counsel was familiar with the CCJ Rules when as Counsel for the applicant in *Brent Griffith (supra)* he filed in this Court a similar application for special leave to appeal. No application for leave to appeal was made to the Court of Appeal in the instant matter until 25<sup>th</sup> August, 2006, and none to this Court until 7<sup>th</sup> December, 2006.
- [15] The applicant sought to explain the delay by stating that he was awaiting a reply from the Court of Appeal to his request to reopen arguments on the issue of the Court's jurisdiction to hear the appeal, and to have the decision reviewed. Counsel conceded that he knew of no appeal where such a request was ever granted by the Court of Appeal, and also admitted that the Court of Appeal was being asked to change its mind about an issue on which it had already ruled.
- [16] Further evidence that Counsel knew of the existence of this Court can be found in the letter dated 24<sup>th</sup> October, 2005 addressed to the Hon. Chancellor (ag.) seeking his assistance in having the Court of Appeal revisit the matter; in it he stated that "this decision has very serious consequences in Public Law Litigation and may have to be ventilated in the Caribbean Court of Justice".
- [17] In spite of the fact that no action was taken in response to his two letters of 22<sup>nd</sup> August, 2005 and 24<sup>th</sup> October, 2005 the applicant still cherished the hope that the Court of Appeal would heed his request despite the absence of new arguments or new facts. He continued to cherish that hope one year from the first letter and ten months after the second, not to mention over thirteen (13) months after the date of the decision.
- [18] This Court in *Brent Griffith (supra)* laid down the parameters within which it will exercise its discretion to grant special leave to appeal, and emphasised that the grant of special leave is purely an act of grace or discretion, and never a matter of

right. The applicant's claim falters on the ground that the delay was inordinately long and the excuse for it was not acceptable. In the result we are not persuaded that there are sufficient and adequate grounds for the exercise of the Court's discretion.

**Prospect of success of intended appeal**

- [19] It is expected that an application for special leave will be supported by reasonable and not frivolous grounds of appeal. As appears from *Brent Griffith (supra)* if the intended appeal has no real prospect of success, special leave will not be granted.
- [20] No proposed grounds of appeal were filed by the applicant, but one can safely assume that they would have been the same as those advanced as grounds for the application for special leave.
- [21] In substance these grounds seem to be based on the finality and superiority of the Tribunal's decisions over those of the courts. However the central question is whether the Tribunal had jurisdiction to entertain an appeal from the applicant. Article 215A of the Constitution provides for the establishment of the Tribunal for the hearing of appeals in respect of a matter in which the Public Service Commission is empowered to make a decision.
- [22] The applicant was appointed a temporary social security officer by the Regional Executive Officer in 1992 which by its definition was not a position of permanence, and certainly not one of continuity as evidenced by the fact that the position was abolished by the Regional Administration in 2000. One can conclude from all this that the applicant was not a public officer and did not hold a public office. However, on 1<sup>st</sup> March 1994 he was appointed by the Public Service Commission to act as Assistant Hospital Administrator in the same Region thereby temporarily holding a public office, but that acting appointment was terminated by the Commission with effect from 1<sup>st</sup> January, 1996 when he was interdicted from duty having been charged with an offence not related to his

appointment. The acting appointment having been terminated the applicant reverted to his former substantive temporary position, and ceased to fall under the jurisdiction of the Public Service Commission. He thereafter ceased to hold a public office. It follows that there was no decision of the Public Service Commission which the Tribunal had jurisdiction to hear and determine.

- [23] According to the judgment at first instance the applicant admitted while testifying that his appointment had nothing to do with the Public Service Commission, and the action he brought had nothing to do with his acting appointment, but only with emoluments which he felt were due to him upon abolition of his position of temporary social security officer. In fact his claim was for a specific sum being salary and increases payable in respect of his post of social security officer (said to have been renamed “social worker”) from 1<sup>st</sup> January, 1996, the date of his interdiction. The basis of his claim was in effect the failure to reinstate him in his substantive post following his acquittal of the charges laid against him. That failure could not be laid at the door of the Public Service Commission.
- [24] The inevitable conclusion to be drawn from the foregoing analysis of the applicant’s claim and status is that the Tribunal had no jurisdiction to make a finding that the applicant was wrongfully removed from his position or to recommend that he be compensated since this was based on the erroneous assumption that he continued to be a public officer falling under the control of the Public Service Commission even after his acting appointment as Assistant Hospital Administrator had been terminated.
- [25] For all of the aforementioned reasons we find that the applicant has failed to demonstrate that the intended appeal has any real prospect of success so as to warrant an exercise of this Court’s discretion to grant special leave to appeal.

[26] As a consequence the application for special leave to appeal is refused as well as the application for special leave to appeal as a poor person. We made no order as to costs.

\_\_\_\_\_/s/\_\_\_\_\_  
Mr. Justice Michael A. de la Bastide (President)

\_\_\_\_\_/s/\_\_\_\_\_  
Justice Rolston Nelson

\_\_\_\_\_/s/\_\_\_\_\_  
Justice Désirée Bernard