2009 NO. 582/W DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

CONSTITUTIONAL JURISDICTION

In the matter of the Constitution of the Republic of Guyana, Chapter 1:01.

-and-

In the matter of Articles 8,144 and 153 of the Constitution.

-and

In the Matter of an Application by Clico Life and General Insurance Co. (S.A.) Limited for redress under Article 153 of the Constitution for Contravention of its rights and fundamental rights as guaranteed under Article 144 of the Constitution.

BETWEEN:

CLICO LIFE AND GENERAL INSURANCE CO. (S.A.) LIMITED.

Plaintiff

-and-

1. THE ATTORNEY GENERAL

2. MARIA VAN BEEK, The Judicial Manager of Clico Life and General Insurance Company (South America) Limited, a Company incorporated under the Companies Act 1991 as amended.

3. THE BANK OF GUYANA.

Defendants

Mr. Ashton Chase S.C. for the first named Applicant/Defendant

Mr. Roysdale Forde for the Plaintiff/Respondent

DECISION:

On the 17th day of December, 2009, the Plaintiff, Clico Life and General Insurance Co. (S.A.) Limited, filed a writ of Summons

No. 582-W of 2009 claiming constitutional redress for alleged contravention of its fundamental rights guaranteed by Article 144 (8) of the Constitution of Guyana.

Prior to this action the Commissioner of Insurance had applied to the Court for leave to present a petition under section 67 of the Insurance Act, 1998 and said leave was granted by the Honorable Chief Justice, Mr. Ian Chang. Thereafter Petition No. 191-P of 2009 was filed by the Commissioner of Insurance for the winding up of the plaintiff company or alternatively for an order that the company be placed under judicial management. The Honorable Chief Justice, Mr. Ian Chang ordered that the plaintiff company be placed under judicial management until the court otherwise orders, and that the Commissioner of Insurance be appointed judicial manager of the company.

The application for leave to present the petition was made ex-parte and the hearing of the petition was done without notice to the plaintiff company. There were several interlocutory applications engaging the attention of the Court and various orders were made on those applications culminating with an order made on the 22nd day of December 2009 by the Honorable Justice Franklin Holder staying the proceedings in Petition No. 191-P of 2009 until the hearing and determination or this action. On the 20th May 2010, the number one defendant, the Attorney General of Guyana, filed a Summons in Chambers seeking to have the writ struck out on the basis "that the above Constitutional action No. 582 –W of 2009 be

struck out and dismissed on the ground that the facts alleged in the statement of claim filed therein disclose no breach or threatened breach of any constitutional right under articles 138-151 of the Constitution of the Co-operative Republic of Guyana and therefore cannot attract any redress or relief under Article 153 of the Constitution and is therefore totally misconceived and without merit."

In their Indorsement of Claim, the Plaintiff claimed the following remedies:

(a) A declaration that Section 67 of the Insurance Act is unconstitutional and is in contravention of Article 144 (8) of the Constitution of Guyana in that the said Section 67 does not provide for a hearing as guaranteed by Article 144 (8) of the Constitution before the Commissioner is satisfied that there are grounds for the winding-up of the Plaintiff.

(b) A declaration that the Plaintiff is entitled to be heard under Section 67 by the Commissioner of Insurance before the Commissioner of Insurance applies under Section 67of the Insurance Act for an order to institute winding up proceedings as the Plaintiff is entitled to a fair hearing as guaranteed under Article 144 (8) of the Constitution of Guyana.

(c) A declaration that the Plaintiff has been deprived of a fair hearing as guaranteed by Article 144 (8) of the Constitution of Guyana when the Commissioner of Insurance applied for leave to institute winding up proceedings without the Court and/or the Commissioner of insurance affording the Plaintiff a hearing.

(d) A declaration that the Plaintiff has been deprived of a fair hearing as guaranteed by Article 144 (8) of the Constitution when the Court by order dated the 25th day of February 2009, appointed the Commissioner as Judicial Manager of the Plaintiff without affording the plaintiff an opportunity to be heard.

(e) A declaration that the order dated 25th day of February 2009, is unconstitutional and void as being in breach of Article 144 (8) of the Constitution as it was made without affording the plaintiff an opportunity to be heard before depriving the said plaintiff of its property.

(f) A declaration that the Commissioner of Insurance is neither independent and or impartial within the meaning of Article 144 (8) of the Constitution of Guyana as the said Commissioner of Insurance is appointed by and the terms of service are

determined by the executive and has no tenure of service.

(g) A declaration that the second named Respondent's failure to file an Originating Motion for leave to present Petition No.191 of 2009 to the High Court to which the plaintiff was entitled to be heard amounts to an improper commencement and constitution of the said Petition No. 191 of 2009 and a contravention of the plaintiff's constitutional rights to Natural Justice as guaranteed by Article 144 (8) of the Constitution of Guyana.

(h) A declaration that the Appellant's right to Natural Justice as known at Common law and as guaranteed by the Constitution of Guyana were contravened by the ex-parte grant of leave to file a petition under section 67 of the Insurance Act.

(i) An order staying the proceedings, Petition No. 191 of 2009 until the hearing and determination of the Action filed by the Plaintiff.

(j) Such further or other relief as may be just.

(k) Costs.

On the 8th July 2010 the Plaintiff/Respondent was given an opportunity to file an Affidavit in Answer but did not do so. Arguments were heard on the Summons dated 20th May 2010 on the 16th June 2010 and were followed up by written submissions by both parties.

Counsel for the Respondent/Plaintiff, /Clico Life and General Insurance Co. (S.A.) Limited, argued that the Summons could not be properly brought to strike out the Writ and that evidence had to be taken before a Writ can be struck out. For obvious reasons this submission is without merit, since the Rules of the High Court, Cap. 3:02 provide under Order 43 (Chamber Applications) that the Court has the power to entertain any application dealing with the cause or matter and this would include an application to strike out an action which has no merit, on the ground that it does not disclose a cause of action, or in this case on the ground that there is no legal basis for the declarations claimed since the statement of claim does not disclose a breach of any fundamental right of the company as set out in the Constitution of Guyana. It is a matter of law which can be determined on a chamber application and does not require evidence. See also Order 23 of the Rules of the High Court, Cap. 3:02, where the Court or Judge may decide any point of law which substantially disposes of the whole cause or action, and may thereupon dismiss the action.

Another objection raised by Counsel for the Respondent is that this Court cannot undo the ruling of the Honorable Justice Holder, as they are Judges of equal standing. The first observation is that this Court is only bound by Courts or Judges of superior jurisdiction. In any event this Court is not dealing with Justice Holder's ruling which dealt only with the stay of the proceedings in Petition No 191 of 2009 which order was granted by Justice Holder, on an inter- partes Summons for a Stay of those proceedings and which was requested by Summons to be discharged before the said Judge, and which Summons was dismissed. Justice Holder's ruling is not a ruling on the substantive writ, but only gives his reasons for granting the stay and for dismissing the summons to discharge the order he had made. This Court is not bound by those reasons. The order granted by Justice Holder stays the proceedings under petition N0. 191 of 2009 until the hearing and determination of the Writ and is not a hearing of the writ. Furthermore this Court is not bound by any decision given by a judge of concurrent jurisdiction.

As regards the plaintiff's claim, that the applicant's failure to file an originating motion for leave to present Petition No. 191 of 2009 amounts to an improper commencement of the said petition and is a contravention of the plaintiff's constitutional rights to natural justice as guaranteed by Article 144 (8) of the Constitution, it is to be noted that the High Court Rules do not provide for an application for leave to institute proceedings to be brought by originating motion.

Having said that, it is well known that failure to commence a proceeding by the proper method or application is a procedural error which cannot render the proceedings null and void, but at most amounts to a procedural irregularity that does not render the proceedings a nullity.

Procedural matters are dealt with under the High Court Rules and Order 54 Rule 1 states as follows:-

"non – compliance with any of these rules or any rule of practice for the time being in force shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

The learned Chief Justice in his decision of the 19th November 2009 referring to the submission made by Counsel for the Plaintiff/Respondent that the application made for leave to present the petition for winding up was irregular quoted the said Rules of the High Court, and I agree and endorse the reasoning given by the Chief Justice.

The Chief Justice stated that he was given a pre-prepared petition by Counsel for the petitioner, who requested him to grant leave to the Commissioner of Insurance to present the said petition and that such leave was given on grounds of urgency and on the undertaking by Counsel that the Petition with supporting affidavit

would be filed the following morning since the petition itself sought leave for its presentment. The undertaking was fulfilled and the petition was presented for hearing. Section 67 (1) (a) of the Insurance Act does not specify what form or method such leave should take. In that instance Counsel for the Insurer argued that Order 41 Rule 1 of the High Court Rules mandated the Commissioner to approach the Court for leave to present the winding up petition by way of an ex parte application by way of affidavit. In this Summons Counsel for the Insurer is asking this court to find that the applicant should have filed an originating motion for leave to present the petition. Counsel seems to be inconsistent in deciding which form of procedure he is asking the court to find is the proper procedure the applicant should have followed.

However, without deciding which procedure should have been followed, I would concur with the Chief Justice's ruling at page 8 where he stated:

"But whether or not the application made on the 24th February 2009 was made by way of an oral application or by way of an ex parte application by way of affidavit, Order 54 Rule 1 of the High Court Rules applies", and he further went on to say at page 9 "For the Court to now hold that non compliance of the Commissioner necessarily meant that her application was a nullity for non compliance with Order 41 Rule 1 or any other rule would

in effect be to judicially nullify the application on the ground of such non compliance in brazen disregard of Order 54 Rule 1".

There is no constitutional right under Article 144 (8) or any other article of the Constitution that a proceeding brought by an irregular procedure constitutes a breach of a constitutional right.

In **Peters v Attorney General, CA Trinidad & Tobago** (2001) 63 WIR the learned trial judge rejected the contention of the appellants that the leave given to bring the representation petitions was a nullity because it was obtained on an ex-parte application and his decision was upheld by the Court of Appeal of Trinidad and Tobago. Chief Justice de la Bastide ruled that :

"Application for leave to file representation petitions under section 52 (2) of the Constitution may be made ex-parte and, in the absence of rules made under the Representation of People Act, such applications should be made in accordance with the Rules of the Supreme Court 1975."

And the learned Judge further went on to say "the gap between procedural irregularity and undue process was pointed to by Lord Diplock in Chokolingo (32 WIR 354 at 357) when with reference to the opinion expressed by Kelsick JA in the Court of Appeal that the offence of scandalizing the Court should be dealt with by criminal proceedings rather than by way of motion for committal, he said:

"Even if it were right, it would at most amount to a mere irregularity of procedure which, as this Board pointed out in **Ramesh Lawrence Maharaj v AG** (No. 2) (1978) 30 WIR 310 at 321, does not of itself constitute an infringement of rights protected by section 1 (a), (now section 4 (a)) unless it involves a failure to observe one of the fundamental rules of natural justice."

Our own Chief justice, Mr. Ian Chang, further went on to say at page 20 "it is difficult to see how any procedural irregularity in the mode of making the application can adversely affect the gate-keeping functions of the Court which relate to the substance of the intended petition especially when, undeniably, the application for such leave could have been properly made by an ex parte application".

Order 41 Rule 1 states that "every application in Chambers not made ex parte shall be made by summons. Ex parte applications shall be made on affidavit." Under Order 41 an ex parte application can be made by ex parte originating summons supported by affidavit, an ex parte summons with affidavit, or an ex parte application by affidavit.

The conclusion therefore is that an originating summons is not the only method by which an ex parte application can be made, but an ex parte application by affidavit is sufficient. However as the Chief Justice said at page 8 of his decision "…….under Order 41 an ex parte application in chambers in a matter not pending

before the court should be by way of ex parte originating summons supported by affidavit". (However Counsel in this action refers to an originating motion). The learned Chief Justice further went on to say at page 9 of his decision that "Under Order 54 Rule 1, any non compliance with Order 41 Rule 1 constituted by the Commissioner's failure to approach the court for leave by way of ex parte Originating Summons…….cannot per se render the proceedings void. Avoidance of the proceedings could be effected only by direction of the court. The effect of any non compliance by the Commissioner with any Rule of Court meant that the Court had a discretionary power under Order 54 Rule 1 to "avoid" her application and to refuse to hear it, but such non compliance did not per se render the application a nullity."

Jaundoo v AG of Guyana (1971) 16 WIR 141, is good authority for the proposition that, where matters of pure procedure have not been prescribed in relation to the exercise of a jurisdiction conferred by statute, the court has an inherent jurisdiction to approve or direct the procedure to be adopted.

As regards the plaintiff's declaration wherein the plaintiff alleges that section 67 of the Insurance Act is unconstitutional and is a contravention of article 144 (8) of the Constitution in that the said section 67 does not provide for a hearing as guaranteed by Article 144 (8) before the Commissioner is satisfied that there are grounds for the winding up of the plaintiff, and as regards the declaration wherein the plaintiff claims that it is entitled to be heard under

section 67 by the Commissioner of Insurance before the Commissioner of Insurance applies under section 67 of the Insurance Act for an order to institute winding up proceedings as the plaintiff is entitled to a fair hearing as guaranteed under article 144 (8) of the Constitution of Guyana, the following observations are made:

On the application for leave to present a petition for winding up the relevant section is section 67 of the Insurance Act. Section 67 (1) (a) of the Insurance Act 1998, provides:

> "Where the commissioner is satisfied that it is necessary and proper that an insurer ought to be wound up, he may, with leave, of the court, present a petition,
>
> (a) for the winding up by the court of the insurer on the ground……"

No where does it say that the commissioner must give a hearing to the insurer before asking the court to grant leave to present a petition for winding up. After obtaining leave of the Court to present the petition, the commissioner then has to present a petition upon which certain grounds have to be established as set out in section 67 (1) (a) and request that the court make an order either (a) for the winding up by the Court or (b) for an order that the insurer or any part of the insurance business of the insurer be placed under judicial management.

It is quite clear that it is the court that decides whether the insurer should be wound up and not the commissioner who makes this decision. The commissioner does not make any decision that the insurer should be wound up. All the commissioner is required to do is present his grounds why he believes the insurer should be wound up but it is the court that makes the final decision, either to order that the insurer be wound up or that the business of the insurer be placed under judicial management. Thus the insurer cannot be deprived of a hearing by the commissioner because there is no necessity for a hearing to be given. The commissioner is not the decision making party here but the court is. The Commissioner is not exercising any judicial function nor is the Commissioner involved in any determination of the existence or extent of any civil right or obligation.

After leave is given a petition therefore has to be presented to the court and the commissioner has to persuade the court, on one or more of the grounds set out in section 67 (1) (a) or (b) before the court will grant either of the orders.

Therefore there can be no breach of any constitutional right where what is required is merely that the Commissioner must comply with a procedural step before the powers of the court can be invoked. It is a procedural step mandated by statute and if not complied with then the position would have been different. (see **Reinsurance Company of Trinidad and Tobago Ltd v Caribbean Commercial Insurance Ltd and Others** (1955) 50

WIR 437 and **Re National Employers Mutual General Insurance Assoc. Ltd** (in liquidation) (1995) BCLC 232).

The other issue that has to be determined is whether the plaintiff had a protected right under Article 144 (8) of the Constitution to a hearing on the application to the Court for leave to present a petition in accordance with section 67 (1) of the Insurance Act.

In **Peters v AG** (supra) the learned Chief Justice, de la Bastide said also "The Question of giving a defendant an opportunity to be heard before he is sued does not normally arise in the context of civil proceedings. Whenever leave is required before civil proceedings are commenced, it is the invariable practice that such leave may be applied for and granted 'ex parte'. The most common case in which such leave is required is for the institution of judicial review proceedings. The requirement of leave in these cases serves the same purpose……..namely to prevent the launching of actions that are frivolous and vexatious or plainly have no chance whatever of success."

In **Peters v AG** (supra) reference was made to the case of **Wallace-Whitfield v Hanna** (1983) (unreported) where the Court of appeal held that the provisions of section 78 (1) of the Representation of People Act 1969 permitting an application for leave to present an election petition ex parte were intra vires article 51 of the Constitution. In the joint judgment of Luckhoo P, Sir James Smith and da Costa JJA said:

"The clear purpose we think is to avoid the bringing of frivolous or vexatious petitions. The Supreme Court Judge in that regard must be satisfied that the applicant has the locus standi to bring the petition in question…..The Judge is not required to make any finding that would affect any right of or determine anything to the detriment of any person who might eventually be made a party to a petition. No mini trial is contemplated before the Supreme Court judge. No counter affidavits or cross examination are envisaged in such an application as they certainly are in an inter-partes application. The judge is, in effect a judicial censor to screen, as it were, applications before applications are permitted to bring proceedings against persons against whom allegations are to be made in those proceedings."

Thus the plaintiff is not entitled to a right to a hearing on the application for leave by the Commissioner of Insurance, since no determination of any right of the plaintiff is required to be made at this stage. The Court is only required at this stage to determine whether the Commissioner should be granted leave to present a petition.

Since an applicant for leave to present a winding up petition can obtain leave of the High Court to present it and still not present it, an application for leave to present a winding up petition is not part and parcel of any ensuing winding up proceedings. Even though necessarily related to an ensuing winding up petition, an application for leave to present a winding up petition is not part

and parcel of the proceedings in the petition itself. (**Peters v A.G**. (2001) 63 WIR 244). A company has no common law or statutory right to be heard in an application for leave to present a winding up petition. As such there can be no common law or statutory right to be heard in such an application for leave (see Peters v A.G. (supra). If so, there can be no constitutional right to be heard in the company in such an application. The requirement for leave of the High Court to be first obtained before a winding up petition can be presented is to ensure that the processes of the high court will not be abused and not to protect the company itself from having a winding up petition presented against it since a company has no right at all from being wound up and therefore can have no right at all not to have a winding up petition presented against it. As such, even though the high court may hear the company before giving leave for the presentation of a winding up proceeding, it need not do so.

There is no constitutional right in any company not to have winding up proceedings presented against it. There is a statutory right not to have a winding up petition presented without leave of the court, therefore even if leave to present a winding up petition is irregularly granted by the High Court, the remedy cannot lie in a constitutional motion or action.

Since there is no right in a company not to have a winding up petition presented against it (since the application can be made ex parte) it is difficult to see how there can be a right of appeal against

the grant of leave itself. This is precisely why the proviso (b) to section 79 of the High Court Act, Cap 3:02 and section 6 (5) (d) of the Court of Appeal Act, Cap 3:01 provides that no appeal lies against an order made on an ex parte application. A review is possible but an appeal is prohibited by statute.

If a winding up petition is made following the grant of leave, then the decision on the petition itself can be challenged on appeal on the ground that the grant of leave was a nullity and therefore the petition itself is a nullity. But such a challenge can be made only on appeal from the decision of the court after hearing the petition. Such a challenge cannot be made in a constitutional motion or action before a winding up order is made for the simple reason that no company has a constitutional right not to be petitioned for winding up or to have winding up proceedings presented against it.

In **Nankissoon Boodram v Attorney General** (1996) 47 WIR 459, the Privy Council upheld the dismissal of the constitutional motion by which the appellant sought to terminate a prosecution for murder on the ground that his right to a fair trial had been infringed by adverse press reports and the failure of the Director of Public Prosecutions to stop them. Their Lordships held that this complaint should have been raised in the criminal proceedings themselves, either at the start of the trial or in advance of it, if necessary. The right which the appellant had to obtain from a judge in the criminal proceedings an order that measures necessary to ensure him a fair trial be implemented or, if that was not

possible, an order terminating or staying the prosecution, provided him with the 'protection of the law' to which he was entitled. The only circumstances in which the Privy Council envisaged that redress by way of a constitutional motion would be available in such circumstances was where exceptionally all charges (sic) of a fair trial had been destroyed. Lord Mustil said at page 494:

"It is only if it can be shown that the mechanisms themselves (as distinct from the way in which, in the individual case, they are put into practice) have been, are being or will be subverted that the complaint moves from the ordinary process of appeal into the realm of constitutional law."

There is no constitutional right in any company not to have its affairs put under judicial management or to have a particular Board of Directors managing or directing its affairs. If there were such a constitutional right then there would have been need for a constitutional amendment for the enactment of provisions providing for judicial management (the same applies to winding up provisions). No constitutional amendment was needed to enact the relevant provisions of the Insurance act relating either to winding up or judicial management simply because there is no constitutional right in any company not to be wound up or put under judicial management.

A petition for the winding up of a company by its very nature is not a proceeding for the determination of any civil right or obligation and therefore cannot attract the constitutional right to a

fair hearing under article 144 (8) of the constitution. Article 144 (8) applies only to civil proceedings fro the determination of a civil right or obligation and has no application to a petition for the winding up of a company whether under the Companies Act or the Insurance Act.

Section 67 (3) of the Insurance Act states "both the Insurer and the Commissioner are entitled to be heard on any petition presented to the Court under this section."

The right of an insurance company to be heard under the Insurance Act before judicial management is imposed (as an alternative to a final order for winding up) is a statutory right and not a constitutional right under article 144 (8). A common law or statutory right cannot be elevated into a constitutional right unless the constitution itself so elevates it. It simply remains a right at common law or a right under statute. One cannot therefore simply look at a statute and elevate any right therein into a constitutional right. The right of an insurer to be heard before the imposition of judicial management as an alternative to winding up under the Insurance Act is a statutory right only.

A company has no civil right not to be wound up or not to be put under judicial management. The nature and object of winding up proceedings or for judicial management is not for the determination of any civil right or obligation either in the petitioner or in the company. Therefore any right to be heard which is

conferred by the Insurance Act can be statutory only and not constitutional.

The order for judicial management was an interim order made until the hearing and determination of the petition, so therefore in effect the plaintiff is being afforded a hearing before any judicial management is imposed as a final order.

The High Court has not imposed judicial management as a final order or as an alternative to a final winding up order. The High Court saw it fit to impose judicial management as an interim order as a necessary measure for the protection of the interests of the policy holders which the court must consider in making its final decision for winding up under the Insurance Act. There can be no doubt that the Court has an inherent jurisdiction to make such an interim order to ensure that the interests of the policy holders are protected and not detrimentally affected pending the hearing and determination of the winding up petition.

The case of Maharaj (No. 2) has no application to the instant matter in this regard. That case dealt with the clearly constitutional right against deprivation of personal liberty without due process of law. The right to personal liberty is without doubt a constitutional right. The same cannot be said of any right in a company not to be wound up or placed under judicial management. There is simply no constitutional right in any company not to be wound up or placed under judicial management. The process by which winding

up is obtained is governed by the Insurance Act and not the Constitution. Nothing in the proceedings can attract constitutional intervention and the case of Maharaj (No. 2) cannot apply.

Any reference to a statutory right to be heard has no place in a constitutional motion or action for breach of Article 144 (8) since a statute cannot be allowed to override the constitution and a statutory right cannot be elevated and transformed into a constitutional right to be heard. A judicial manager takes control of and manages the company's business and property on behalf of the company itself, on the direction of the court. Judicial management does not deprive the company of the ownership or possession of its property in breach of article 142 of the constitution. The company remains in possession of its property through the statutory agency of the judicial manager.

For these reasons I find that the constitutional action filed by CLICO is fundamentally baseless and misconceived since it is not founded on any breach of articles 138 – 151 of the constitution and was filed solely for the purpose of delaying the proceedings for winding up. The action is therefore struck out with costs in the sum of $150,000.

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Diana F. Insanally
Puisne Judge
6th day of September 2010.