

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. S-430 OF 2003

BETWEEN

SEEBALACK SINGH

Applicant

AND

THE AGRICULTURAL DEVELOPMENT BANK

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE A. TIWARY-REDDY

Appearances:

A. Ramlogan led by Dr. F. Ramsahoye S.C. for the Applicant

E. Prescott and P. Lamont for the Respondent

K. Ramkissoon led by Dr. Denbow S.C. (Absent) for the Proposed Interveners

REASONS FOR DECISION

By Notice filed on 14.4.03 Messrs Hubert Alleyne, Keith Paul, Jacqueline Rawlins and Sati Jagmohan (the said persons) gave notice of their intention to seek an order pursuant to Order 53 Rule 9(1) of the Rules of the Supreme Court as amended by Legal Notice No. 27 of 1983 and/or under the inherent jurisdiction of the Court that:

- (i) the said persons be permitted to be heard in opposition to the applicant's Notice filed herein on 24.3.203;

- (ii) the said persons be served with the notice of motion filed herein, pursuant to Order 53 Rule 5(7) of the Rules of the Supreme Court (as amended);
- (iii) the costs of this application be provided for

In his said Motion the Applicant had filed for Judicial Review and had sought inter alia, a declaration that the termination by the Respondent of the Applicant's employment contract by letter dated 23.1.03 for alleged misconduct on the grounds set out therein was illegal and ultra vires the powers of the Respondent established by Parliament pursuant to the Agricultural Development Bank Act (ADB Act).

The said persons were the Chairman of the Board of the Respondent, a member of the said Board, the Acting Chief Executive Officer and the Corporate Secretary of the Respondent. One affidavit sworn by Sati Jagmohan the Corporate Secretary of the Respondent was filed on 26.6.03 in support of the said Notice.

Having reviewed the evidence and the authorities and having considered the submissions of the Applicant and of the said persons this Court held that the said persons were not directly affected by a decision in favour of the Applicant and that they could be heard through the Respondent. Accordingly this Court dismissed the said Notice filed on 14.4.03 and ordered the said persons to pay the Applicant's costs. Hereunder are the reasons for the decision.

The decision which the Applicant is seeking to review is the Respondent's decision to terminate the Applicant's employment contract for alleged mis-conduct. The Applicant maintained that the mis-conduct alleged against him was his failure or refusal to implement the Board's instruction to invest \$4.5 million in CLICO. For his part the Applicant contended that the Board's said instruction was ultra vires the Board's powers under the ADB Act as amended.

In her affidavit Ms. Jagmohan deposed that her duties as Corporate Secretary included providing administrative and secretarial support to the Board and that she had access to all the Respondent's books, records and documents including minutes of the meetings of

the Board and of the several committees established by the Board. Further, the Respondent was served with these proceedings which she had read.

Counsel for the said persons, Mr. Ramkissoon submitted that 22 of 43 paragraphs of the Applicant's affidavit dealt with allegations of misconduct or impropriety of the said persons and in which their bona fides and the lawfulness of their conduct were questioned. In these circumstances at the hearing of the substantive motion the court would be required to make findings about the propriety of their conduct. Since their characters were individually and collectively being impugned the said persons needed to be represented separately and apart from the corporate umbrella of the Respondent. Therefore the said persons required leave to be heard in opposition. Further the justice of the case demanded that the said persons be granted leave to intervene if only to protect their good names.

Two of the said persons, Messrs Alleyne and Paul were directors of the Respondent at the date of the decision under challenge. This Court took judicial notice of the fact that Alleyne, who was then the Chairman of the Respondent's Board, has since resigned. Ms. Jacqueline Rawlins, the Respondent's Acting CEO is an ex officio director of the Respondent's Board. As acting CEO Ms. Rawlins was charged with the day to day administration and control of the Respondent's business.

Counsel for the Applicant, Mr. Ramlogan submitted that the Applicant did not wish to shut out the said persons who could be heard through the Respondent and that there was no need for the said persons to be joined as parties. Further the Applicant was seeking no relief against the said persons who stood to suffer no pecuniary loss. Thus the Court should be careful not to set a dangerous precedent by opening the flood gates. As a matter of public policy re the administration of justice, there will be no end to litigation of interveners are allowed "willy nilly".

Mr. Ramlogan submitted further that the status of three of the said persons had not changed vis a vis the Respondent. There was no evidence from any of the said persons including Alleyne, that any of them would be precluded from responding to the Applicant's allegations via the Respondent. Neither was there any intimation that their

positions were at variance with that of the Respondent. To date there had been no affidavit filed by the Respondent and consequently, no suggestion that the said persons acted other than as directors/officer of the Respondent.

Section 14(1) of the Judicial Review Act 2000 provides that any person who has an interest in a decision which is the subject of an application for judicial review may make application to be made a party to the proceedings. And section 14(2) provides that the Court may grant or refuse the application or may:

“(c) refuse the application but allow the person to make written or oral submissions at the hearing.”

It is to be noted that Order 53 of the Rules of the Supreme Court 1975 was revoked and replaced by the Supreme Court (Amendment) (No. 3) Rules 1982 (the 1983 Order 53) contained in Legal Notice 27 of 1983 and which came into force on 17.1.83. Further the 1983 Order 53 was itself revoked and replaced by the Supreme Court of Judicature (Judicial Review) (Amendment) Rules 2002 and contained in Legal Notice 184 of 2003 which took effect on 16.9.03.

Thus when the Notice herein was filed the 1983 Order 53 was in effect. Order 53 Rule 9(1) of the 1983 Order 53 is now Order 53 Rule 7(1) of the latest Order 53. And Order 53 Rule 5(7) of the 1983 Order 53 is now Order 53 Rule 4(6).

ORDER 53

Rule 4(2) **The Notice of motion or summons shall be served on all persons directly affected and where it relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons shall also be served on the clerk or other appropriate officer of the court and, where any objection to the conduct of the judge or**

other person presiding over such court is to be made, on the judge or other person.

Rule 4(6) **If on the hearing of the motion or summons the Court is of the opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served the Court may adjourn the hearing on such terms, if any, as it may direct in order that the notice or summons may be served on that person.**

Rule 7(1) **On the hearing of any motion or summons under rule 4, any person who desires to be heard in opposition to the motion or summons and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion or the summons.**

Order 53 Rule 4(2) provides that in an application for judicial review the notice of motion or summons shall be served on all persons directly affected. And Order 53 Rule 7(1) provides that on the hearing of any motion or summons under rule 4, any person who desires to be heard in opposition to the motion or summons and appears to the court to be a proper person to be heard, shall be heard notwithstanding that he has not been served with the notice of motion or the summons.

Thus it seems that there are two categories of persons who may be heard in judicial review proceedings i.e. persons who are directly affected and persons who desire to be heard in opposition to the motion or summons. However throughout his submissions Mr. Ramkisson referred to no such distinction and concentrated on seeking to have the said persons intervene as parties. And Mr. Ramlogan responded accordingly.

Mr. Ramkisson submitted that the test to be applied was that set by the House of Lords in R v Rent Officer Service ex parte Muldoon and Kelly 1996 1 WLR 1103 at 110E in which the Applicants sought judicial review of the refusal/failure of the Rent Officer Service and the local authority to determine their claims to housing benefit. The

Secretary of State for Housing, who was responsible for reimbursing up to 95% of the benefit paid by a local authority applied to be joined as a party on the ground that he was a person “directly affected” by a decision made in favour of the applicants. The Secretary’s application was dismissed at first instance and the decision upheld by the Court of Appeal and the House of Lords.

The House of Lords held that while the Secretary would be affected by the decision, he would be only indirectly affected, by reason of his collateral obligation to pay subsidy to the local authority. Per Lord Keith of Kinkel at 500 d:

“That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency.”

In the said speech of Lord Keith reference was also made to Re Salmon – Priest v Uppleby 1889 42 Ch D 35 in which the Defendant had brought in third parties alleging that the third parties had agreed to indemnify him. The Plaintiff was unsuccessful against the Defendant at first instance and appealed. The Defendant objected that the Plaintiff had not served the notice of appeal on the third parties. Rule 2 of the then Order 58 provided that notice of appeal was to be served on all parties “directly affected”. The Court of Appeal over-ruled the Defendant’s objection and held that the third parties are only indirectly affected by the appeal by reason of the Defendant’s rights against them.

Mr. Ramkissoon also referred briefly to two local cases in which leave was granted to a third party to intervene i.e. HCA 12254 of 2000 – the application of Harricrete where Trinidad Cement Limited (TCL) was granted leave to intervene and Air Caribbean v Air Transport Licensing Authority (no reference provided) in which BWIA was granted leave to intervene. Mr. Ramlogan pointed out that in both those cases the interveners stood to lose money.

In R v Legal Aid Board Ex parte Megarry 1994 COD 468 the applicants obtained leave to apply for judicial review of the Legal Aid Board’s decision to refuse them legal aid to pursue actions for personal injuries against various tobacco companies. The applicants had given notice of the proceedings to the tobacco companies but had not served them

with the notice of motion and supporting documents. The tobacco companies sought an order directing the applicants to serve them on the ground that they were persons “directly affected” under RSC Order 53 Rule 5(3). Turner J. refused the tobacco companies’ applications and directed that respectful attention should be paid to the interpretation of “directly affected” in RE Salmon (Supra). Further there were many eventualities before the tobacco companies might become affected by the applications for judicial review.

Since the decision was given herein the Court’s attention has been drawn to the recent decision of Pemberton J. (unreported) in HCA No. S-109 of 2005 Chandresh Sharma (Sharma) v The Director of Public Prosecutions (DPP) in which Dr. Keith Rowley (Dr. Rowley) sought to intervene in an application by Sharma seeking judicial review of the DPP’s decision not to prosecute Dr. Rowley for his alleged assault of Sharma in the Parliament’s tea room. The learned judge reviewed the authorities and held that while Dr. Rowley would be affected by the decision of the DPP he was not directly affected. Further the learned judge declined to permit Dr. Rowley to make submissions at the hearing.

In the course of her judgment that court referred to B v Lord Savile of Newdigate 1999 EWJ No. 312 C/0/0358/99 in which the words “directly affected” fell to be construed and referred to paragraphs 17 and 18 of the said judgment (erroneously stated to be paragraphs 21 and 22).

“17 **The importance of the question whether they are directly affected within rule 5(3) is that it may affect whether they have any appeal rights against any decision that is ultimately made. If they are merely proper persons to be heard within rule 9, then they do not have such rights. If they are directly affected, then they may.**

18 **That they are affected by the decision in the sense that it is a decision in which they have an interest and which may have some effect upon the manner in which their case is presented**

and their representatives are able to probe and to test the evidence ... is undoubtedly true. They therefore can be regarded as persons affected, but are they directly affected? The word 'directly' must be given its proper weight. The House of Lords in R v Rent Officer Service and another, ex parte Muldoon [1996] 1 WLR 1103 had to consider the meaning of Order 53, rule 5(3). A narrow construction was placed on it ... Lord Keith, .. said:

That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency ...”

Having considered the two last mentioned judgments this Court is fortified in its decision that the said persons are not directly affected. Further, since Mr. Ramkissoon did not specifically ask that the said persons be permitted to make written or oral submissions at the hearing, the Court did not consider this question.

Dated this 14th day of November, 2005.

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Amrika Tiwary-Reddy
Judge